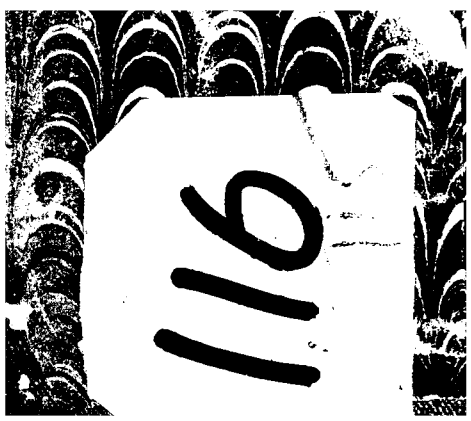
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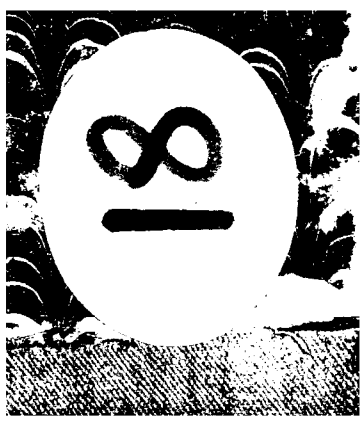
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THE INDIAN LAW REPORTS.

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.*
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1st January—31st December 1887.

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 (*On leave*).
,, F. Brandt.
,, G. A. Parker.
,, F. Wilkinson.

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

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2. ————, (44 & 45 Vic., c. 58), s. 156:

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Under s. 123 of the City of Madras Municipal Act, the gross annual rent at which a building might reasonably be expected to let from month to month, or from year to year, is, for the purpose of assessment to house-tax under the Act, to be deemed to be the annual value of such building. The Lying-in Hospital at Madras, built and supported by Government, having been assessed by the President of the Municipality as on a rental of Rs. 1,000 a month, the Magistrates on appeal reduced the assessment, finding that Rs. 7,920 would be a reasonable rent, having regard to the letting value of the buildings in the neighbourhood; but, at the request of the Municipality, referred the following questions to the High Court:—Whether (as contended by Government) the property in question should be valued and assessed on the rent, which, on the property being offered in the open market without reserve, a person desirous of securing it would have to pay; or whether (as

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contended by the Municipality) it should be valued and assessed on the highest reserve rent which an owner of the property offering it in the open market would reasonably demand, and below which sum he would not be willing to let:—*Held*, that the standard value was what the hypothetical tenant requiring the building for use as a hospital would be willing to pay rather than rent a less suitable building and adapt it to his requirements at his own expense, and that in this sense the contention of the Municipality was correct.

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CIVIL PROCEDURE CODE (ACT VIII) OF 1859, s. 148—Res judicata. *Previous suit by next friend dismissed for default—Evidence of fraud of next friend—Limitation—Contract by a minor—Ratification by acquiescence:*

A, sued in 1885 to recover certain estates from B., alleging claim under his adoption which took place in 1865. A suit to recover the same estates had been filed on behalf of A. by his next friend and had been dismissed for default in 1872. In 1875 A., being still a minor, relinquished his claim to the estates for Rs. 12,000 under exhibit B.; but now alleged that he thought he was relinquishing it only in favor of the defendant's predecessor in title who died in 1883, having been in possession of the estates since 1867. The plaintiff attained his majority in 1878:—*Held*, that the claim was *res judicata*, the plaintiff having failed to prove fraud on the part of his next friend: that whether the cause of action arose in 1865 or 1867, it was equally barred from 1879: that assuming the plaintiff was a minor of 15 years of age at the date of the deed of relinquishment, it is not likely he would not have understood its effect, or that he failed to ascertain it when he attained his majority in 1878. *Per cur.*—The plea of *res judicata* ordinarily presupposes an adjudication on the merits; but s. 148 of the Code of Civil Procedure (Act VIII) of 1859 contains a statutory direction that in case the plaintiff neglects to produce evidence and to prove his claim as he is bound to do, the Court do proceed to decide the suit on such material as is actually before it, and that the decision so pronounced shall have the force of a decree on the merits, notwithstanding the default on the part of the plaintiff.

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2. ——————, s. 264—*Execution of decree against a member of an undivided family by sale of his personal interest in the family estate, which was an impartible zamíndárí; such interest, by reason of his death before the sale, consisting only of the rents and profits then uncollected:*

On a sale of the right, title, and interest in an impartible zamíndárí in execution of decrees against the zamíndár, the head of an undivided family, the question was whether (*a*) only his own personal interest, or (*b*) the whole title to the zamíndári, including the interest of a son and successor, passed to the purchaser. The proclamation of sale purported to relate to (*a*) only; and between the dates of proclamation and the auction sale the zamíndár died. On the argument that, this having given rise to an ambiguity, the Court must be understood to have sold all that it could sell, and that under the circumstances it could sell, and was bound to sell (*b*); because, the debts, the subject of the decrees under execution, not having been incurred by the late zamíndár for any immoral purpose, the entire zamíndárí formed assets for their payment in the hands of his son:—*Held*, that the question of what the Court could, or should, have sold had not arisen. All that required decision was what the Court had sold. If (*a*) only was put up for sale, then that interest only could have been purchased. Two Courts having concurred in finding that (*a*) only was sold, in which also their Lordships agreed, only that interest passed to the purchaser.

Píttachi v. *Chinnatambiar* 241

CIVIL PROCEDURE CODE, 1877, ss. 44, 146, 147, 539—*Suits in respect of religious and charitable trusts—Joinder of claim for movable and immovable property—Form of decree not indicated in the plaint but indicated by the issues—Limitation Act, 1877—Act XV of 1877, s. 10—Act V of 1843—Spiritual slavery of a pupil to his Guru:*

This was a suit brought in 1881 with no written consent of the Advocate-General by the head of an Ádhinam for declarations that a Mutt was subject

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to his control: that he was entitled to appoint a manager: that the present head of the Mutt was not duly appointed and his nomination by his predecessor was invalid; and for delivery of possession of the movable and immovable properties of the Mutt to a nominee of the plaintiff. The claim extended also to religious establishments at Benares and elsewhere connected with the Mutt. The Mutt was founded by a member of the Ádhinam. Many previous heads of the Mutt had agreed to be "slaves" of the head of the Ádhinam, but for over 60 years the head of the Ádhinam had exercised no management over the endowments belonging to the Mutt; and in a suit (compromised) of the year 1854 the present pretentions of the head of the Ádhinam had been denied *in toto*. The defendant had succeeded in 1880 to the management of the Mutt under the will of his predecessor, dated the same year, and was not a disciple of the Ádhinam:—*Held*, (1) that the Mutt is affiliated to the Ádhinam, but the head of the Ádhinam is not entitled to appoint to the office of head of the Mutt and is not entitled to an order for delivery of the property of the Mutt to himself or to his appointee; (2) that on the evidence as to the usage in the establishments in question, the head of the Mutt is entitled to appoint his successor, but his election is limited to members of the Ádhinam; and the head of the Ádhinam is entitled to enforce this rule though he is bound to invest a disciple properly nominated by the head of the Mutt; (3) that the defendant not being disciple of the Ádhinam, his appointment is invalid and the head of the Ádhinam is entitled to see that a competent member of the Ádhinam was appointed in his stead; (4) that the plaintiff is entitled to declarations based on the two last-mentioned findings since they were comprised in the issues framed under ss. 146 and 147 of the Code of Civil Procedure, although the appropriate form in which the decree should be passed was not indicated with precision in the plaint itself; (5) that the suit was barred by limitation in respect of the personal claim to manage the endowments as to which no claim had been put forward for 60 years; (6) that the suit was not barred by limitation in respect of the claim to set aside the appointment of the defendant (who entered into possession in 1880 under a will, dated in the same year), or to see that a competent Dharmapuram man be appointed, in spite of the total denial of the claims of the head of the Ádhinam in 1854; (7) that the consent of the Advocate-General to the suit is not required; the suit having been instituted under the Civil Procedure Code of 1877 and the cause of action not being an alleged breach of trust; (8) that there is nothing irregular in seeking to recover movable and immovable property in the same suit if the cause of action is the same in respect of both; (9) that the agreement of the head of the Mutt to become the "slave" of his *guru* could have no legal operation since 1843, and that the adverse possession of the defendant from that year is fatal to any claim of the plaintiff under such agreement.

Giyana Sambandha Pandara Sannadhi v. *Kandasámi Tambiran* 375

CIVIL PROCEDURE CODE, 1882, s. 11:

See Rent Recovery Act, 5.

2. ——————, s. 13, expl. 5, s. 30 79

3. ——————, s. 30—*Malabar Law—Joinder of parties.* Res judicata. *Cancellation of deeds—Declaratory suit—Withdrawal of part of claim:*

A and B, junior members of a Malabar tarwad, sued to cancel certain mortgages executed by their karnavan and senior anandravan, on the ground that the secured debt was not binding on the tarwad, and to appoint A to the office of karnavan. The last part of the prayer was withdrawn. The mortgages were executed to secure a decree-debt, the decree having been passed *ex parte* against the late karnavan of the tarward. No fraud was alleged, but the Lower Courts found that the karnavan had been guilty of fraud in allowing the decree to be passed *ex parte*. The plaintiffs had not been parties to the decree, and the other junior members of the tarwad who had been joined were exempted from liability:—*Held*, that the nature of the debt was not *res judicata*, and that the plaintiffs were entitled to a declaration that the mortgages in question were invalid as against them:—*Held* further *per cur.*—All the members of the plaintiffs' tarwad should have been joined actually or constructively; but (Kernan, J., dissenting) the objection

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as to non-joinder is not essential, but merely formal, and weight should not be attached to it when it is first taken on second appeal.

Moidin Kutti v. *Krishnan* 322

4. ——————, s. 32 44

5. ——————, s. 43—*Declaration of title to continue to enjoy separate possession of land—Suit for partition :*

The plaintiffs having obtained a declaration of title to continue to enjoy separate possession of certain lands sued the former defendants again for partition of the same lands :—*Held*, that the suit was unnecessary and should be dismissed. *Per curiam*.—The claim and the remedy mentioned in s. 43 of the Code of Civil Procedure have reference to the cause of action litigated in the previous suit.

Ándi v. *Thatha* 347

6. ——————, ss. 43, 373—*Merger of securities :*

On the 5th September 1874 R., a Hindú, and his sons borrowed Rs. 5,000 from V. and mortgaged to him certain land, items 1, 2 and 3. On the 7th September 1874, V. borrowed Rs. 5,000 from R. N. and mortgaged his rights in items 1 and 2 and land of his own to R. N. In 1877 R. N. bought at a sale in execution of a decree against R. the share of R. in the said items 1 and 2 subject to the mortgage created by R., on 5th September 1874, and to another mortgage created by R. on 11th January 1875. In 1880, R. N. sued V. and the sons of R., for arrears of interest due under his mortgage bond. This suit was withdrawn with liberty to bring a fresh suit for the principal and interest due under the bond. In 1885, R. N. sued the sons of R. and V. to recover principal and interest due under his mortgage bond. V. pleaded that, as R. N. had bought R.'s share in items 1 and 2, subject to the mortgages created by him, R. N.'s rights as mortgagee were merged in his rights as purchaser. R.'s sons pleaded, *inter alia*, that the suit was barred by the provisions of ss. 43 and 373 of the Code of Civil Procedure :—*Held*, that the claim of R. N. was neither merged nor barred.

Venkata v. *Ranga* 160

7. ——————, s. 57—*Plaint presented in a wrong Court :*

In all cases where no option as to the selection of the Court is allowed by law to the plaintiff, a plaint presented in a wrong Court must be returned for presentation in the proper Court.

Muttirulandi v. *Kottayan* 211

8. ——————, ss. 98, 99—*Decree passed in a restored suit pending appeal against order of restoration :*

A suit was filed in a Múnsif's Court, but neither party appeared for the hearing, and the suit was dismissed. The Múnsif subsequently on review made an order restoring the suit and eventually decreed for the plaintiff. The defendant in the meanwhile appealed to the District Court against the order of restoration, and after the date of the decree, the District Court made an order allowing the defendant's appeal. The plaintiff appealed to the High Court and the order of the District Court was reversed and the order of restoration upheld :—*Held*, that the Múnsif's decree was not passed without jurisdiction.

Álwar v. *Séshammál* 290

9. ——————, ss. 98, 99, 157, 158 :

A District Múnsif struck a case off the file of his Court on neither party appearing. Subsequently on an application by the plaintiffs the case was restored. The order of restoration was reversed by the District Judge :—*Held*, (1) that the order to strike off the case was illegal; (2) that assuming that the case was dismissed, no appeal lay to the District Judge whose order was accordingly made without jurisdiction.

Álwar v. *Séshammál* 270

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10. ——————, ss. 206, 622—*Error of Law—Application to bring decree into conformity with judgment—Limitation Act not applicable :*

Applications to the Court under s. 206 of the Code of Civil Procedure are not governed by the Limitation Act. A Small Cause Court rejected an application made under s. 206 of the Code of Civil Procedure to bring a decree into conformity with the judgment, on the ground that a former application had been dismissed for default and the petitioner was bound to apply within one month from the date of dismissal and was now too late. On an application to the High Court under s. 622 of the Code to set aside this order :—*Held*, that the High Court could not interfere.

Jivráji v. *Pragji* 51

11. ——————, s. 244 :

R. having obtained a decree for money against K., the karnavan of the defendants, K. died and the defendants were made parties to the suit as representatives of K. Tarwad property was then attached by R., and the defendants having objected, the Court raised the attachment. R. sued for a declaration that the property released was liable to be sold :—*Held*, that the suit was barred by s. 244 of the Code of Civil Procedure.

Ravunni Menon v. *Kunju Náyar* 117

12. ——————, s. 244—*Execution proceedings—Revaluation of improvements allowed for in decree :*

A mortgagor obtained a decree for redemption on payment of the mortgage amount, together with a further sum assessed as the value of improvements made by the mortgagee. When the decree-holder applied for the execution of the decree it was contended on behalf of the mortgagee that the improvements ought to be revalued as they were at the time of execution of more value than at the date of the decree :—*Held*, that the mortgagee was entitled to revaluation in the execution proceedings.

Ramunni v. *Shanku* 367

13. ——————, ss. 268, 274—*Sale of interest of obligee in a hypothecation bond :*

The interest of the obligee in a bond hypothecating certain land as security for a debt having been attached under s. 274 of the Code of Civil Procedure and sold, a suit was brought by the purchaser upon the said bond; it was objected that the suit was not maintainable because the bond had not been also attached as a debt under s. 268 :—*Held*, that the fact of the bond not having been attached as a debt under s. 268, did not affect the right of the purchaser to realize the amount due under it.

Sámi v. *Krishnasámi* 169

14. ——————, ss. 268, 284, 287 (*e*), 301—*Attachment of a debt due to a judgment-debtor—Sale of debt—Payment into Court—Prohibitory order :*

A decree-holder by a prohibitory order made under s. 268 (*a*) of the Civil Procedure Code attached a debt due to his judgment-debtor. The debt was not paid into Court :—*Held*, that the Court cannot, under s. 268, of the Code of Civil Procedure, call on a person subject to a prohibitory order to pay or show cause why he should not pay his debt into Court. The Court is bound to satisfy itself that a debt is due, the debt must then be sold and delivery made under ss. 284 and 301 of the Code of Civil Procedure.

Sériah v. *Múckanáchárry* 194

15. ——————, s. 292—*Pleaders not officers of the Court within the meaning of that section :*

Pleaders of parties to a suit are not debarred by s. 292 of the Code of Civil Procedure from purchasing property sold in execution of the decree.

Alagirisámi v. *Ramanáthan* 111

16. ——————, s. 295 57

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17. ——————, s. 311—"*Decree-holder*" *not restricted to decree-holder who has attached, but includes one entitled to ratable distribution under s.* 295 :

Where one decree-holder had attached certain land and another decree-holder against the same debtor had entitled himself to ratable distribution of the assets under s. 295 of the Code of Civil Procedure :—*Held*, that the latter was entitled to apply, under s. 311 of the Code, to set aside the sale on the ground of material irregularity.

Lakshmi v. *Kuttunni* 57

18. ——————, ss. 318, 335—*Suit to recover possession of property sold in execution of decree* :

S. attached certain land and a house in execution of a decree against R. M. put in a claim, under s. 278 of the Code of Civil Procedure, alleging that he was in possession as purchaser from R. The claim was rejected. No suit was brought by M. to contest this order. S. purchased the said land and house in execution and obtained a sale certificate. In 1884 S. sued M. to recover possession of the land and house, alleging that in execution proceedings in 1882 he had been put into possession of the land, but not of the house, which was found locked up by the Court amin, and that M. prevented him from enjoying both the land and house. M. pleaded that S. had never been put into possession, and again set up his title as purchaser from R. and possession under such title. The Múnsif found that S. had been put into formal or constructive possession of the land, but not of the house, and decreed the claim. On appeal the District Judge held that S. was bound to proceed according to the provisions of s. 335 of the Code of Civil Procedure to recover possession, and could not bring a separate suit :—*Held* that, whether there had been legal delivery or not, the suit was not barred.

Sevu v. *Muttusámi* 53

19. ——————, ss. 335, 623—*Limitation Act—Act XV of* 1877, *sch. II, art.* 11—*Order disallowing claim in execution proceedings—Review of judgment—Malabar Law—Personal decree against karnavan* :

Where a review of judgment was applied for on the ground of the subsequent publication of the report of a High Court decision on a point of law which governed the case but which had not been urged at the previous hearing, it was considered that the applicant was not to blame for his omission to bring the decision to the notice of the Court at the first hearing, and the application for review of judgment was granted. A. sued for possession of certain shops belonging to a Malabar tarwad, which had been attached in execution of a personal decree passed against a karnavan in a suit on a private debt. In the execution proceedings, an objection petition was put in stating that the shops were sridhanam and was rejected; and the order of rejection was not appealed against for one year. Respondents Nos. 1 to 4, the husbands of the persons who put in the objection petition, were in possession and were now sued for possession. The plaintiff was assignee of the purchaser at the execution sale :—*Held*, that upon the facts found, the plaintiff acquired nothing under the Court sale. *Per cur.*—An order rejecting a claim petition under s. 335 of the Civil Procedure Code, not being appealed against within one year acquires the force of a decree. *Veláyuthan* v. *Laksmana*, I.L.R., 8 Mad., 506, followed.

Achuta v. *Mammavu* 35

20. ——————, s. 373—*Jurisdiction—Suit to declare land liable to be sold in execution of decree—Civil Procedure Code*, s. 373—*Withdrawal of part of claim* :

In a suit brought in a District Múnsif's Court to declare certain land liable to be sold in execution of a decree for more than Rs. 2,500, the defendants pleaded that the Court had no jurisdiction. The Múnsif allowed the plaintiff to amend the plaint by stating that he abandoned his claim to execute the decree against the land for more than Rs. 2,500. On appeal, the District Judge held that the plaint could not be amended after the first hearing :—*Held*, on appeal to the High Court, that the claim was not one which could be amended so as to bring the suit within the pecuniary jurisdiction of the District Múnsif.

Annáji v. *Rámá Kúrup* 15

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21. ——————, ss. 404, 406—*Application for permission to sue as paupers, presented by several paupers jointly* :

The mere fact that several persons jointly present an application for permission to sue as paupers does not authorize the Court to entertain it on behalf of applicants who do not appear in person.

Burgess v. *Sidden* 193

22. ——————, s. 468—Army Act of 1881, 44 & 45 Vic. c. 58, ss. 144, 151—*Jurisdiction of Small Cause Court over soldiers* :

A. sued a soldier to recover a debt not amounting to £30 :—*Held*, that the suit was cognizable by a Court of Small Causes. *Semble.*—The Commanding Officer of the defendant is bound to cause the summons of the Small Cause Court to be served on him.

Mahomed v. *Aggas* 319

23. ——————, ss. 503, 505, 588—*Receiver, appointment of—Appealable order* :

An order rejecting an application to appoint a Receiver is an order passed under s. 503, and is therefore appealable under s. 588, cl. 24, of the Code of Civil Procedure. *Subramanya* v. *Appasámi*, I.L.R., 6 Mad., 355, overruled.

Venkatasámi v. *Stridavamma* 179

24. ——————, s. 539—*Sanction granted to two persons separately to institute suit in respect of branch of charitable trust* :

R. instituted a suit with the Collector's sanction to compel the performance of a charitable trust; D. was subsequently joined as plaintiff, having also obtained the Collector's sanction to institute the suit :—*Held*, that the sanction obtained by D. related back to the institution of the suit.

Ramayyangár v. *Krishnayyangár* 185

25. ——————, s. 561—*Appeal from appellate decree disallowing memorandum of objections—Limitation Act—Act XV of* 1877, *s.* 12—*Karnam—Rights of* de facto *karnam* :

A. filed a plaint on 28th June 1882 for a declaration of his title as karnam of a village and for arrears of dues payable to him as such, including those for fasli 1288, which accrued due on 1st July 1879. His family had held the office and discharged its duties for three generations, but there was no evidence of any formal appointment of A. or his ancestors :—*Held*, that the plaintiff was entitled to the dues as *de facto* karnam, and his claim was not barred in respect of any of the arrears claimed. *Per cur.*—The preliminary objection taken by the respondent that no second appeal lies from so much of the decree of the Subordinate Judge as disallowed the objections filed by the appellant under s. 561 of the Code of Civil Procedure is without weight.

Ganapati v. *Sithárámá* 292

26. ——————, s. 583 :

See LIMITATION ACT, 13.

27. ——————, s. 584—*Powers of High Court on second appeal* :

On second appeal by a landlord against a decree of a District Judge, who stated in his Judgment that "though the tenant admitted the execution of the Muchalká, it was not shown that he dispensed with the pattá," no objection was taken in the memorandum of appeal that the Muchalká, which contained a statement that no pattá was necessary, had been neglected or misconstrued. The High Court ordered that the Judge be asked to take the postscript into his consideration and submit a revised finding.

Náráyana v. *Múni* 363

28. ——————, s. 599—*Limitation Act*, s. 12, *sch. II, art.* 177—*Period of Limitation for admission of an appeal to Privy Council* :

On a petition for leave to appeal to the Privy Council presented on the 8th April, it appeared that the period of six months from the date of the decree to be appealed against had expired on the 23rd of March if the time occupied

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by the petitioner in getting a copy of the decree was to be computed in that period:—*Held*, that the petition was barred by limitation. *Per cur.*—It is not at all clear that the word "ordinarily" in s. 599 of the Code of Civil Procedure does not refer to the circumstance referred to in the second paragraph of that section, viz., when the last day happens to be one on which the Court is closed.

Lakshmanan v. *Peryasámi* 373

29. ——————, s. 622 .. .. 51, 68, 98

30. ——————, s. 622—*Small Cause suit to recover money paid by the plaintiff in discharge of a decree-debt against him and the defendants—Jurisdiction of Court to go into facts of former suit:*

A. sued four persons, against whom, together with A., a money decree had been passed in a previous suit, to recover a proportionate part of a sum paid by A. in discharge of the decree-debt. Two of the defendants pleaded that they had not appeared in the former suit, and have been unnecessarily brought into the record by A.:—*Held*, that the Court had jurisdiction to inquire into the circumstances of the previous suit. *Supat Singh* v. *Imrit Tiwari*, I.L.R., 5 Cal., 720, followed.

Thangammál v. *Thyyamuthu* 518

COMPENSATION:

See LANDLORD AND TENANT, 2.

CONTRACT ACT, s. 74 — *Penalty—Enhanced rate of interest and compound interest:*

A mortgagor agreed that if any instalment of interest accruing due on the mortgage was not paid, he should pay compound interest and discharge the principal in one year, and further that if the principal was not so discharged he should pay interest at an enhanced rate:—*Held*, that the mortgagee could enforce the agreement.

Appa Ráu v. *Suryanáráyana* 203

COUNSEL—*Privilege:*

An advocate in India cannot be proceeded against civilly or criminally for words uttered in his office as advocate.

Sullivan v. *Norton* 28

COURT FEES ACT—VII of 1870, s. 6, sch II, art. 17:

In a suit on a mortgage bond a decree was passed for payment of principal and interest, and in default for sale of the mortgaged property. Some of the defendants filed a memorandum of appeal against so much of the decree as declared the liability of the property, affixing a stamp of Rs. 10 only:—*Held*, that the proper stamp to be paid was not Rs. 10 as in the case of a declaratory decree, but on the value of the debt not exceeding the value of the property.

Venkappa v. *Narasimha* 187

CRIMINAL PROCEDURE CODE, s. 33—*Penal Code*, s. 65—*Imprisonment in default of payment of fine:*

Section 33 of the Code of Criminal Procedure, 1882, does not authorise a Magistrate to pass a sentence in default of payment of fine in excess of the term prescribed by s. 65 of the Indian Penal Code. *Reg.* v. *Muhammad Saib*, I.L.R., 1 Mad., 277, was overruled in 1881.

Queen-Empress v. *Venkatésagádu* 165

2. ——————, s. 195—*Registration s. Act*, 41—*Sanction of Registrar—Condition precedent to trial for forgery of will registered:*

A Sub-registrar acting under s. 41 of the Registration Act, 1877, is a "Court" within the meaning of s. 195 of the Code of Criminal Procedure.

Venkatáchala, In re 154

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3. ——————, s. 195—*Sanction to prosecute—Notice to accused:*

A conviction for preferring a false complaint is not illegal only by reason of the prosecution having been sanctioned without notice previously given to the accused. Sanctioning a prosecution for an offence is a judicial act, and the party to whose prejudice it is done must be previously heard and a judgment formed upon legal evidence. In cases in which the Magistrate dismisses the original complaint upon a report from the police, there is no legal evidence before him on which to form his judgment. In cases, however, in which the Magistrate examines the complainant and hears the evidence and acquits or discharges the accused, and then, without notice to the complainant, sanctions his prosecution for preferring a false charge, sanction cannot be said to be improperly given.

Queen-Empress v. *Sheik Beari* 232

4. ——————, ss. 342, 364—*Withdrawal of uncorroborated evidence by the witness—Examination of the accused—Confessions:*

A. and B. were charged with the murder of C., the husband of B. There was some evidence that B. had said her husband was dead a few days after his disappearance; and some bones, a skull, and some clothes were found in a neighbouring burying ground which were identified as those of C. B. made a statement, recorded on 4th June by the Village Múnsif, to the effect that she had lured C. into a garden, and that A., who was her paramour, had murdered him in her arms, which statement she repeated frequently with greater detail in answer to questions from the Committing Magistrate, and subsequently before the Sessions Court. On her appeal to the High Court after she had been sentenced to death, she retracted her former statements and made the usual charges of ill-treatment against the Police. A. made a statement to the Committing Magistrate which he subsequently repudiated before the Sessions Court, to the effect that he has assisted in disposing of the corpse of C. at the request of his brother-in-law, who corroborated the statement in two depositions before the Magistrate which were likewise repudiated by the deponent before the Sessions Court:—*Held*, that the conviction of A. was wrong and further (Parker, J., dissenting) that the conviction of B. was wrong. *Per* Kernan, J.—"As the second prisoner has withdrawn all the confessional statements made by her, it is necessary, according to the rulings of this Court, to examine the evidence and see if there is reliable independent evidence to corroborate to a material extent and in material particulars the statements contained in the withdrawn confessional statements. If no such corroborative evidence exists, then the contradictory statements of the second prisoner remain and doubt exists as to which statements is true, and the confessional statements cannot be safely relied on against the prisoner." *Semble.*—The same rule should be followed when a witness withdraws his deposition before the Sessions Court. *Per* Kernan, J.—The examination of an accused person under Criminal Procedure Code, s. 364, is subject to the purpose referred to in s. 342, viz., "to enable him to explain any circumstances appearing against him," and not to supplement the case for the prosecution against him to show that he is guilty.

Queen-Empress v. *Rangi* 295

5. ——————, s. 488:

Where an application is made to a Magistrate to enforce an order for maintenance, passed under s. 488 of the Code of Criminal Procedure, such Magistrate is not bound to enforce the order if the defendant proves that the claim for maintenance has been released.

Rangamma v. *Muhammad Ali* 13

6. ——————, s. 517.—*Disposal of stolen property—Cow stolen—Disposal of calf, not in esse at time of theft, by Magistrate on conviction of thief:*

R.'s cow having been stolen, the thief after a lapse of a year and-a-half was convicted. Six months after the theft, V. innocently purchased the cow, which while in his possession had a calf. The Magistrate, under s. 517 of the Code of Criminal Procedure, ordered that the cow and calf should be delivered up by V. to R.:—*Held*, that, as the calf was not even in embryo at the date of the theft, the order to deliver up the calf was illegal.

Vernede, In re 25

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CUSTOM—*Caste usage—Expulsion of member of caste under mistake of fact and without notice :*

In a suit relating to the management of the common property of the members of a Hindú caste, the plaintiff's right to sue was denied on the ground that, having violated the rules of the caste, he had been expelled from it :—*Held*, (1) that it was open to the Court to determine whether or not the alleged expulsion from caste was valid ; (2) that if the plaintiff had not in fact violated the rules of the caste, but was expelled under the *bonâ fide*, but mistaken belief that he had committed a caste offence, the expulsion was illegal and could not affect his rights. *Per* Kernan, J.—A custom or usage of a caste to expel a member in his absence without notice given or opportunity of explanation offered is not a valid custom.

Krishnasámi v. *Virasámi* 133

DEBT, ATTACHMENT OF :

See CIVIL PROCEDURE CODE, 14.

DECLARATION OF TITLE, LIMITATION FOR SUITS FOR :

See LIMITATION ACT, 8.

DECREE—*Fraud—Collusion between parties—Defendant subsequently pleading his own fraud :*

A. obtained a decree against B., in execution of which he was put in possession of certain land by proclamation, the land being in the possession of tenants. A. subsequently sued B. and the tenants to recover possession of the same land. B. pleaded that the decree obtained by A. was the result of a collusion between himself and A. in fraud of B.'s creditors :—*Held*, that it was not open to B. to raise this plea.

Venkatramanna v. *Viramma* 17

DEFAMATION, PRIVILEGE :

See COUNSEL AND WITNESS 28, 87

DISTRICT MUNSIF, JURISDICTION OF :

See CIVIL PROCEDURE CODE, 20.

ESCHEAT UNDER MAPILLA ACT :

See MALABAR LAW, 7.

ESTOPPEL :

See RES JUDICATA, 3.

EVIDENCE—*Admissibility as to pedigree of a document that has been set aside by the Court :*

In a suit for division of the property of an extinct divided branch of the family of the parties who were governed by the Aliyasantána law, a written agreement which had been set aside by the Court as against the defendants was offered in evidence by the plaintiff to prove that the parties were of equal grade of relationship, in which case it was admitted that partition was enforceable :—*Held*, that the written agreement was admissible as evidence of pedigree and that the plaintiff was entitled to the decree sought for.

Timma v. *Daramma* 362

2.——— *Admissibility of petition signed by a person available but not called as witness :*

A., the son of a deceased zamíndár, sued B. and C. his widow and brother, for possession of the zamíndári, which was impartible. In order to prove that A. was illegitimate, C. filed two petitions purporting to have been signed and sent to the Collector of the district by C. in 1871, referring to A.'s mother as a concubine. C. was not examined as a witness :—*Held*, that their contents were not evidence, but the petitions were themselves evidence to show that a complaint was made as mentioned therein.

Parvathi v. *Thirumalai* 334

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EVIDENCE ACT, s. 91—*Suit for money lent—Unstamped promissory note—Cause of action :*

The terms of a contract to repay a loan of money with interest, having been settled and the money paid, a promissory note specifying these terms was executed later in the day by defendant and given to plaintiff. This promissory note was not stamped. In a suit brought to recover the unpaid balance of the loan on an oral contract to pay :—*Held*, that plaintiff could not recover.

Pothi Reddi v. *Velayudasivan* 94

FOREST ACT (MADRAS)—*Act V of* 1882, *ss.* 14, 39—*Indian Limitation Act—Act XV of* 1877, *ss.* 5, 6—*Period of Limitation—Power to excuse delay :*

Delay in preferring an appeal under the Madras Forest Act beyond the period prescribed by s. 14 of that Act, may be excused under s. 5 of the Indian Limitation Act, 1877.

Reference under Forest Act V of 1882 210

FORFEITURE :

See LANDLORD AND TENANT, 1.

FRAUD :

See DECREE.

GIFT TO TAKE EFFECT AT AN INDEFINITE FUTURE TIME :

See MUHAMMADAN LAW.

HINDU LAW—*Adoption—Widow adopting to her deceased husband, with consent of sapindas—Effect of estate having already vested in the widow of a son :*

A son's widow having obtained her widow's estate in the property inherited by her deceased husband from his father, the widow of that father cannot adopt a son to the latter, whether she acts under authority from her husband or as widow with the assent of sapindas. That the power of the father's widow to adopt a son to him is brought to an end upon the vesting of the estate in the son's widow was decided in *Mussumat Bhoobum Moyee Debia* v. *Ram Kishore Acharj Chowdhry* and *Padmakumari Debi* v. *The Court of Wards.*

Thayammál v. *Venkatarámá* 205

2.——— *Attempt to control the descent of property*—Res judicata :

Two brothers having divided their family estate, each took a share consisting of villages which they held separately, agreeing in the instrument of partition that "the villages of the shares of both of us should in future descend only to the sons and grandsons, and so on of us both, but must not go to any others." On the death of one brother leaving a widow and daughters, the widow obtained possession of the villages which formed her husband's share, and a suit brought against her by the other brother to recover them was dismissed on the ground that the divided shares descended according to law. The widow then transferred the villages to her elder daughter, whose right to the possession, as against the brother, was declared in the present suit on the ground that, as between the widow and the brother, the question of the widow's title was *res judicata.*

Venkatadri Appa Ráu v. *Peda Venkayamma* 15

3.——— *Converts :*

See SUCCESSION ACT.

4.——— *Decree against an undivided brother—Mortgage of joint property :*

A., an undivided member of a Hindú family, mortgaged part of the family property by way of conditional sale to B., to secure a loan. B. having sued A. personally for the amount due, A. admitted the mortgage and said he would surrender the property in discharge of the debt, and a decree was passed accordingly. A.'s undivided brothers intervened in execution :—*Held*, that the decree not being passed against the joint family or its representative,

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and not describing the property, which it directed to be delivered to the plaintiff by way of absolute sale to be family property, could not be executed against the family property.

Guruvappa v. *Thimma* 316

5. ——— *Execution of decree against a member of an undivided family by sale of his personal interest in the family estate, which was an impartible zamíndárí; such interest, by reason of his death before the sale, consisting only of the rents and profits then uncollected:*

On a sale of the right, title, and interest in an impartible zamíndárí in execution of decrees against the zamíndár, the head of an undivided family, the question was whether (*a*) only his own personal interest, or (*b*) the whole title to the zamíndárí, including the interest of a son and successor, passed to the purchaser. The proclamation of sale purported to relate to (*a*) only; and between the dates of proclamation and the auction sale the zamíndár died. On the argument that, this having given rise to an ambiguity, the Court must be understood to have sold all that it could sell, and that under the circumstances it could sell, and was bound to sell, (*b*); because, the debts, the subject of the decrees under execution, not having been incurred by the late zamíndár for any immoral purpose, the entire zamíndárí formed assets for their payment in the hands of his son:—*Held*, that the question of what the Court could, or should, have sold had not arisen. All that required decision was what the Court had sold. If (*a*) only was put up for sale, then that interest only could have been purchased. Two Courts having concurred in finding that (*a*) only was sold, in which also their Lordships agreed, only that interest passed to the purchaser.

Pettazhi v. *Chinnatambiar* 241

6. ——— *Execution of decree for maintenance of widow—Liability of ancestral estate:*

Maintenance decreed to a coparcener's widow by reason of her exclusion from succession in a joint family cannot be regarded as a charge on the family estate or the decree treated as a decree against the managing member of the family for the time being.

A., the widow of an undivided member of joint Hindú family, obtained a decree for maintenance against B., the brother of her deceased husband, not expressed to be a decree against the head or representative of the joint family. B. died, and C., his son, having been brought in as his representative, resisted the execution of the decree by attachment of the family estate:—*Held*, that the family estate was not liable. *Per cur.*—In a regular suit, C. may clearly be held liable to pay maintenance to A., and a decree may be passed against him; but in execution proceedings the decree must be taken as it stands and executed against the son as his legal representative in the mode prescribed by s. 234 of the Code of Civil Procedure, and it is not open to extend the scope of the decree in such proceedings—*Karpakambál* v. *Subbayyan* (I.L.R., 5 Mad., 234) approved and followed.

Muttia v. *Virammál* 283

7. ——— *Landlord and Tenant—Compensation:*

See LANDLORD AND TENANT, 2.

8. ——— *Religious institution—Succession in religious houses and among ascetics—Civil Procedure Code, ss.* 44, 146, 147, 539—*Suits in respect of religious and charitable trusts—Joinder of claim for movable and immovable property—Form of decree not indicated in the plaint but indicated by the issues—Limitation Act,* 1877—*Act XV of* 1877, *s.* 10—*Act V of* 1843—*Spiritual slavery of a pupil to his Guru:*

This was a suit brought in 1881 with no written consent of the Advocate-General by the head of an Ádhinam for declarations that a Mutt was subject to his control: that he was entitled to appoint a manager: that the present head of the Mutt was not duly appointed and his nomination by his predecessor was invalid; and for delivery of possession of the movable and immovable properties of the Mutt to a nominee of the plaintiff. The claim extended also to religious establishments at Benares and elsewhere connected with the Mutt. The Mutt was founded by a member of the Ádhinam. Many previous heads of the Mutt had agreed to be "slaves" of the head of the

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Ádhinam, but for over 60 years the head of the Ádhinam had exercised no management over the endowments belonging to the Mutt: and in a suit (compromised) of the year 1854 the present pretentions of the head of the Ádhinam had been denied *in toto*. The defendant had succeeded in 1880 to the management of the Mutt under the will of his predecessor, dated the same year, and was not a disciple of the Ádhinam:— *Held*, (1) that the Mutt is affiliated to the Ádhinam, but the head of the Ádhinam is not entitled to appoint to the office of head of the Mutt and is not entitled to an order for delivery of the property of the Mutt to himself or to his appointee; (2) that on the evidence as to the usage in the establishments in question, the head of the Mutt is entitled to appoint his successor, but his election is limited to members of the Ádhinam; and the head of the Ádhinam is entitled to enforce this rule though he is bound to invest a disciple properly nominated by the head of the Mutt; (3) that the defendant not being a disciple of the Ádhinam, his appointment is invalid and the head of the Ádhinam is entitled to see that a competent member of the Ádhinam was appointed in his stead; (4) that the plaintiff is entitled to declarations based on the two last mentioned findings since they were comprised in the issues framed under ss. 146 and 147 of the Code of Civil Procedure, although the appropriate form in which the decree should be passed was not indicated with precision in the plaint itself; (5) that the suit was barred by limitation in respect of the personal claim to manage the endowments as to which no claim had been put forward for 60 years; (6) that the suit was not barred by limitation in respect of the claim to set aside the appointment of the defendant (who entered into possession in 1880 under a will, dated in the same year), or to see that a competent Dharmapuram man be appointed, in spite of the total denial of the claims of the head of the Ádhinam in 1854; (7) that the consent of the Advocate-General to the suit is not required; the suit having been instituted under the Civil Procedure Code of 1877 and the cause of action not being an alleged breach of trust; (8) that there is nothing irregular in seeking to recover movable and immovable property in the same suit if the cause of action is the same in respect of both; (9) that the agreement of the head of the Mutt to become the "slave" of his *guru* could have no legal operation since 1843, and that the adverse possession of the defendant from that year is fatal to any claim of the plaintiff under such agreement.

Giyana Sambhandha Pandara Sannadhi v. *Kandasámi Tumbiran* 375

9. ——— *Rights of an illegitimate son of a Sudra—Position of legitimate, adoptive, and illegitimate sons and daughter's sons, compared—Construction of a deed of partition—Partial partition—Admissibility in evidence of petitions signed by a person available but not called as witness:*

A., the son of a deceased zamíndár, sued B. and C., his widow and brother, for possession of the zamíndárí, which was impartible. In order to prove that A. was illegitimate, C. filed two petitions purporting to have been signed and sent to the Collector of the district by C., in 1871, referring to A.'s mother as a concubine. C. was not examined as a witness:—*Held*, that their contents were not evidence, but the petitions were themselves evidence to show that a complaint was made as mentioned therein.

In order to prove that C. was divided from the late zamíndár, A. filed and proved a deed of partition executed by them in respect of their movable property and of a house, which concluded as follows:—"There shall be connection only by relationship, but there shall be no pecuniary connection between us." *Held*, that the deed effected only a partial partition, and that the last clause must be referred to the coparcener's right in partible property described in the instrument, and did not operate as a release of any right of succession to impartible property.

A. was found to be an illegitimate son of the late zamíndár:—*Held*, that he could not exclude his father's coparcener or widow from succession to the impartible zamíndárí—*Krishnayyan* v. *Muttusámi*, I.L.R., 7 Mad., 407, and *Kulanthai Natchear* v. *Ramamani* (unreported), in which it was ruled that a widow's claim to inherit would exclude that of an illegitimate son, approved and followed. *Sadu* v. *Baiza*, I.L.R., 4 Bom., 37, and *Jogendro Bhupati* v. *Nittyanundman Singh*, I.L.R., 11 Cal., 702, distinguished.

Parvathi v. *Thirumalai* 334

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10. ——————*Self-acquired immovable property—Nuncupative will—Disinherison of an undivided son :*

Under 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. A., a Hindu, took up some abandoned waste land and brought it into cultivation :—*Held*, that the true test as to whether the land is his self-acquired property or not, is whether it was brought under cultivation by family or self-acquired funds, and the *onus probandi* lies upon those who alleged the latter.

Subbayya v. *Súrayya* 251

11. ——————*Unsettled palayam held on service tenure—Commutation of service for quit-rent—Enfranchisement—Inám puttá issued to Hindú widow by Government, acknowledging her absolute title to estate, not a grant of a new estate—Joinder of plaintiffs—Suit by daughter and daughter's son against widow to declare alienations invalid :*

The palayam of C. was granted during the Muhammadan rule to a Hindú on service tenure, the condition being that the grantee should maintain a body of police for the service of the paramount power. This palayam was not brought under permanent settlement under the provisions of Regulation XXV of 1802. The last male holder died in 1860 leaving him surviving a widow K. and a daughter C. In 1865 the Government discontinued the service and, in lieu thereof and of the reversionary interest of the Crown, imposed a quit-rent, and an inám puttá was issued to K. by the Inám Commissioner by which her title to the estate was acknowledged by the Government of Madras and the estate was confirmed to her as her absolute property subject to the quit-rent. In 1882, C. and her minor son A. sued K. and others, to whom K. had alienated portions of the estate, for a declaration that they were the reversionary heirs of K. and that the alienations made by K. were good only during the lifetime of K. The District Judge held that there being no collusion between C. and the defendants, A. was not entitled to join in the suit :—*Held*, that A. was entitled to join C. as co-plaintiff. *Held* also that the effect of the inám puttá was not to confer on K. any new estate but merely as between the Crown and the owners of the estate to release the reversionary right of the Crown.

Nárâyana v. *Chengalamma* 1

HYPOTHECATION BOND—*Attachment of debt due :*

See CIVIL PROCEDURE CODE, 13.

JENMI RIGHT, DENIAL OF, BY KANAMDAR :

See MALABAR LAW, 7.

JOINDER OF PLAINTIFFS :

See HINDÚ LAW 11.

JURISDICTION OF DISTRICT MUNSIF :

See CIVIL PROCEDURE CODE, 20.

2. ——————————

See VALUATION OF SUIT 371

KANAM :

See MALABAR LAW, 4 and 7.

KARNAM—REGULATION XXIX OF 1802, s. 7—*Office of karnam in a zamindári village—Succession to—Female claimant—Incapacity of next heir :*

The karnam of a zamindári village having died, leaving a widow his heir, the zamindár appointed her to the office of karnam. The nearest male sapinda of the deceased karnam (from whom he was divided) sued to establish his right to the office of karnam :—*Held* (1) that a woman cannot hold the office of karnam :—*Held* further, (2) that when the immediate heir is incapacitated, the nearest male sapinda of the deceased karnam is entitled to succeed to the office.

Chandrammá v. *Venkatráju* 226

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——*Rights of* de facto :

A. filed a plaint on 28th June 1882 for a declaration of his title as karnam of a village and for arrears of dues payable to him as such, including those for fasli 1288, which accrued due on 1st July 1879. His family had held the office and discharged its duties for three generations, but there was no evidence of any formal appointment of A. or his ancestors :—*Held*, that the plaintiff was entitled to the dues as *de facto* karnam, and his claim was not barred in respect of any of the arrears claimed.

Ganapathi v. *Sithárámá* 292

LANDLORD AND TENANT—*Forfeiture—Waste—Planting a mango tope on dry land :*

In the absence of local custom, tenants are not entitled to convert land under cultivation into a mango grove. Tenants from year to year are not at liberty to change the usual course of husbandry without the consent of the landlord.

Lakshmana v. *Rámachandra* 351

2. ——————*Hindú Law—Wells dug with consent of Landlord—Compensation :*

Where tenants from year to year, with permission of the landlord, sank a well in the land demised :—*Held*, that they were not entitled under Hindú law to any compensation therefor from the landlord after the determination of the tenancy.

Venkatavaragappa v. *Thirumalai* 112

LETTERS PATENT, s. 10—*Advocates* 31

LIMITATION :

See ADVERSE POSSESSION 189

2. ——————

See REVENUE RECOVERY ACT.

LIMITATION ACT, ss. 5, 6—*Period of limitation—Power to excuse delay :*

Delay in preferring an appeal under the Madras Forest Act beyond the period prescribed by s. 14 of that Act, may be excused under s. 5 of the Indian Limitation Act, 1877.

Reference under Forest Act V of 1882 210

2. ——————, **s. 10 :**

See HINDÚ LAW, 8.

3. ——————, **s. 12 :**

A. filed a plaint on 28th June 1882 for a declaration of his title as karnam of a village and for arrears of dues payable to him as such, including those for fasli 1288, which accrued due on 1st July 1879. His family had held the office and discharged its duties for three generations, but there was no evidence of any formal appointment of A. or his ancestors :—*Held*, that the plaintiff was entitled to the dues as *de facto* karnam, and his claim was not barred in respect of any of the arrears claimed.

Ganapathi v. *Sithárámá* 292

4. ——————, **s. 12, sch. II, art. 177**—*Period of limitation for admission of an appeal to Privy Council :*

On a petition for leave to appeal to the Privy Council presented on the 8th April, it appeared that the period of six months from the date of the decree to be appealed against had expired on the 23rd of March if the time occupied by the petitioner in getting a copy of the decree was to be computed in that period :—*Held*, that the petition was barred by limitation.

Lakshmanan v. *Peryasámi* 373

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5. ——————, s. 19, sch. II, art. 85—*Acknowledgment—Mutual, open and current accounts:*

A. acted as commission agent for B. and C. A. furnished a debit and credit account in February 1878. The account was disputed and the matter was referred to an arbitration: for which purpose in March 1880 a "memorandum of items to be settled" was drawn up and signed by B. and C., in which they denied that any balance would be found due to A., but acknowledged that accounts must be taken and that they would be liable if any balance were found due to A. In June 1880 B. signed and supplied to the arbitrator an account on behalf of himself and C. The arbitrator made an award which was set aside. A. filed a suit against B. and C. in September 1882 for a balance due to him:—*Held*, that the accounts were mutual, open and current accounts; that B. and C. had made an acknowledgment of their debt to A.; and that the suit was not barred by limitation.

Sitayya v. *Rangareddi* 259

6. ——————, sch. II, art. 11:

An order rejecting a claim petition under s. 335 of the Civil Procedure Code, not being appealed against within one year acquires the force of a decree—*Veldyuthan* v. *Lakshmana*, I.L.R., 8 Mad., 506, followed.

Achuta v. *Mammavu* 357

7. ——————, sch. II, art. 85—*Mutual current accounts—Reciprocal demands:*

A. employed B. as his agent. B. alone kept written debit and credit accounts. A. sued B. for a balance due on the account between them:—*Held*, that the debit and credit account showed reciprocal demands between plaintiff and defendants, and that the account was a mutual open and current account within the meaning of Limitation Act, 1877, sch. II, art. 85.

Lakshmayya v. *Jagannatham* 199

8. ——————, sch. II, arts. 91, 120—*Suit for declaration of title—Incidental relief—Setting aside instrument:*

The period of limitation for suits to declare title is six years from the date when the right accrued, under Indian Limitation Act, 1877, sch. II, art. 120; and this period is not affected by art. 91, though the effect of the declaration is to set aside an instrument as against the plaintiff.

Pachamuthu v. *Chinnappan* 213

9. ——————, arts. 131, 132, 140, 144—*Claim for arrears of revenue by grantee from Government:*

The right to the revenue on certain land having been granted to the trustees of a mosque, the said grant was confirmed by Government in 1866. In 1883, a suit was brought to recover arrears of revenue from the owners of the land. It was found that no payment of revenue had ever been made by the defendants to the plaintiff and the suit was dismissed as barred by limitation under art. 144, sch. II of the Limitation Act:—*Held*, that the suit was not barred and that the plaintiff was entitled to recover 12 years' arrears of revenue.

Alubi v. *Kunhi Bi* 115

10. ——————, sch. II, art. 132—*Registered hypothecation bond—Personal remedy barred after six years:*

Article 132 of sch. II of the Indian Limitation Act, 1877, by which a period of 12 years is allowed to enforce payment of money charged on immovable property, refers only to suits to enforce payment by sale of the property charged and not to a claim to enforce the personal remedy on a registered bond by which immovable property is pledged as security for the debt.

Seshayya v. *Annamma* 100

11. ——————, sch. II, arts. 132, 147—*Transfer of Property Act—Act IV of* 1882, *ss.* 58, 100—*Hypothecation bond:*

The period of limitation for suits upon hypothecation bonds, which contain no power of sale, or effect no transfer of property, executed before the

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Transfer of Property Act came into operation, is 12 years under sch. II, art. 132, of the Limitation Act of 1877—*Aliba* v. *Nanu* (I.L.R., 9 Mad., 218) followed. *Per* Muttusámi Ayyar, J.—"The transaction in suit appears to be of the kind described in s. 100 of the Transfer of Property Act, which defines how a charge is created;" but "it seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages, whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages."

Rangasámi v. *Muttukumarappa* 509

12. ——————, sch. II, arts. 178, 179—*Decree—Execution—Attachment set aside—Time occupied in suing to declare property liable to attachment not excluded from computation:*

An application for execution of a decree having been made in 1880, certain land was attached as being the property of the judgment-debtor (deceased). His children thereupon claimed the land and the attachment was raised. Upon this, the judgment-creditor sued to establish his right to sell the land in execution and obtained a decree in 1882, which was confirmed on appeal in 1883. In 1885, the judgment-creditor again applied for attachment and sale of the same land:—*Held*, that the application was barred by limitation—*Paras Ram* v. *Gardner*, I.L.R., All., 355, dissented from.

Nárâyana v. *Pappi Brahmani* 22

13. ——————, sch. II, arts. 178, 179, (3)—*Civil Procedure Code, s.* 583—*Application for refund of moneys levied under decree reversed on appeal—Review rejected—Time not excluded from computation:*

Where a review of judgment has been applied for, and, after notice to the other side, refused, the period during which such application was pending cannot be excluded in computing the period of limitation for execution of the decree under art. 179 (3) of sch. II of the Indian Limitation Act. *Semble.*—An application for refund of moneys levied in execution of a decree subsequently reversed on appeal is not governed by art. 179 but by art. 178 of sch. II of the Limitation Act.

Kurupam Zamindár v. *Sadasiva* 66

MADRAS DISTRICT MUNICIPALITIES ACT, ss. 191, 192, 193, 196—*Butchers' licenses—Private market, meaning of:*

A Municipal Council, under the Madras District Municipalities Act, refused to give licenses to certain persons keeping butchers' shops not used as slaughter-houses, except on the condition that they should remove to a fixed market:—*Held*, that butchers' shops are not "private markets" within the meaning of the Act, and that the action of the Municipal Council was *ultra vires*.

Queen-Empress v. *Baodur Bhai* 216

MAINTENANCE OF WIDOW—*Execution of decree for:*

See HINDÚ LAW, 6.

MALABAR LAW—*Brahmans—Numbudris—Mussads—Hindú Law, how far applicable—Liability of sons for father's debt in Hindú Law, not applicable:*

The principle of Hindú Law, which imposes a duty on a son to pay his father's debt, contracted for purposes neither illegal nor immoral, is not applicable to the Malabar Brahmans called Nambudris and Massads.

Nilakandan v. *Madhavan* 9

2. ——————, *Civil Procedure Code, s.* 30—*Joinder of parties*—Res judicata—*Cancellation of deeds—Declaratory suit—Withdrawal of part of claim:*

A. and B., junior members of a Malabar tarwad, sued to cancel certain mortgages executed by their karnavan and senior anandravan, on the ground that the secured debt was not binding on the tarwad, and to appoint A. to the office of karnavan. The last part of the prayer was withdrawn. The mortgages were executed to secure a decree-debt, the decree having been passed *ex parte* against the late karnavan of the tarwad. No fraud was alleged, but the Lower Courts found that the karnavan had been guilty of fraud in allowing the decree to be passed *ex parte*. The plaintiffs had not been parties to

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the decree, and the other junior members of the tarwad who had been joined were exempted from liability :—*Held*, that the nature of the debt was not *res judicata*, and that the plaintiffs were entitled to a declaration that the mortgages in question were invalid as against them :—*Held*, further *Per cur.*—All the members of the plaintiff's tarwad should have been joined actually or constructively ; but (Kernan, J., dissenting), the objection as to non-joinder is not essential, but merely formal, and weight should not be attached to it when it is first taken on second appeal.

Moidin Kutti v. *Krishnan* 322

3. ——————, *Decree against karnavan and senior anandravan not binding on junior members—Civil Procedure Code, s.* 13, *expl.* 5, *s.* 30 :

A decree having been obtained against the karnavan and senior anandravan of a Malabar tarwad whereby the tarwad was dispossessed of certain land, the junior members of the tarwad who had not been impleaded in the suit sued to recover the land :—*Held*, that the plaintiffs were entitled to recover upon proof that the decree in the former suit was not substantially correct, and that they were not bound to prove *mala fides* on the part of their karnavan in defending the former suit as a condition precedent to recovery.

Sridevi v. *Kelu Eradi* 79

4. ——————, *Kanam—Construction of redemption clause—Time for redemption :*

The primary intention that a kanam is to be redeemed only after 12 years, can be negatived either expressly or by implication by a special clause. *Puthenpurayil Kuridipravan Kanara Kurup* v. *Puthenpurayil Kuridipravan Govindan* (I.L.R., 5 Mad., 311) distinguished.

Ahmed Kutti v. *Kunhamed* 192

5. ——————, *Karnavan—decree against,—Female not incapable of managing the affairs of a tarwad*—Res judicata :

The senior female member of a Malabar tarwad, who managed its affairs, instituted a suit on behalf of the tarwad and in the capacity of karnavan :—*Held*, (1) that a female is not precluded from managing the affairs of her tarwad when there is no male member in her family capable of performing the duties of a karnavan ; and (2) that the junior members of the tarwad were, in the absence of fraud shown, constructively parties to the suit, and were accordingly bound by the decree.

Subramanyan v. *Gopala* 223

6. ——————, *Personal decree against karnavan—Civil Procedure Code, s.* 335 :

A. sued for possession of certain shops belonging to a Malabar tarwad, which had been attached in execution of a personal decree passed against a karnavan in a suit on a private debt. In the execution proceedings, an objection petition was put in, stating that the shops were sridhanam and was rejected ; and the order of rejection was not appealed against for one year. Respondents Nos. 1 to 4, the husbands of the persons who put in the objection petition, were in possession and were now sued for possession. The plaintiff was assignee of the purchaser at the execution sale :—*Held*, that upon the facts found the plaintiff acquired nothing under the Court sale.

Achuta v. *Mammavu* 357

7. ——————, *Rights under a kanam—Denial of jenm right by kanamdâr—Adverse possession—Limitation—Declaration of escheat :*

A. demised certain lands on kanam to B. in 1853. B. afterwards committed an offence under the Mapilla Act and the lands were handed over for the benefit of his representatives to C. Government subsequently without making A. a party to their proceedings, declared the lands to have escheated, and in 1863 sold them to C. A.'s representatives now sued to recover the lands from C.'s representatives who set up an adverse title and alleged that the suit was time-barred :—*Held*, that C. was, at the time of the escheat, in the position of a manager for mortgagees ; that the escheat proceedings of which the mortgagor had no notice did not affect his rights ; that denial by the mortgagee in possession of the mortgagor's right to redeem is not sufficient to convert such possession into adverse possession.

Hussáid v. *The Collector of Malabar* 189

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8. ——————*Suit against karnavan and senior female member of a tarwad—Evidence of intention to sue defendants as representatives of the tarwad :*

The karnavan and senior female member of a Malabar tarwad executed a hypothecation bond, on which a suit was brought against them asking for the sale of the tarwad property. The defendants had represented the tarwad in other suits, but were not in this case expressly sued in representative capacity. The plaintiff obtained a decree :—*Held*, that the decree was binding on the tarwad.

Subramanyan v. *Kali* 355

MAPILLAS :

See MUHAMMADAN LAW.

2. ——————*Escheat under Mapilla Act :*

See MALABAR LAW, 7.

MERGER OF SECURITIES :

See CIVIL PROCEDURE CODE, 6.

MINOR—*Contract by—Ratification by acquiescence :*

A. sued in 1885 to recover certain estates from B., alleging claim under his adoption which took place in 1865. A suit to recover the same estates had been filed on behalf of A. by his next friend and had been dismissed for default in 1872. In 1875 A., being still a minor, relinquished his claim to the estates for Rs. 12,000 under exhibit B. ; but now alleged that he thought he was relinquishing it only in favor of the defendant's predecessor in title who died in 1883, having been in possession of the estates since 1867. The plaintiff attained his majority in 1878 :—*Held*, that the claim was *res judicata*, the plaintiff having failed to prove fraud on the part of his next friend : that whether the cause of action arose in 1865 or 1867, it was equally barred from 1879 : that assuming the plaintiff was a minor of 15 years of age at the date of the deed of relinquishment, it is not likely he would not have understood its effect, or that he failed to ascertain it when he attained his majority in 1878.

Venkatachalam v. *Mahalakshmamma* 272

MORTGAGE—*Effect of sale of mortgaged property in execution of a money decree for interest due* 175

2. ——————*Redemption of—who may redeem* 102

MUHAMMADAN LAW—*Mapillas—Gift to take effect at an indefinite future time :*

Gifts to take effect at an indefinite future time are void under Muhammadan law.

Chekkonekutti v. *Ahmed* 196

MULAGENI LEASE :

See RENT RECOVERY ACT, 1.

MUTUAL CURRENT ACCOUNTS :

See LIMITATION ACT, 7.

NATIVE CHRISTIAN :

See PENAL CODE, 4 ; SUCCESSION ACT.

PAUPERS, JOINT APPLICATION FOR PERMISSION TO SUE AS :

See CIVIL PROCEDURE CODE, 21.

PENAL CODE, ss. 22, 378, 379—*Theft—Movable property :*

A. dug up and immediately carried away, without any authority or right, several cart-loads of earth, part of unassessed lands of a village :—*Held*, that A. was not guilty of theft.

Queen-Empress v. *Kotayya* 255

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2. ————, ss. 24, 378—*Theft of joint property by coparcener :*

Theft of joint property may be committed by a coparcener if he takes it from joint possession and converts such possession into separate possession.

Queen-Empress v. *Ponnurangam* 186

3. ————, s. 65 :

See CRIMINAL PROCEDURE CODE, 1.

4. ————, ss. 103 and 494—*Native Christian—Marriage by relapsed convert :*

A. was baptized in infancy into the Roman Catholic Church, but subsequently relapsed, with the rest of her family, into Hindúism and was married to a Hindú. Her Hindú husband since discarded her, and alleged that he would not have married her if he had known that she had been baptized. A. was subsequently re-admitted into the Roman Catholic Church and married by B., a priest, to a Roman Catholic during the lifetime of her Hindú husband :—*Held*, that A.'s marriage with the Hindú was subsisting and valid at the time of her Christian marriage ; that she was guilty of the offence of bigamy ; and that B. was guilty of abetting that offence—*Lopez* v. *Lopez* (I.L.R., 12 Cal., 706) discussed.

Millard, In re 218

5. ————, ss. 295, 297—*Defiling a place of worship—Trespass on a place of sepulture :*

R., a Hindú, had sexual intercourse with a woman within an enclosure surrounding the tomb of a Muhammadan fakir. He was convicted under s. 295 of the Indian Penal Code :—*Held* that, in the absence of proof, that the place was used for worship or otherwise held sacred, the conviction was bad, and that it should be altered to a conviction under s. 297 of the said Code.

Ratna Mudali, In re 126

6. ————, s. 504—*Intent to provoke a breach of the peace :*

A. abused B. to such an extent as to reduce B. to a state of abject terror :—*Held*, that A. having given to B. such provocation as would under ordinary circumstances have caused a breach of the peace was guilty of an offence under s. 504 of the Penal Code.

Queen-Empress v. *Jogayya* 353

PENALTY :

See CONTRACT ACT, 74.

PLEADER—*Officer of Court :*

See CIVIL PROCEDURE CODE, 15.

PRESIDENCY SMALL CAUSE COURTS' ACT, 1882, s. 18—*Suits for maintenance cognizable :*

Presidency Small Cause Courts, constituted under Act XV of 1882, are not debarred from entertaining suits for maintenance not based on contract or declaratory decree.

Pokala v. *Murugappa* 114

PRIVILEGE :

See COUNSEL AND WITNESS.

PRIVY COUNCIL—*Practice—Re-hearing—Infancy of party at the time of the hearing of appeal—"Res noviter" not itself a ground for a re-hearing :*

There may be exceptional circumstances which will warrant the Judicial Committee in allowing, even after an order of Her Majesty in Council has issued upon their report, a re-hearing at the instance of one of the parties. But this is an indulgence with a view mainly to doing justice when by some accident, without any blame, the party has not been heard, and an order has been made, inadvertently, as if he had been heard. In one of two appeals in suits relating to the same estate, judgment was given by the Judicial Committee after a hearing on the merits. In the other, judgment

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was given to the same effect as in the first, it being conceded between the parties that the questions in both suits were the same. After both judgments had been reported to Her Majesty, and confirmed by her orders in Council, a petition for a re-hearing was presented :—*Held*, that, even assuming that a case of the *res noviter* had been made out (which was not, however, the fact), the orders were final, and the petition must be rejected.

Appa Rao, In re 73

RATING :

See CITY OF MADRAS MUNICIPAL ACT.

RECEIPT :

See STAMP ACT, 1 & 2.

RECEIVER :

See CIVIL PROCEDURE CODE, 23.

RECIPROCAL DEMANDS :

See LIMITATION ACT, 7.

REDEMPTION OF KANAM, TIME FOR :

See MALABAR LAW, 4.

REGISTRATION ACT, s. 41 :

See CRIMINAL PROCEDURE CODE, 2.

REGULATION XXIX OF 1802, s. 7 :

See KARNAM, 1.

2. ———— V OF 1804, s. 14 (4), s. 20 44

3. ———— IV OF 1831 7

4. ———— X OF 1831, ss. 1, 2, 3—*Regulation V of* 1804, *s.* 14 (4), *s.* 20—*Sale for arrears of revenue of mitta held by tenants in common during minority of some of the owners—Minority no bar to sale—Civil Procedure Code, s.* 32 :

A mitta held by tenants in common was sold for arrears of revenue at a time when the owners of a moiety thereof were minors. In a suit brought by the mother of these minors on their behalf against the Collector to set aside the sale, the District Court held that Regulation X of 1831, s. 2, absolutely debarred the Collector from selling the estate of the minors during their minority and set aside the sale so far as their interests were concerned :—*Held*, on appeal, that the minors not being sole proprietors, their estate was not one of which the Court of Wards could assume the management, and, therefore, s. 2 of Regulation X of 1831 did not affect the sale. In the above-mentioned suit the plaintiffs impleaded also the other previous owners, of whom one was the purchaser at the sale. Two others, in their written statement, pleaded that the purchase had been made in fraud of their rights, and claimed to be still entitled to their shares in the mitta on the ground that the purchaser must be held to have purchased for their benefit (Indian Trusts Act, 1882, s. 90). They further claimed that should the sale be set aside so far as the plaintiffs' interests were concerned, the sale of their interests also should be held to be null and void. Before the suit came on for hearing the District Judge *suo motu* ordered that these two defendants should be made plaintiffs in the suit under s. 32 of the Code of Civil Procedure. At the date when this order was made, the claim of these defendants, had they sued to set aside the sale in their own interest, was barred by limitation :—*Held*, that the order was illegal.

Krishna v. *Mekamperuma* 44

RENT RECOVERY ACT—ACT VIII OF 1865 (MADRAS)—*Mulageni lease—Encumbered tenancy—Sale for arrears of rent :*

A. demised land to B. on a mulageni lease. B. mortgaged his tenancy to C. The rent under the mulageni lease fell into arrears, and A. obtained a decree against B. for the amount :—*Held*, that arrears of rent are not a first charge

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on the tenant's holding, and accordingly that the landlord could not execute his decree by sale of the tenancy free from the mortgage created by the tenant—*Rájágopál* v. *Subbaráya* (I.L.R., 7 Mad., 31) followed.

Padakannaya v. *Narasimma* 260

2. ——————, **ss. 3, 4, and 7**—*Civil Procedure Code, s. 584—Powers of High Court on second appeal—Contents of pattá—Date of tender of pattá :*

A landlord within three days of the end of the fasli tendered to a tenant by way of pattá a document containing a statement of account of rent payable in respect of the current fasli :—*Held*, that the document tendered was a good pattá, and that under local custom a valid tender of pattá may be made at the end of the fasli. On second appeal by a landlord against a decree of a District Judge, who stated in his judgment that "though the tenant admitted the execution of the muchalká, it was not shown that he dispensed with the pattá ;" no objection was taken in the memorandum of appeal that the muchalká, which contained a statement that no pattá was necessary, had been neglected or misconstrued. The High Court ordered that the Judge be asked to take the postscript into his consideration and submit a revised finding.

Náráyana v. *Muni* 363

3. ——————, **s. 11**—*Water-cess—Tenants—Cultivation improved by water taken from landlord's tank :*

A landlord has a right to charge water-cess when his tenant cultivates a wet crop on dry land or a second wet crop on wet land by means of water taken from the landlord's tank.

Tháyammál v. *Muttia* 282

4. ——————, **s. 13**—*Who entitled to proceed under—Attachment held good as to part :*

A. granted two villages in perpetuity to B. under a deed, reserving a certain rent to himself which was to be recovered "according to the Act" if it fell into arrear. The rent remained unpaid for two years, and A. obtained an attachment for the whole arrear under the Madras Rent Recovery Act :—*Held*, (1) that A. was entitled to proceed as landlord under the Madras Rent Recovery Act, (2) that the attachment held good for such amount of rent as was recoverable under that Act—*Rámasámi* v. *Collector of Madura* (I.L.R., 2 Mad., 67) discussed.

Rámachandra v. *Naráyanasámi* 229

5. ——————, **ss. 39, 40, 78**—*Civil Procedure Code, s. 11—Remedy of tenant aggrieved by notice of attachment :*

A tenant having received a notice of attachment under s. 39 of the Rent Recovery Act sued in a District Múnsif's Court to have the notice cancelled, no specific damage being alleged :—*Held*, that the suit did not lie.

Mahomed v. *Lakshmipati* 368

RES JUDICATA :

See CIVIL PROCEDURE CODE OF 1859, 1.

2. ——————:

See HINDÚ LAW, 2.

3. ——————*Estoppel :*

V. sued to eject K. from certain land, alleging that K., having entered under a lease held as a trespasser. K. pleaded that he held as mortgagee. It was found that K. obtained possession under a mortgage deed for Rs. 1,000, which had not been registered, and that he held also a second mortgage for Rs. 50, and it was held on second appeal that K. was entitled to defend his possession by virtue of the mortgage for Rs. 50 and, as V. had not offered to redeem the charge but had sued on false averments, the suit was dismissed. V. then sued K. to recover the land on payment of Rs. 50. In his plaint V. stated that, though the mortgage deed for Rs. 50 was fabricated, the High Court had decided that he was bound to pay Rs. 50

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before recovering the land from K. The District Court on appeal dismissed the suit on the ground, *inter alia*, that as V. denied the genuineness of the mortgage, he could not sue for redemption :—*Held*, that V. was entitled to redeem.

Varathayyangár v. *Krishnasámi* 102

RES NOVITER—Review 73

REVENUE—*Claim for arrears :*

See LIMITATION ACT, 9.

REVENUE RECOVERY ACT, s. 59—*Limitation—Sale of land subject to mortgage—Suit by mortgagor :*

Land which was subject to a mortgage having been sold for arrears of revenue under Act II of 1864 (Madras), the mortgagee's assignee sued to enforce the terms of the bond by sale of the land more than six months after the date of the sale of the land :—*Held*, that the suit was barred by s. 59 of the said Act.

Yellaug v. *Viraya* 62

REVIEW OF JUDGMENT 73

SANCTION TO INSTITUTE SUIT :

See CIVIL PROCEDURE CODE, 24.

SMALL CAUSE COURT—*Jurisdiction of, over soldiers :*

See ARMY ACT, 1.

SPECIFIC RELIEF ACT, s. 42—*Suit by reversioners of Hindú widow :*

The plaintiffs, uncle's sons of R., a deceased Hindú, brought a suit as reversioners of R., for a declaration that certain alienations made by M. the widow of R. were not binding beyond the lifetime of M. The District Judge held on the strength of *Greeman Singh* v. *Wahari Lall Singh* (I.L.R., 8 Cal., 12) that the suit would not lie under s. 42 of the Specific Relief Act :—*Held*, that the suit would lie.

Gangayya v. *Mahálakshmi* 90

STAMP :

See COURT FEES ACT.

STAMP ACT, sch. II, art. 15 (a)—*Receipt—Endorsement of payment on mortgage deed :*

An endorsement on a mortgage, acknowledging the receipt of the sum thereby secured is exempt from stamp duty under sch. II, art. 15 (a), of the Indian Stamp Act, 1879.

Reference under Stamp Act, s. 46 64

2. ——————, **sch. II, art. 15 (b)**—*Receipt given by Secretary of Club to a Member for Club bill :*

Where a receipt in writing is given by the Secretary or other Manager of a Club to a Member acknowledging a payment above Rs. 20 on account of a Club bill, it is liable to stamp duty.

Reference under Stamp Act, s. 46 65

3. ——————, **sch. II, cl. 2 (a)**—*Agreement for, or relating to, the sale of goods :*

By an agreement in writing the vendor agreed to sell, and the purchaser to buy, certain salt for a price to be paid at a future date. The salt was to be at purchaser's risk from the date of the execution of the agreement, and, if not removed within a certain time, to revert to, and become the property of, the vendor :—*Held*, that this document was exempt from duty under sch. II, cl. 2 (a), of the Indian Stamp Act, 1879.

Reference under Stamp Act, s. 46 27

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4. ————, s. 3, cl. 4 (b)—*Bond:*

A. executed a document, by which he promised to pay on demand Rs. 16 to B. The writer of the document signed the document as writer, for the purpose of attesting A.'s signature:—*Held*, that the document was liable to stamp duty as a bond.

Reference under Stamp Act, s. 49 168

STATUTE 44 & 45 Vic. c. 58, ss. 144, 151, 156:

See ARMY ACT, 1 & 2.

SUCCESSION ACT, 1865—*Effect of, on estates of Native Christians previously following Hindú law:*

A. and J., brothers, Native Christians, descendants of Brahmans, were living in coparcenary and owned certain land on the date when the Indian Succession Act, 1865, came into force. In 1872, no partition having been made, A. died:—*Held*, that J. did not take the whole estate on the death of A. by survivorship.

Tellis v. Saldanha 69

THEFT OF JOINT PROPERTY BY COPARCENER:

See PENAL CODE, 2.

TRANSFER OF PROPERTY ACT, ss. 2, 99—*Attachment of property mortgaged prior to* 1882:

In 1884, a mortgagee obtained a decree for arrears of interest due under a mortgage deed of 1879 and in execution of the decree attached and applied for the sale of the land mortgaged:—*Held*, that by reason of s. 99 of the Transfer of Property Act, 1882, the land could not be sold otherwise than by a suit instituted under s. 67 of the said Act.

Kaveri v. Ananthayya 129

2. ————————, ss. 58, 100—*Hypothecation bond:*

The period of limitation for suits upon hypothecation bonds, which contain no power of sale, or effect no transfer of property, executed before the Transfer of Property Act came into operation, is twelve years under sch. II, art. 132, of the Limitation Act of 1877—*Aliba v. Nanu* (I.L.R., 9 Mad., 218) followed. *Per* Muttusámi Ayyar, J.—"The transaction in suit appears to be of the kind described in s. 100 of the Transfer of Property Act, which defines how a charge is created; but "it seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages, whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages."

Rangasámi v. Muttukumarappá 509

3. ————————, ss. 131, 135—*Notice—Assignment of actionable claim—Rights of transferee for value:*

A. sued for principal and interest due on a mortgage assigned to him for value by the mortgagee. No notice of the assignment was given to the mortgagors before the plaintiff's demand. The sum sued far exceeded the amount paid by the plaintiff for the assignment and reasonable interest on it; but such amount was not paid or tendered to the plaintiff:—*Held*, that the plaintiff was entitled to a decree for the whole amount due on the assigned mortgage.

Subbammál v. Venkatarámá 289

VALUATION OF SUIT—*Jurisdiction of District Múnsif—Suit for declaration of title to paid offices—Withdrawal of claim to some of the offices—Office still claimed involving the right to the others:*

In a suit to declare title to four paid offices in a temple, the plaintiffs asked that the issues with regard to three of them should not be tried, but on cross-examination asserted right to them:—*Held*, that the plaintiffs were not

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shown to have relinquished their claim on the three offices for the purposes of the suit. On findings that the fourth office carried with it the right to the other three and that united value of the four offices exceeded the jurisdiction of the District Múnsif:—*Held*, that the District Múnsif had no jurisdiction to entertain the suit and that the plaint should be returned for presentation in the proper Court.

Sundara v. Subba 371

2. ————————*Court Fees Act, s. 6, sch. II, art.* 17:

In a suit on a mortgage bond a decree was passed for payment of principal and interest, and in default for sale of the mortgaged property. Some of the defendants filed a mémorandum of appeal against so much of the decree as declared the liability of the property, affixing a stamp of Rs. 10 only:—*Held*, that the proper stamp to be paid was not Rs. 10 as in the case of a declaratory decree, but on the value of the debt not exceeding the value of the property.

Venkappa v. Narasimha 187

WASTE:

See LANDLORD AND TENANT, 1.

WITNESS—*Privilege—Cause of action—Suit for damages caused by false statement of witness in a suit:*

No action will lie against a witness for making a false statement in the course of a judicial proceeding.

Chidambara v. Thirumani 87

THE

INDIAN LAW REPORTS,

Madras Series.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

NARÁYANA AND OTHERS (DEFENDANTS), APPELLANTS,

and

CHENGALAMMA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1885. December 17. 1886. July 12.

Hindú Law—Unsettled palayam held on service tenure—Commutation of service for quit-rent—Enfranchisement—Inám pattá issued to Hindú widow by Government, acknowledging her absolute title to estate, not a grant of a new estate—Joinder of plaintiffs—Suit by daughter and daughter's son against widow to declare alienations invalid.

The palayam of C. was granted during the Muhammadan rule to a Hindú on service tenure, the condition being that the grantee should maintain a body of police for the service of the paramount power. This palayam was not brought under permanent settlement under the provisions of Regulation XXV of 1802. The last male holder died in 1860 leaving him surviving a widow K. and a daughter C. In 1865 the Government discontinued the service and, in lieu thereof and of the reversionary interest of the Crown, imposed a quit-rent, and an inám pattá was issued to K. by the inám Commissioner by which her title to the estate was acknowledged by the Government of Madras and the estate was confirmed to her as her absolute property subject to the quit-rent.

In 1852 C. and her minor son A. sued K. and others to whom K. had alienated portions of the estate for a declaration that they were the reversionary heirs of K. and that the alienations made by K. were good only during the lifetime of K.

The District Judge held that there being no collusion between C. and the defendants, A. was not entitled to join in the suit:

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* Appeals Nos. 8, 9, 19 and 25 of 1885.

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Held that A. was entitled to join C. as co-plaintiff.

Held also that the *effect of* the inám pattá was not to confer on K. any new estate but merely as between the Crown and the owners of the estate to release the reversionary right of the Crown.

IN suit No. 9 of 1882 in the District Court of Nellore, Tiruvanthipuram Chengalamma and her minor son, Lakshmi Kumara Akkulu Náyudu (represented by his mother), sued Chitteti Kannamma, the mother of plaintiff No. 1, and 18 others for a declaration that plaintiffs were the reversionary heirs of defendant No. 1, and that alienations of portions of the palayapát called Chitteti palayam made by defendant No. 1 to the other defendants were not binding on the plaintiffs.

The District Judge held that plaintiff No. 2 could not join in the suit, but decreed the claim in full in favor of plaintiff No. 1.

Against this decree the following appeals were preferred :—

(1) No. 19 by defendants Nos. 3 and 4, Mummareddi Tulasamma and her minor son.

(2) No. 25 by defendant No. 5, the Rájá of Venkatagiri.

(3) No. 8 by defendant No. 6, Pennubolu Náráyana Reddi.

(4) No. 9 by defendant No. 7, Nallappa Reddi Adilakshmamma.

Plaintiff No. 2 filed a memorandum of objections to the decree so far as it disallowed his claim to join as a plaintiff with his mother.

Rámáchandra Ráu Saheb for appellants in Nos. 8 and 9.

Anandácharlu for appellants in No. 19.

Rámá Ráu for appellant in No. 25.

Bháshyam Ayyangár for respondents.

The Court (Collins, C.J., and Muttusámi Ayyar, J.) delivered the following

JUDGMENT :—The respondent Chengalamma is the daughter of Kannamma, defendant No. 1, and the mother of the minor, T. L. Akkulu Náyudu, and the several appellants are the alienees of hamlets and villages which are comprised in the Chitteti palayam of the District of Nellore. This palayam, it is stated in the plaint, was originally granted to Chengalamma's paternal ancestor during the Muhammadan rule on condition that he was to maintain a body of police for the service of the paramount power. The original grantee and his descendants have since continued to render the service and enjoy the estate. It is not, however, one of the palayams brought under permanent settlement with

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reference to the provisions of Regulation XXV of 1802, and the tenure on which it was held was that of an unsettled palayam originally granted for police service. The last male holder was one Lakshmi Rágavappa Náyudu, who died on the 23rd August 1860, leaving him surviving his widow Kanhamma, defendant No. 1, his only daughter, Chengalamma, the respondent, and his mother, Náráyanamma. Upon his death, the estate devolved on his widow, Kannamma, who was his heir at law, and whilst she was in possession, Government discontinued the police service in 1865 and charged on the palayam in perpetuity a quit-rent of Rs. 1,250 in commutation of that service and of the reversionary interest which the Crown claimed as the paramount power under the terms of the original grant. The title-deed C which was then issued by the inám Commissioner on behalf of the Governor in Council was issued in the name of Kannamma, and it purported to confirm the inám to her in freehold or as her absolute property, to be held or disposed of as she thought proper, subject only to the payment of the quit-rent which was charged upon it. It is also alleged in the plaint that Chengalamma was an infant of a year and-a-half old when her father died, and according to Act IX of 1875, she attained her majority on the 23rd August 1877. On the 1st January 1882, she instituted the suit from which these appeals arise in her own name and on behalf of her minor son to obtain a declaration that the alienations made by Kannamma in favour of the appellants were not binding upon her as reversionary heir. It is conceded, however, that the alienations are good during the lifetime of defendant No. 1 and to the extent of her estate as a Hindú widow. The respondents' case, then, was that the properties alienated were ancestral, that Kannamma took but a widow's estate therein, and that the alienations were in excess of that estate and in contravention of the provisions of the Hindú Law. On the other hand, the appellants contended that the alienations in which they are interested were made for value actually paid and for purposes recognized by the Hindú Law as binding on the reversioner. We may here observe that though defendant No. 2, Chengalamma's husband, alleged at one time that the consideration mentioned in connection with some of the alienations was fictitious, and though Kannamma herself stated in her evidence that the gumastas in her service had deceived her, the contention that the consideration was fictitious in whole or in part is not

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pressed on us in appeal in regard to the sales and mortgages now under consideration. The parties then proceeded to trial mainly upon the question whether those sales and mortgages were made in circumstances which rendered them valid against the reversioner. The Judge decided in favour of Chengalamma, but he observed in regard to her minor son that as he was not the next reversioner and as there was no collusion between her and the appellants, he was not entitled to join in the suit. From this decree four appeals have been preferred—No. 19 of 1885 by defendants Nos. 3 and 4 in regard to the sale of the village of Kesávaram in February 1876 under exhibit IA and the perpetual lease granted in July 1871 under document VII A with reference to 40 gorrus of land in the hamlet of Chittedu; No. 25, by the Rájá of Venkatagiri, defendant No. 5, in regard to the sale of the village of Maddali in execution of the decree in Original Suit 3 of 1867 on the file of the District Múnsif of Nellore; No. 8, by defendant No. 6 in regard to the sale of Vajjavaripalayam in October 1877 under exhibit C; and No. 9, by defendant No. 7 in regard to the mortgage of the village of Chittedu in March 1874 under exhibit ID and the perpetual leases granted in July 1871 and in November 1873 under exhibits IIID and IID.

In connection with Appeal 19 of 1885, objection has also been taken to the decree by Chengalamma on behalf of her minor son under section 561 of the Code of Civil Procedure in so far as it negatives his right to join in the suit. Some of the objections raised against the decree and the evidence in regard to Kannamma's position in life, the income at her disposal, and the mode in which she managed the estate relate to all the appeals before us, and it is desirable to deal with them in one judgment.

It is contended in Appeals 19 and 25 that the properties in dispute were Kannamma's self-acquisitions and that Chengalamma is not therefore at liberty to impeach their alienation. If this contention were to prevail, all the appeals should be allowed, and it is necessary to consider the grounds on which it rests though at some length it is not denied that the villages and hamlets sold and mortgaged are portions of the ancestral palayam, but it is asserted that the tenure of an unsettled palayam is such that there can be no proprietary estate in it, that on the death of each incumbent there is a lapse to the Crown, that if the palayam is still permitted to descend to the heir at law, such heir takes it not in

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continuation of the antecedent title (for there was none), but as a fresh grant from the paramount power, and that the enfranchisement which changed the tenure into permanent and heritable property was an act of State or an event which occurred during Kannamma's incumbency as a grantee. A tenure like this came under the consideration of the Privy Council in *The Collector of Trichinopoly* v. *The Zamindár of Marungapúri and* (his predecessor's widow) *Lakkamani.*(1) The *de facto* zamíndár was the brother of the former palayagár and was recognized by Government as entitled to the palayam or appointed to it in preference to the widow. She alleged that the nominee of Government was an illegitimate brother of her husband, that the palayam was an ancestral and hereditary tenure, and that the succession to it was governed by the Hindú Law and not liable to be changed by the appointment made by Government. On behalf of the Crown, the Collector pleaded among other matters that the estate was an unsettled palayam, that the right to nominate a successor to the former palayagár was vested in the Government, that in the exercise of his right, the Government granted the palayam to the late palayagár's brother, and that the grant being an act of State was not liable to be impugned in any Municipal Court. The matter in contest in that case was mainly the character of the tenure as heritable property though with this difference, *viz.*, that the contest was then between the Crown and the heir at law, and that there was an express appointment made by Government to divert the estate from the ordinary course of descent, whereas in the case before us, the Crown did not at all interfere with the ordinary course of succession and the contest is between a person claiming under a Hindú widow and her husband's reversioner.

After considering the history of the palayam tenures in this Presidency and the distinction between the palayams which were permanently settled under Regulation XXV of 1802 and those which were not brought under the permanent settlement, the Judicial Committee observed that a palayam might be hereditary though it was not permanently settled, and that the existence of a proprietary estate in such palayam and the tenure on which it is held are questions of fact which ought to be judicially determined in each case by legal evidence. There is thus no doubt that we

(1) L.R., 1 I.A., 282.

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cannot support the contention that because the palayam now in dispute was an unsettled palayam when the late palayagár died, there was no heritable property in it. Again, it may well be that when the Crown does not step in and supersede the heir at law, the tenure is an ancestral estate as between that heir and the reversioner though not as between them and the Crown. In *Stree Rajah Yanumula Venkayama* v. *Stree Rajah Yanumula Boochia Vankondora*(1), the Privy Council considered what circumstances would support a plea of self-acquisition in regard to an estate originally granted by Government. They held that unless there was a confiscation of the antecedent estate and a fresh grant by a person competent to confer a legal title, the new occupant must be considered to take the estate, not as self-acquisition, but in continuation of the former title. Considerable stress was next laid on the words in the inám title-deed C, "Confirmed to you in freehold or as your absolute property, &c." In construing those words, regard must be had to the other parts of the document and to the parties between whom they were intended to have operation. The document commences with the words, "On behalf of the Governor in Council of Madras, I acknowledge your title to the mokhasa village of Chittetivar palayam." What was then the title which was acknowledged as the basis of enfranchisement? Was it not Kannamma's title as the widow of the late palayagár or the descendant of the original grantee of an ancient palayam? If it was, is not the enfranchisement in the nature of a mere accretion to what was undoubtedly an ancestral and hereditary tenure? Nor is there reason to doubt that the words were intended to be operative only as between the Crown and the inámdár and not as between the latter and his heir. In *Cherukuri Venkanna* v. *Mantravathi Lakshmi Narayana Sastrulu*,(2) it was decided that the enfranchisement of a personal inám was no bar to an enquiry into the title to that inám and that the title-deed granted by the inám Commissioner might be set aside by Civil Courts without prejudice to its effect as enfranchisement of the inám tenure. It was only provided by section 2 of Madras Act IV of 1862 "that the title-deed issued by the inám Commissioner shall be deemed sufficient proof of the enfranchisement of land previously held on inám tenure," while section 1 abolished the special jurisdiction vested

(1) 13 M.I.A., 333. (2) 2 M.H.C.R., 327.

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in the Governor in Council by section 2, Regulation IV of 1831, and revived the jurisdiction of the Civil Courts in regard to claims made to the inám. Although the palayam in this suit is described in document C as mokhasa and is as such in the nature of a service inám mentioned in Regulation VI of 1831, the legal effect of enfranchisement is the same as in the case of a personal inám. With reference to service ináms, Madras Act IV of 1866, sections 1 and 2, enacted similar provisions, with the proviso contained in section 3, viz., "No Court of Civil Judicature shall be competent to call into question decisions affecting any service inám which may have been already passed by Revenue officers acting under the provisions of Regulation VI of 1831 prior to the enfranchisement of such inám. There is then no foundation for the contention that the inám title-deed conferred a new title upon Kannamma or that the enfranchisement had a larger operation than as a release granted by the Crown in respect of its reversionary interest and of the obligation of rendering service. Again, reliance was placed on *Bada* v. *Hussu Bhai*(1). In that case the share which the plaintiff claimed had been transferred by the Collector prior to the enfranchisement to the office-bearer, defendant No. 1, under Regulation VI of 1831, and this Court held that the enfranchisement did not revive a title which had already become extinct. It was a decision with reference to the proviso contained in section 3 of Madras Act IV of 1866 and there is no pretence in this case for saying that the Collector ever adjudicated in favor of Kannamma as against her daughter under Regulation VI of 1831. It is not clear whether the palayam in dispute was treated by Government as a service inám or as an unsettled palayam, but in either view of the case Kannamma acquired no new right of property under the inám title-deed. It has been repeatedly held with reference to ancient palayams and zamíndáris brought under the permanent settlement that such settlement only changed a precarious tenure into permanent property and a varying assessment into a fixed demand and did not otherwise alter the incidents of the estates either in regard to their mode of descent or partibility as evidenced by family usage. With reference to the decision of the Privy Council in *the Marungapuri case*, it is suggested by the pleader for the defendants Nos. 3 and 4 that we should

(1) I.L.R., 7 Mad., 236.

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now direct an inquiry as to whether or not the palayam in dispute was treated by Government prior to 1860 as a proprietary estate. We are unable to accede to this suggestion, for the question of self-acquisition did not at all arise on the pleading. Though there was a distinct averment in the plaint that the palayam was an ancestral estate, yet none of the appellants traversed it either in their written statements or at the first hearing. On the other hand, they justified the alienations and went to trial in regard to the question of justification. Though we may perhaps consider in appeal any question of law arising from facts which are either admitted or undisputed, we cannot allow without any satisfactory reason new questions of fact to be raised for the first time in appeal. Again, the petitions of appeal contain no ground of objection which specifically raises the question of self-acquisition, and it is extremely doubtful whether the contention is even open to the appellants under section 542 of the Code of Civil Procedure. Further, the learned pleader for defendants Nos. 3 and 4 does not state on what specific facts he grounds his application for further enquiry and on what occasions the Crown interfered with the hereditary descent of the palayam, and it is difficult to resist the impression that the question is probably started for the first time at the hearing of the appeals as a matter of speculative reasoning. We have therefore no hesitation in overruling the contention that the palayam was Kannamma's self-acquisition as frivolous.

This being so, she succeeded to the palayam as her husband's heir and took in it but a Hindú widow's estate. In this view, the evidence which relates to her position in life, to the income at her disposal and to the mode in which she managed the estate is common to all the appeals.

(After disposing of the other questions in the appeals, the judgment proceeded as follows) :—

It only remains for us to dispose of the memorandum of objections. As observed by the Judge plaintiff No. 2 is not the next reversioner and the general rule undoubtedly is that no declaratory suit can be maintained when there is no existing interest to protect as contradistinguished from a mere possibility or contingency.

It was held, however, in the *Sivaganga case*(1) that, like the widow, the daughter takes under the Mitákshará Law but a

(1) I.L.R., 3 Mad., p. 331.

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qualified heritage, and that, though for the time being she represents the inheritance, her succession is but a case of interposition between the last full male owner and his nearest male sapinda. The two plaintiffs in the suit before us would represent together full ownership, and in one sense, the position of plaintiff No. 2 is similar to that of a person who in terms of the English Law has a vested remainder subject to two pre-existing life estates. Adverting to such a case arising under a will left by the last male holder, the Privy Council observed in *Anant Bahadur Sing* v. *Thakurain Raghunath Koer*(1) that the remainderman was entitled to maintain a declaratory suit under the Specific Relief Act. We do not now consider it necessary to decide whether, in the absence of collusion between the plaintiff No. 1 and the alienees, the plaintiff No. 2 would be entitled to maintain a separate suit, and it is sufficient to say that we see no objection to his joining in this suit as a co-plaintiff.

Furthermore, none of the appellants seriously resists the claim of plaintiff No. 2 to intervene as a co-plaintiff.

On these grounds, we allow the memorandum of objections.

The result is, that Appeals 8, 9, 19 and 25 of 1885 are dismissed with costs and that the objections of plaintiff No. 2 are allowed, but, under the circumstances, without costs.

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

1886. April 5. August 30.

NILAKANDAN (PLAINTIFF), APPELLANT,

and

MADHAVAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Malabar Law—Brahmans—Nambudris—Mussads—Hindú Law, how far applicable—Liability of sons for father's debt in Hindú Law not applicable.

The principle of Hindú Law, which imposes a duty on a son to pay his father's debt, contracted for purposes neither illegal nor immoral, is not applicable to the Málabar Brahmans called Nambudris and Mussads.

IN suit No. 401 of 1883, on the file of the District Múnsif of Ernád,

(1) L.R., 9 I.A., 41.

* Second Appeal 784 of 1885.

NILAKANDAN v. MADHAVAN.

Nilakandan Nambudri sued Madhavan Mussad for specific performance of a contract to sell portion of his illam (family house).

The defendant admitted the claim and plaintiff got a decree.

The execution of that decree was resisted by the judgment-debtor's wife, Nangunili Manyamma, and the decree-holder's petition against her obstruction was registered as a suit under s. 311 of the Code of Civil Procedure, the minor sons of Madhavan being made defendants Nos. 1 and 2 along with their mother who was defendant No. 3.

The Múnsif found that the debt (Rs. 68) for which Madhavan contracted to sell part of the family house was incurred for purposes binding on the defendants, and held that plaintiff was entitled to a decree. He decreed that defendant No. 3 should pay the debt and all costs of suit within a month, and that in case of default the portion of the house sued for should be surrendered to plaintiff.

On appeal the Subordinate Judge reversed this decree, holding that the decree in suit No. 401 of 1883 was not binding on the defendants and, if examinable, was not one which should have been passed.

The plaintiff having died, his representative, Vishnu Nambudri, appealed on the ground, *inter alia*, that the parties being Mussads were governed by Hindú Law and, therefore, defendants could not contest the decree against Madhavan, except on the ground that the debt which led to the decree was illegal or immoral.

Sankara Menon for appellant.

Sankaran Náyar for respondents.

The Court (Brandt and Parker, JJ.) delivered the following

JUDGMENT:—We consider it is necessary to ask for a finding, on such evidence as the parties may properly adduce, whether the family to which the respondents belong is governed by the ordinary Hindú Law or by the Marumakkatayam Law, or by a combination of the two systems of law, and if so, in what respects the law as affecting the liability of the defendants in this case by which they are customarily bound differs from the ordinary Hindú Law.

Findings to be returned within three months from date of the re-opening of the Lower Court, when ten days will be allowed for filing objections.

Costs to abide the result.

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

Finding:—"I am directed to submit a finding, on such evidence as the parties may adduce, 'whether the family to which the respondents belong is governed by the ordinary Hindú Law or by the Marumakkatayam Law or by a combination of the two systems of law, and if so, in what respects the law as affecting the liability of the defendants in this case by which they are customarily bound differs from the ordinary Hindú Law.'

"No evidence has been adduced by either party in this case.

"The respondents (defendants) are Mussads, a class of Nambudris or Malabar Brahmans.

"Usages of the Nambudris differ on some important points from those of Brahmans in other provinces. The prominent variations are detailed in *Vishnu* v. *Krishnan*.(1)

"Their customs in the management and assignment of property do not differ from the customs of the Náyars. Impartibility is the rule, and the eldest member is the manager. The eldest member in a Nambudri family, like the eldest member in a Náyar family, is called the karnavan, *Nambiatan Nambudri* v. *Nambiatan Nambudri*.(2) The management does not descend from father to son, but invariably devolves on the senior male member however remotely connected, even though the deceased manager may have left adult sons competent to enter upon the management. The only difference between a Nambudri illam and a Náyar tarwad is, that in the former the offspring of the marriage and the married woman become members of the husband's illam, while the children of a Náyar woman become members of her own tarwad. The self-acquired property left undisposed of by a deceased junior male member does not descend to his son, but, following the custom of the Náyar tarwad, it lapses to the illam.

"It is worthy of remark that one of the earliest decisions of the High Court which established the rule that a decree obtained against the karnavan is not binding on the family unless members had notice under s. 30 of the Civil Procedure Code, or were parties to the suit, was passed in a case in which the parties were Nambudris, *Váeudéva* v. *Náráyana*.(3) Mr. Justice Kernan

(1) I.L.R., 7 Mad., 15. (2) 2 M.H.C.R., 110. (3) I.L.R., 6 Mad., 121.

NILAKANDAN v. MADHAVAN.

observed in that suit: 'on his own statement he is a member of a Nambudri Brahman illam in Malabar, and *primâ facie* he is governed by Malabar Law and not by the ordinary Hindú Law.'

"I am not aware of any decision, and the vakíl of the plaintiff has not been able to refer me to any, in which it has been held that Nambudris are governed by the ordinary Hindú Law in respect of the management and alienation of their family property.

"There is nothing to show that the Nambudris who do not follow the Hindú Law in the management and alienation of their property are governed by the principle of the Hindú Law, imposing on the son the religious obligation of paying his father's debts, even though contracted without necessity, and by the logical extension of that principle laid down in *Girdharee Lall* v. *Kantoo Lall* (1) that the father is entitled to sell the family property in order to pay off such debts.

"The decision of the Privy Council cannot be carried beyond the circumstances upon which it was based. Under the Hindú Law, the father has a share in family property which may be severed by partition and which descends on his death to his sons. The obligation of the sons to discharge the father's debts is incidental to the heritage. For discharge of debts other than debts incurred for immoral purposes, the interest of the son in the family property may be sold. But among Nambudris, neither the father nor the son has any definite share in family property which may be made available for the father's debt. The property is joint and indivisible and belongs to the whole family. The family in the present suit consists of the father, his two sons and their mother; and the three latter, according to the decision of the High Court in *Vásudéva* v. *Náráyana* (2), are not bound by a decree against the former to which they were not parties.

"My finding is that the family to which defendants belong is governed by a combination of Hindú Law and Marumakkatayam Law, and that, in respect of the liability of the sons for a decree against the father, the law as affecting Mussads differs from the ordinary Hindú Law."

On the 30th August the Court delivered the following

JUDGMENT:—The finding being in favour of the respondents, and no objection having been taken, the appeal is dismissed with costs.

(1) 14 B.L.R., 187. (2) I.L.R., 6 Mad., 121.

APPELLATE CRIMINAL.

Before Mr. Justice Brandt.

RANGAMMA

against

MUHAMMAD ALI. *

1886. September 15.

Criminal Procedure Code, s. 488.

Where an application is made to a Magistrate to enforce an order for maintenance, passed under s. 488 of the Code of Criminal Procedure, such Magistrate is not bound to enforce the order if the defendant proves that the claim for maintenance has been released.

ON the 1st of December 1885 Muhammad Ali was ordered by C. Rámachandrayyar, a Presidency Magistrate, to pay Rs. 5 a month to Rángamma, for the maintenance of three illegitimate children.

On the 14th of July 1886 Muhammad Ali applied to the same Magistrate to cancel this order, on the ground that on the 16th January 1886 he had paid Rs. 60 to Rangamma and obtained a release from her by which she agreed to claim no more maintenance from him. The Magistrate held that the case did not fall under s. 489 of the Code of Criminal Procedure and that the proper course for Muhammad Ali was to plead the release if Rangamma moved the court to enforce the order.

On the 26th July Rangamma complained to the Acting Chief Presidency Magistrate (W. M. Scharlieb) against Muhammad Ali for neglecting to pay Rs. 5 as ordered on the 1st December 1885.

The Magistrate ordered payment forthwith and costs.

Against this order Muhammad Ali presented a petition to the High Court.

In forwarding the record, the Acting Chief Presidency Magistrate remarked that the proceedings held by him were the enforcement of a previous order, and that if Muhammad Ali felt aggrieved by the order for maintenance, he ought to have asked

* Criminal Revision Case 437 of 1886.

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the High Court to set it aside, or to have applied under s. 489, and that he had made no such application.

Dunhill for Muhammad Ali.

The Court (Brandt, J.) delivered the following

JUDGMENT:—The Code of Criminal Procedure contains no express provision for cancelling an order for maintenance in circumstances such as those here represented, but if it be true that the woman received a lump sum of money in satisfaction of all claims for maintenance for herself and the illegitimate children of herself and the petitioner, a Magistrate would clearly not only be justified in refusing to enforce the order for maintenance but would be wrong in enforcing it; of course I know nothing as to the truth or untruth of the petitioner's allegations. If the woman accepted the money said to have been paid in satisfaction of all claims, including a claim on account of the infant in arms, the youngest child, then the woman will have no right to an allowance for this child either; but if this is not so, and the rest of the arrangement is proved as alleged by the petitioner, the allowance should be reduced, as provided in s. 489 Criminal Procedure Code, so as to secure the maintenance of the infant child only.

The order of the Chief Magistrate is set aside, and he is directed to dispose of the petitioner's application in due course of law. The Chief Magistrate is in error in thinking that the petitioner did not apply to have the order originally granted reconsidered; such application was made to the Presidency Magistrate, Mr. Rámachandrayyar, and an order was passed by that Magistrate that it might be considered when and if the woman again applied to enforce the maintenance order.

PRIVY COUNCIL.

P. C.
* J. C.
1886.
July 7.

VENKATADRI APPA RÁU (PLAINTIFF)

and

PEDA VENKAYAMMA AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Madras.]

Attempt to control the descent of property—Res judicata.

Two brothers having divided their family estate, each took a share consisting of villages which they held separately, agreeing in the instrument of partition that "the villages of the shares of both of us should in future descend only to the sons and grandsons, and so on of us both, but must not go to any others."

On the death of one brother leaving a widow and daughters, the widow obtained possession of the villages which formed her husband's share, and a suit brought against her by the other brother to recover them was dismissed on the ground that the divided shares descended according to law. The widow then transferred the villages to her elder daughter, whose right to the possession, as against the brother, was declared in the present suit on the ground that, as between the widow and the brother, the question of the widow's title was *res judicata*.

APPEAL from a decree (26th February 1884) of the High Court, affirming a decree (16th March 1883) of the District Judge of Godávari.

About the year 1835, the brothers Simhadri and Venkatadri, Rájás belonging to the Nuzvid family, received from their elder brothers, the zamíndárs of Nidadavole and Nuzvid, respectively, a grant of certain villages in the Godávari district by way of permanent and heritable maintenance. On the 7th August 1846, the two brothers entered into an arrangement for the separate holding of these villages by them, each taking his separate share and agreeing in a samákhya or partition deed of that date to the following effect:—"As both of us are born of the same mother, the villages of the shares of both of us should in future descend only to the sons and grandsons, and so on, of us both, but must not go to any others." An entry in accordance with the above was made in the collectorate books and the separation was carried out.

Simhadri died in November 1861, Venkatadri surviving him, and left a widow, Sithaya, and two daughters; and the widow

* *Present*: Lord WATSON, Lord HOBHOUSE, Sir BARNES PEACOCK, and Sir RICHARD COUCH.

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obtained possession of the villages which had been allotted to her husband. These, by suit in 1863, Venkatadri sought to recover from her, alleging that he had been joint with his late brother, and that, by usage from time immemorial in the family, women did not inherit. This suit was dismissed, the Court holding that the deed of 1846 was an ordinary partition deed in its effect and that the alleged special custom was not proved. This decree was affirmed by the High Court.

By an instrument executed on the 24th April 1880, Sithaya transferred all the villages in her possession, as above stated, to her elder daughter, Peda Venkayamma, the first respondent, in consideration of her assuming the management thereof and discharging all the debts payable by her mother, including Rs. 20,000 stated in the document to be due to the elder daughter, whose sister, in the event of her death, was to succeed her, the issue of the younger daughter taking ultimately.

Venkatadri opposed the entry of this transfer in the collectorate books and Peda Venkayamma, accordingly, brought against him the present suit to obtain a declaration of her right to possession of the villages. He contended that the alienation by Sithaya was inoperative in consequence of the effect of the agreement of 1846 between himself and his deceased brother; also that it was contrary to the custom of the family that females should hold the family estate.

The District Judge held that effect should be given to the transfer made in 1880 by Sithaya. The questions whether or not the estate was still family estate, and whether or not the brothers were divided, and whether there was any agreement or custom of the family debarring females from inheriting, had been directly and substantially in issue in the suit decided in 1863. The questions raised had, in the Judge's opinion, been decided, and he decreed the suit in the plaintiff's favor.

On appeal to the High Court, this decree was affirmed by a Divisional Bench (Muttusámi Ayyar and Hutchins, JJ.), whose judgment was as follows:—

"Only two points have been urged by the Advocate-General in support of this appeal—(1) that the question whether female heirs can come in is not *res judicata;* and (2) that the suit for a declaration is not maintainable. Upon the latter point there cannot be any doubt. The declaration is necessary to enable the

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plaintiff to go to the Collector for consequential relief, and it has been rendered necessary by the appellant's own act in opposing the application which she formerly made to the Collector. Nor can the appeal be sustained upon the other ground. The same question was clearly decided in the former suit between this appellant and the widow, the defendant No. 1. The widow then represented the estate; and even if it were not so, her daughter, the present plaintiff, is at present claiming under her.

"We dismiss the appeal with costs."

On this appeal Mr. *J. D. Mayne* appeared for the appellant.

Mr. *R. V. Doyne* and Mr. *G. P. Johnstone* for the respondents.

Mr. *J. D. Mayne* for the appellant, after adverting to some other points bearing on the question how far the decision of 1863 was conclusive in regard to the present suit, suggested that the transfer of 1880 was open to the construction that it attempted to control the descent of the estate. This might be held to render it an invalid act on the part of a female, whose estate was but a limited one, the estate of a widow. This question, however, had not been raised below.

Their Lordships, in the result, without calling upon counsel for the respondents, dismised the appeal with costs. C.B.

Appeal dismissed.

Solicitor for the appellant—*R. T. Tasker.*

Solicitors for the respondent—*T. L. Wilson & Co.*

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

VENKATRAMANNA (PLAINTIFF), APPELLANT,

and

VÍRAMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1886. Sept. 6, 8.

Decree—Fraud—Collusion between parties—Defendant subsequently pleading his own fraud.

A obtained a decree against B, in execution of which he was put in possession of certain land by proclamation, the land being in the possession of tenants. A subsequently sued B and the tenants to recover possession of the same land. B pleaded

* Second Appeal 418 of 1886.

VENKATRAMANNA v. VÍRAMMA.

that the decree obtained by A was the result of collusion between himself and A in fraud of B's creditors:

Held, that it was not open to B to raise this plea.

APPEAL from the decree of Mr. F. Graham, Acting District Judge of Cuddapah, reversing the decree of M. Jayaram Ráu, District Múnsif of Nandalúr, in suit 313 of 1884.

Plaintiff, Ravoru Venkatramanna, sued Víramma, Bojjaya and Subbadu to recover certain land.

In suit 283 of 1869 plaintiff obtained a decree against Víramma, in execution of which he alleged the land was delivered to him in 1873.

Plaintiff also alleged that he had let this land to the father of Bojjaya and to Subbadu who refused to give up possession in 1881. Víramma pleaded that the decree in suit 283 of 1869 and the sale deed on which it was based were collusive, intended to protect the land against her creditors not to transfer it to plaintiff, and that the land had been in her possession throughout.

She also alleged that she had let the land to the other defendants.

The Múnsif found that it was not proved by Víramma that the sale deed or the former suit were collusive.

He found that the land had been in plaintiff's possession after the execution of the decree, but that it was not proved that defendants Nos. 2 and 3 were tenants of plaintiff.

The claim was decreed.

Defendants appealed.

The District Judge found that the former suit was collusive, that no valid delivery took place in execution thereof, and that defendant No. 1 had been in possession since the date of that suit.

The suit was dismissed.

Plaintiff appealed on the following grounds:—

I. As between the plaintiff and defendant No. 1 the process of delivery in execution of the decree in Original Suit No. 283 of 1869 transferred possession from the defendant to the plaintiff; and the defendant No. 1 and defendants Nos. 2 and 3 who claim under him are precluded from contending that there was only a symbolical delivery of possession and that such possession as defendant No. 1 had was not transferred to plaintiff.

II. Whether the process of delivery purported to be under s. 223 or s. 224 of Act VIII of 1859 is immaterial as between the parties to the said suit and such delivery cannot affect the rights of third parties or the tenants if any having a right of occupancy.

III. That defendants Nos. 2 and 3 are estopped from denying the title and possession of the plaintiff on the dates of the rental agreement executed by defendant No. 3 and the father of defendant No. 2 in favour of the plaintiff whether or not rents were paid under those agreements.

IV. Defendant No. 1 who was defendant in Original Suit No. 283 of 1869 cannot be permitted to plead that the decree in the said suit was obtained by the plaintiff in collusion with her.

V. The decree in Original Suit No. 283 of 1869, dated 22nd April 1870, is in force, and even assuming that it can be set aside by a party alleging that it was obtained in collusion with him, the period of limitation of three years for setting aside such a decree has long ago expired.

Bháshyam Ayyangár for appellant.

Anandácharlu for respondents.

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

BRANDT, J.—The District Judge finds that there was such delivery of possession as the case admitted of, viz., symbolical delivery by proclamation, the land being in the occupation of tenants; and such delivery is in the circumstances as effectual to effect transfer of possession as physical delivery, and the suit is brought within twelve years from the date of such delivery.

It is admitted then that the decree of the Lower Appellate Court cannot be supported, except upon the ground that there was in fact no sale by defendant No. 1 to the appellant, and that the suit and decree in and by which the land was adjudged to the appellant can be, and should be treated as a nullity, the sale having been, as it is found by the Lower Appellate Court, a merely colourable transaction intended to screen the land from the pretended vendor's creditors. It is suggested that the rule observed in cases in which plaintiff and defendant are *in pari delicto*, should be observed in this case also, viz., that the position

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of the defendant is the better, and that the Court will not assist a plaintiff in such case. But the contention of the learned vakíl for the plaintiff is correct, viz., that where there is a decree which the defendant has taken no steps to have set aside on the ground of fraud or otherwise, the decree, although it was the result of fraud and collusion between the parties, will not be set aside, nor treated as a nullity when no injury to third parties will ensue. The subject is dealt with in *Ahmedbhoy Hubibhoy* v. *Cassumbhoy*, (1) and, on the authorities therein cited, I consider rightly dealt with. I may add that there is also considerable force in the argument that as defendant No. 1 would not be in time with a suit to set aside the decree on the ground of fraud, so it is not open to her now to set up this plea; but the case may be disposed of irrespective of this, and on the broad ground above stated I am of opinion that the decree of the Lower Appellate Court should be set aside, and that of the Court of First Instance restored, and the appellant should have costs of this appeal and in the Lower Appellate Court.

PARKER, J.—Although when a contract or deed is made for an illegal or immoral purpose a defendant against whom it is sought to be enforced may—not for his own sake but on grounds of general policy (per Lord Mansfield in *Holman* v. *Johnson* (2) and *Luckmidás Khimji* v. *Mulji Canji* (3)—show the turpitude of both himself and the plaintiff, it is otherwise when a decree has been obtained by the fraud and collusion of both the parties. In such case it is binding upon both, *Ahmedbhoy Hubibhoy* v. *Cassumbhoy* (1) and *Prudham* v. *Phillips*. (4) It is not therefore open to defendant No. 1 to plead the collusion of herself and plaintiff in obtaining the decree in suit No. 283 of 1869.

And, as between them the formal transfer of possession carried out by the Court is conclusive, it makes no difference whether the transfer was under s. 223 or 224 of the Code of Civil Procedure, *Juggabundhu Mukerjee* v. *Ram Chunder Bysack* (5) and *Lokessar Koer* v. *Purgun Roy*.(6)

The suit is within twelve years of the transfer and cannot be barred.

(1) I.L.R., 6 Bom., 703.
(2) Cowper, 343.
(3) I.L.R., 5 Bom., 295.
(4) 2 Ambler, 763.
(5) I.L.R., 5 Cal., 584.
(6) I.L.R., 7 Cal., 416.

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The decree of the Lower Appellate Court should be reversed and that of the District Múnsif restored, and the respondent must bear appellant's costs in this and in the Lower Appellate Court.

APPELLATE CRIMINAL.

Before Mr. Justice Parker.

GREGORY

against

VADAKASI KANGANI.*

1886. September 28.

Act XIII of 1859—*Jurisdiction—Breach of contract to labour in foreign territory.*

V having received an advance of money from G, contracted to labour for him in foreign territory. Having broken the contract V was prosecuted under Act XIII of 1859, ordered to repay, and sentenced to imprisonment in default:

Held, that the order was illegal.

CASE referred to the High Court by S. H. Wynne, Acting District Magistrate of Tinnevelly, in calendar case No. 10 of 1886 on the file of the Second-class Magistrate of Tenkasi.

The facts were stated as follows:—

"The magistrate has directed a man to pay up a sum under the Contract Act XIII of 1859, and, in default, ordered him to be kept in rigorous imprisonment for one month, which sentence has been undergone.

"The contract was for work in Travancore territory. This is beyond the limits of British India, and the Act does not apply, though the contract was made in British territory (High Court Proceedings, 15th December 1876, No. 2940)."

Counsel were not instructed.

The Court (Parker, J.) delivered the following

JUDGMENT:—The defendant was prosecuted under the Breach of Contract Act XIII of 1859, and was ordered to repay the money advanced. It is not stated whether the contract was made in British territory, but the work was to be performed in foreign territory.

* Criminal Revision Case 307 of 1886.

GREGORY v. VADAKASI KANGANI.

The case is similar to that on which the High Court Proceedings of 15th December 1876, No. 2940, were passed, in which case it was shown that the contract was made in British territory. It was then held that such an order was *ultrâ vires*.

The order of the Second-class Magistrate must be set aside.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. August 20, 30.

NÁRÁYANA NAMBI (DECREE-HOLDER), APPELLANT,

and

PAPPI BRAHMANI AND ANOTHER (JUDGMENT-DEBTOR'S REPRESENTATIVES), RESPONDENTS.*

Limitation Act, sch. II, arts. 178, 179—*Decree—Execution—Attachment set aside—Time occupied in suing to declare property liable to attachment not excluded from computation.*

An application for execution of a decree having been made in 1880, certain land was attached as being the property of the judgment-debtor (deceased). His children thereupon claimed the land and the attachment was raised. Upon this, the judgment-creditor sued to establish his right to sell the land in execution and obtained a decree in 1882, which was confirmed on appeal in 1883. In 1885, the judgment-creditor again applied for attachment and sale of the same land:

Held that the application was barred by limitation—*Paras Ram* v. *Gardner*, I.L.R., 1 All., 355, dissented from.

APPEAL against an order of H. J. Stokes, Acting District Judge of South Malabar, reversing an order of the District Múnsif of Chowgát in execution of the decree in suit 132 of 1877.

In suit No. 132 of 1877, the decree-holder, Thengil Náráyana Nambi, applied for execution, on the 19th June 1880, by attachment of certain land, the property of the deceased judgment-debtor, Undadi Vasu Nambi. After attachment his daughter Pappi Brahmani and two others presented claim petitions, and the attachment was withdrawn. The decree-holder then instituted suit No. 383 of 1882 on 10th July against the claimants, and on the 13th September the Court decreed that the property which had been attached was liable to be sold in satisfaction of the decree.

* Appeal against Appellate Order 36 of 1885.

NÁRÁYANA NAMBI v. PAPPI BRAHMANI.

On appeal, that decree was confirmed on the 16th June 1883.

On the 28th July 1881 suit No. 132 of 1877 was struck off the file.

On 6th July 1885, the decree-holder applied for execution of the decree in suit No. 132 of 1877 by attachment and sale of the property previously attached.

The Múnsif granted the application, but the District Court reversed his order on appeal, dismissing the application as barred by limitation.

The decree-holder appealed to the High Court on the ground, *inter alia*, that limitation began to run from 16th June 1883 when suit No. 383 of 1882 was decided on appeal.

Anantan Náyar for appellant.

Sankaran Náyar for respondents.

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT:—The first application to execute the decree was made on 19th June 1880. An objection petition was put in on 9th February 1881 and allowed on 11th July 1881. On 10th July 1882 the decree-holder brought a suit to have it declared that the property was liable to his attachment, and got a decree in his favor on the 13th September 1882. On appeal, that decree was confirmed on 16th June 1883. The present application, which is to attach *the same property*, was put in on 6th July 1885.

The District Múnsif, following the Full Bench decision in *Paras Ram* v. *Gardner*,(1) held that the application was not barred, since it was in effect an application to revive the previous application and was brought within three years of the date of the declaratory decree in plaintiff's favor.

On appeal, the District Judge held the application was barred, since the extension of time—if the decree-holder was entitled to any at all—could not exceed the time actually taken up in prosecuting the suit. He refused to follow the Allahabad High Court in reckoning a new period of three years from the date of the decree in the declaratory suit.

The decisions referred to by the District Múnsif [*Rameponder Sandyal* v. *Gopessur Mostofee*,(2) *Krishnají* v. *Ánandráv* (3)], which he refused to follow, do not really apply to such a case as this, since in the one case the second application was to attach *other*

(1) I.L.R., 1 All., 355. (2) I.L.R., 3 Cal., 716. (3) I.L.R., 7 Bom., 293.

NÁRÁYANA NAMBI v. PAPPI BRAHMANI.

lands than those at first attached, and in the second to *arrest* the judgment-debtor. They were, therefore, fresh applications and could not be regarded as reviving previous ones.

In *Virasámi* v. *Athi*,(1) the question was discussed. In that case the fresh application was also to arrest the debtor, and was therefore held to be barred, but the Court (Turner, C.J., and Brandt, J.) intimated that, could the subsequent application have been regarded as a continuance of the former proceedings suspended, by a step necessary to give effect to them, it would have followed *Paras Ram* v. *Gardner*.(2)

This remark, however, is not authoritative, since the question did not arise in that appeal, and the cases *Krishna Chetty* v. *Rámi Chetty* (3) and *Mahalakshmi Ammál* v. *Lakshmi Ammál* (4) were not brought to the notice of the Court. In appeal against appellate order No. 47 of 1883 (not reported) in which they were quoted, this Court has taken a different view.

These two rulings were given under the Limitation Act IX of 1871, art. 167; and in both of them the decree-holder applied a second time to attach *the same property*, which had been released on an objection petition and the liability of which to his decree had been established by a regular suit. In both these cases, it was held that the time must run from the date of the first application, and that the time during which the judgment-creditor was prosecuting another suit to remove obstacles to the execution of his decree could not be deducted. These cases are in conflict, therefore, with 1 All., 355, which was also a ruling under the Limitation Act of 1871. It will be observed that Pearson, J., dissented from the Full Bench ruling of the Allahabad Court and took the same view as Morgan, C.J., and Kindersley, J., in the Madras High Court.

Article 179 of the present Limitation Act follows art. 167 of Act IX of 1871, in that it makes the time run from the date of the decree, or from the date of the last application to execute; and though it might appear reasonable and equitable to exclude from the computation of the period of limitation the time during which the suit was pending, such a course is not authorized by the law.

(1) I.L.R., 7 Mad., 595.
(2) I.L.R., 1 All., 355.
(3) 8 M.H.C.R., 99.
(4) 8 M.H.C.R., 105.

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The Allahabad High Court in *Basant Lal* v. *Batul Bibi*(1) held that an application of this nature ought to be considered as one for the revival of former proceedings after removal of the injunction, and that art. 178 of the Limitation Act 1877 (rather than art. 179) was applicable to it; but, with all respect, we cannot agree with the learned Judges in that conclusion. In the first place, the application in that case was to attach *other* property than that in respect of which the execution of the decree had been stayed; and, secondly, art. 178 only applies to applications for which no period of limitation is provided elsewhere in the schedule. But art. 179 clearly provides for *all* applications for the execution of decrees or orders, and hence art. 178 will not, in our judgment, apply.

The date of the last application in the present case was 19th June 1880, and the decree is therefore barred. We must dismiss the appeal with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Parker.

VERNEDE IN RE.*

1886. September 23

Criminal Procedure Code, s. 517—Disposal of stolen property—Cow stolen—Disposal of calf, not in esse at time of theft, by Magistrate on conviction of thief.

R.'s cow having been stolen, the thief after a lapse of a year and-a-half was convicted. Six months after the theft, V. innocently purchased the cow, which while in his possession had a calf. The magistrate, under s. 517 of the Code of Criminal Procedure, ordered that the cow and calf should be delivered up by V. to R.:

Held that, as the calf was not even in embryo at the date of the theft, the order to deliver up the calf was illegal.

CASE referred to the High Court by L. R. Burrows, District Magistrate of Nílgiris.

The case was stated as follows:—"About a year and-a-half before the 3rd of February 1886, a cow was stolen from one Rangasámi and was sold by the thief to Mr. A. Stonehouse, second witness in calendar case No. 53 of 1886, on the file of the second-class Magistrate of Coonoor. After that, it changed hands several

(1) I.L.R., 6 All., 23.

* Criminal Revision Case 431 of 1886.

VERNEDE *In re.*

times and at last was purchased by Mr. Vernede for Rs. 20. While in Mr. Vernede's possession, which lasted about a year, it had a calf. In the calendar case above mentioned, one Michael was convicted of the theft of the cow, and the Magistrate passed an order that the cow and calf should be handed over to Rangasámi, and that if the fine imposed on Michael should be recovered, Rs. 20 should be paid to Mr. Vernede as compensation. This latter order was quashed by the High Court in proceedings, dated 7th April 1886, Criminal Revision Case No. 180 of 1886.

"The cow and the calf appear to have been taken back to Pattikombi, in the Coimbatore District, by Mr. Vernede, who was most reluctant to part with them. The second-class Magistrate wrote to Mr. Vernede on 20th May 1886 that if he did not give up the cow and calf, he would report him to the District Magistrate for disobedience of his (Magistrate's) legal orders, adding "I should be sorry to go to this extreme and would therefore advise you to hand over the property without any delay."

"Mr. Vernede now states in his petition that the cow and calf were removed from his possession under protest on the 1st of June, and shows reasons for his prayer that the order of the second-class Magistrate may be cancelled and the cow and calf returned to him. I think the calf at all events should not have been taken away from Mr. Vernede. It could not have been in existence, not even in embryonic existence, at the time the theft was committed and is not therefore 'stolen property.'

"I think the second-class Magistrate's order should be modified by making it apply only to the cow."

The Acting Public Prosecutor (Mr. *Powell*) appeared for the Crown.

The Court (Kernan and Parker, JJ.) delivered the following

JUDGMENT:—The calf was not any part of the stolen property. It was not in fact in embryonic existence when the theft took place. Therefore no order could be legally made to deliver up the calf. So much of the order as relates to the calf is quashed. The rest of the order must stand.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Brandt and Mr. Justice Parker.

1886. September 23.

REFERENCE FROM THE BOARD OF REVENUE UNDER S. 46 OF THE INDIAN STAMP ACT, 1879.*

Stamp Act, sch. II, cl. 2 (a)—Agreement for or relating to the sale of goods.

By an agreement in writing the vendor agreed to sell and the purchaser to buy certain salt for a price to be paid at a future date. The salt was to be at purchaser's risk from the date of the execution of the agreement, and, if not removed within a certain time, to revert to and become the property of the vendor:

Held that this document was exempt from duty under sch. II, cl. 2 (a), of the Indian Stamp Act, 1879.

THIS was a case stated for the opinion of the High Court by the Board of Revenue under s. 46 of the Indian Stamp Act, 1879, on the 21st May 1886.

The proceedings which led to the reference were as follows:—

On the 8th May 1886, the Collector of Madras (R. W. Barlow) forwarded to the Board of Revenue, under s. 45 of the Stamp Act, a document presented to him for adjudication of stamp duty under s. 30 of the Act by Messrs. Arbuthnot and Co.

This document purported to be an agreement to sell salt, the price to be paid one month after the execution of the agreement, and the salt to be at the risk of the purchaser upon the execution of the document; if the salt was not removed on the date stipulated, it was agreed it should revert to and become the property of the vendor.

The Collector was of opinion that the document was a sale deed, and, as such, liable to stamp duty, while Messrs. Arbuthnot and Co. contended that it was exempt from duty as being simply an agreement for the sale of goods.

As the amount of stamp duty involved in the decision of this question was very large, the Board, while of opinion that the terms

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* Referred Case No. 2 of 1886.

REFERENCE UNDER STAMP ACT, s. 46.

of the exemption contained in schedule II, 2 (a), covered the case, referred it for an authoritative ruling.

The Acting Government Pleader (Mr. *Powell*) for the Board of Revenue.

The Acting Advocate-General (Mr. *Shephard*) for Arbuthnot and Co.

It was contended by the Government Pleader that the document was really a sale of goods and therefore liable to duty (under art. 21 of sch. I), though it purported to be an agreement to sell, because it transferred the property to the purchaser.

Counsel for the other side was not called on to argue.

The judgment of the Court (Collins, C. J., Kernan, Muttusámi Ayyar, Brandt, and Parker, JJ.) was delivered by

COLLINS, C. J.—We are of opinion that the exemption in schedule II, 2 (a), in Act No. 1 of 1879, covers the case. The instrument is not liable to stamp duty.

Solicitors for Arbuthnot and Co.—*Barclay & Morgan.*

ORIGINAL JURISDICTION—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. August 23. September 24.

SULLIVAN (PETITIONER)

and

NORTON (RESPONDENT).*

Privilege of Counsel.

An advocate in India cannot be proceeded against civilly or criminally for words uttered in his office as advocate.

APPLICATION under s. 10 of the Letters Patent for the High Court at Madras.

The facts appear from the judgment of the Court (Collins, C.J., Kernan, Muttusámi Ayyar, Brandt, and Parker, JJ.).

* Civil Miscellaneous Petition 12 of 1886.

The Acting Advocate-General (Mr. *Shephard*) and Mr. *Branson* for petitioner.

Respondent in person.

COLLINS, C.J. (Kernan, Muttusámi Ayyar, and Parker, JJ., concurring).—This is a petition of the Honorable Henry Edward Sullivan, Senior Member of Council and a Member of the Madras Civil Service, complaining of the conduct of Mr. Eardley Norton, Barrister-at-Law and an Advocate of the High Court of Judicature, Madras.

The prayer of the petition is as follows:—

(1) That this Honorable Court will call upon the said Eardley Norton to explain under what circumstances he applied for and obtained a subpœna against your petitioner and to justify the statements made by him upon such application.

(2) That he may also be called upon to explain his conduct in making charges against your petitioner during the trial of the case of a grossly defamatory character in the absence of any evidence on the record to justify the same.

(3) That this Honorable Court will pass such orders on this petition and on the affidavit filed herewith as to your Lordships may seem fit and proper.

(4) That the said Eardley Norton may be ordered to pay the costs of and incident to this petition and the order to be made thereon.

Mr. Sullivan alleged in his affidavit accompanying the petition that he had been subpœnaed as a witness on behalf of the defence in the prosecution of the Queen-Empress of India against the zamíndár of Bodinayakanúr and others who were charged with abetment of dacoity and other offences under the Indian Penal Code; and that although he was in Court he was not called at the trial, but that Mr. Norton, who defended the zamíndár, made charges of a grossly defamatory character against him not only during the course of the trial but also when making an application to the High Court for leave to summon certain witnesses, he (Mr. Sullivan) being one of those witnesses.

The words principally complained of were—

1st—Mr. Norton when making an application to the High Court for leave to summon witnesses, said—

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"The defence is that this is a concocted case and that Mr. Sullivan knew it to be so concocted and he kept the case up for ulterior purposes. Why should Mr. Sullivan try to ruin my client? He knows that if he is able to smash the zamíndár of Bodinayakanúr, he will have a strong case against Mr. Crole.

"That it is a concocted case and concocted to Mr. Sullivan's knowledge and for reasons of personal animosity."

And in his speech to the jury at the trial he said—

"He was not at all quite certain of calling witnesses, though, as at present advised, he believed he would call some. Independently of witnesses, he would take his stand upon the fact that no motive had been proved against his client for the commission of the offence with which he was charged. Nor had the prosecution even suggested the shadow of a motive why a person in the position of the zamíndár of Bodinayakanúr should behave himself in the manner alleged for the purpose of committing that which was a dacoity with the mere object of loot. If he were forced to call evidence, he would say that there had been a persecution, and that the motive that influenced the persons who had worked out the case against his client was simply the desire to reach, through his client, Mr. Crole, the then Collector of Madura: they were influenced by animosity and a spirit of revenge. There existed very bitter feeling on the part of some persons against Mr. Crole, whose conviction—moral conviction—was to be obtained through the physical conviction of the zamíndár.

"The question for you, gentlemen, to decide is, should I have been committed to stand my trial here, had the case been opened in the Lower Court as it has been opened in this? And at the same time I am also entitled to say this, now that we have traced these documents to the police from Mr. Garstin, I am fairly entitled to ask you whether you think that it is likely that, under these circumstances, with all these facts before you, Mr. French is the true culprit upon whom the responsibility of the introduction of Mr. Crole's name rests, an introduction which my learned friend has characterized as a mistake. And if you agree with me that the responsibility rests, not with Mr. French, but with a powerful, if nameless, *clique*, then ask yourselves, is this a prosecution instituted in the ends of public justice or to promote the ends of private malice?

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"You may remember that I wished to recall Mr. Garstin to ask him whether he had not communicated this scandalous record to the Government, that the learned Chief Justice said that I must give names, that I replied to Mr. Grant Duff, to the Honorable Mr. Sullivan, to the Honorable Mr. Master and that his Lordship finally ruled the question irrelevant until and unless I could prove a conspiracy. I have already told you, gentlemen, that I cannot with the evidence at my disposal, establish that what the law would alone hold to be a conspiracy. But there is enough upon the record already to entitle me to ask you to believe that the present case is the outcome of personal vindictiveness against Mr. Crole, that it is not a prosecution, but a persecution.

"As I have begun so I will end. No motive is opened. No motive is alleged: you cannot convict upon so bald a statement as that advanced by the prosecution. Give me your verdict, gentlemen, and in giving it believe the theory for the defence that this is a case cast upon the waters to gratify the shameful ends of private malice."

The petition supported by affidavits was originally heard before Muttusámi Ayyar and Brandt, JJ., and a rule was granted calling upon Mr. Norton under the provisions of s. 10 of the Letters Patent (amended) as an Advocate of the High Court to explain the matters urged against him contained in the affidavits.

Upon the rule coming on for argument, the Acting Advocate-General (Mr. Shephard) and Mr. Branson appeared for Mr. Sullivan in support of the rule, and Mr. Norton showed cause against it.

Mr. Norton contended that the order of the Court calling upon him to answer the matters contained in the affidavits was bad in law, as it was issued by a Divisional Bench consisting of only two Judges; that it should have been issued under the seal of the Court; and that it should have been heard by a Full Bench. He also contended that the order was issued without such *reasonable cause* as was contemplated by s. 10 of the Letters Patent.

He further submitted that, taking everything to be true as stated in Mr. Sullivan's affidavit, no reasonable cause has been

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shown to enable the High Court to proceed under s. 10; and that in all he said with regard to Mr. Sullivan he was acting under his instructions and was absolutely privileged (*Munster* v. *Lamb*).(1)

The Acting Advocate-General in supporting the rule contended that Mr. Norton had exceeded his privilege as an advocate. He admitted that in an ordinary case it would be sufficient for counsel to say that he was instructed, but in the present case Mr. Sullivan's position should be taken into account and that counsel must, before he makes such serious allegations, satisfy himself of the truth of the charges or at least take more than ordinary pains to satisfy himself that the charges are true. He contended that it was impossible for Mr. Norton to say that he was acting under instructions with respect to the matter complained of in his summing up his evidence to the jury. There was no evidence of any kind before the jury that Mr. Sullivan had been privy to the conspiracy alleged or had been guilty of misconduct of any kind and yet Mr. Norton had reiterated his charges against Mr. Sullivan, and although he did not mention Mr. Sullivan's name, yet he submitted to the jury that Mr. Sullivan was guilty of gross misconduct in connection with the trial.

The Acting Advocate-General referred us to the Evidence Act, ss. 149 and 150.

The Acting Advocate-General also contended that the rules of the English common law did not apply to advocates in this country in cases of defamation—Indian Penal Code, s. 499—and a person uttering defamatory words against another would be guilty of defamation unless he came within the 9th exception given by the Act: in fact the imputation must be made in good faith for the protection of the interests of the person making it or of any other person or for the public good; and that the privileges of an advocate in India, so far as liberty of speech is concerned, is not as great as it is by the common law of England.

I am of opinion that a Divisional Court consisting of two Judges has power to direct a rule to be issued calling on an advocate of the High Court to answer matters alleged against him under s. 10 of the Letters Patent (amended).

The first paragraph of the prayer of the petition was not argued before us. Mr. Sullivan has no right to ask this Court to inquire

(1) 11 Q.B.D., 588; s.c. 52 L.J. (Q.B.D.)

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why Mr. Norton obtained a subpœna against him. The High Court granted it for reasons that appeared to them sufficient.

The only point really involved in this case is, will the High Court take notice of defamatory words against an individual used by an advocate during the progress of the case.

The common law of England is that an advocate is not civilly or criminally responsible for anything he may say in his office as advocate.

The courts in this country are undoubtedly bound to administer, within the original jurisdiction, *inter alia*, the common law as it prevailed in England in the year 1726 and which has not been subsequently altered by statutes especially extending to India or by the Acts of the Legislative Council of India.

Now there can be no doubt what the common law in England in relation to the privileges of advocates was and is. In *Brook* v. *Montague* (1) the Court of King's Bench held that a counsellor in law retained hath a privilege to enforce anything which is informed him by his client and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false.

In *R.* v. *Skinner* (2) Lord Mansfield, C.J., said "Neither party, witness, counsel, jury, or judge can be put to answer, civilly or criminally, for words spoken in office."

In *Hodgson* v. *Scarlett* (3) it was held by Lord Ellenborough, C.J., that an action for defamation will not lie against a barrister for words spoken by him as counsel in a cause pertinent to the matter in issue.

In *Kennedy* v. *Broun* (4) Erle, C.J., says, "The advocate is trusted with interests and privileges and powers, almost to an unlimited degree. His client must trust to him at times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty, and he may have to speak upon subjects concerning the deepest interests of social life and the innermost feelings of the human soul. ..... His words and acts ought to be guided by a sense of duty—that is to say, duty to his client—binding him to exert every faculty and privilege, and power in order that he may maintain that client's right, together

(1) Cro. Jac., 90.
(2) Lofft., 55.
(3) 1 B. & A., 232.
(4) 32 L.J.C.P. (N.S.), 137.

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with duty to the Court and himself, binding him to guard against the abuse of the powers and privileges intrusted to him, by a constant recourse to his own sense of right."

In *Dawkins* v. *Lord Rokeby*,(1) the Court of Exchequer Chamber presided over by Kelly, C.B., and consisting of nine judges, held that "the authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, or witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law.

"The principle which pervades and governs the numberless decisions to that effect is established by the case of *Floyd* v. *Barker*,(2) and many earlier authorities from 27 Edw. III, pl. 15; 9 Hen. IV, 60, pl. 9; and 9 Edw. IV, 3, pl. 10, down to the time of Lord Coke." See also *Revis* v. *Smith*,(3) in which a number of authorities are cited.

In *Munster* v. *Lamb*, the Master of the Rolls says, referring to *Dawkins* v. *Rokeby* and other cases, "if it is right and wise that such a privilege shall be extended to a judge, . . . and if the privilege is equally given to a witness, ... how can it be considered that it is not equally, I would say more, beneficial to the public that a counsel and an advocate should come to the performance of his duty with an equally free and unfettered mind? If any one needs to be free of all fear in the performance of his arduous duty an advocate is that person. His is a position of difficulty: he does not speak of that which he knows, but he has to argue and to support a thesis which it is for him to contend for; he has to do this in such a way as not to degrade himself; but he has to do it under difficulties which are often pressing. If in this position of difficulty he had to consider whether everything which he uttered were false or true, relevant or irrelevant, he could not possibly perform his duty with advantage to his client; and the protection which he needs and the privilege which must be acceded to him is needed and accorded above all for the benefit and advantage of the public."

From the cases I have quoted it is abundantly clear that an advocate speaking in a Court of Justice in England is not liable either civilly or criminally for defamatory words spoken in his

(1) L.R., 3 Q.B., 255. (2) 12 Co. Rep., 23.
(3) 18 C.B. 126; s.c. 25. L.J. (C.P.), 195.

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office if they are pertinent to the inquiry. But it is said by the Acting Advocate-General that the principles of the common law thus laid down are not applicable to this country, and that the privileges as to the liberty of speech of an advocate in his office as advocate in this country are materially abridged, and that an advocate is liable, if he uses defamatory language against an individual, to be prosecuted for defamation unless he can bring himself within the 9th exception of s. 499 of the Indian Penal Code; and s. 150 of the Evidence Act (Act I of 1872) is also referred to as supporting this contention. That section however refers to questions put in cross-examination by any barrister, pleader, vakil or attorney of the class referred to in s. 148 and gives the court the power, if such court is of opinion that such question was asked without reasonable grounds to report the circumstances to the High Court, but it limits the scope of the section to questions asked under the circumstances mentioned in s. 148.

It is also said that Mr. Norton should have considered the position of Mr. Sullivan as a Member of Council before he carried out his instructions and made the allegations complained of against Mr. Sullivan.

I cannot agree with the Acting Advocate-General. I think that the advocates in this country have and should have the same privileges in respect of liberty of speech (bearing always in mind the remarks of Erle, C.J., in *Kennedy* v. *Broun*) they have so long enjoyed in England; and that in this country it would be beyond measure embarrassing to the advocate and disastrous to the interests of the client, if the advocate was exposed to the liability of a criminal or civil charge for defamation for words uttered in court. To quote again the words of the Master of the Rolls in *Munster* v. *Lamb*, "If any one needs to be free of all fear in the performance of his arduous duty an advocate is that person." I see no reason to fear that the privilege will be abused, but if it should unfortunately turn out that I am mistaken, measures can at once be taken to prevent the abuse of the privilege, should the powers the High Court possesses under s. 10 of the Letters Patent (amended) prove insufficient. I hold therefore that an advocate in this country cannot be proceeded against either civilly or criminally for words uttered in his office as advocate.

I disagree with the learned Acting Advocate-General that an advocate is bound to consider the position in life of the person

whose conduct he is condemning. His words and acts ought only to be guided by a sense of duty—duty to his client—and by a constant recourse to his own sense of right to guard against the abuse of the powers and privileges intrusted to him.

Mr. Sullivan complains that Mr. Norton acted recklessly, unprofessionally and unscrupulously and without that due care and caution (see s. 52, Indian Penal Code, definition of good faith) which as an Advocate of the High Court he was bound to take. Mr. Norton's reply is, "I acted under my instructions: all I said and did was within the four corners of those instructions: *and my duty to my client* compelled me to say what I said."

There is no allegation in the petition that Mr. Norton was actuated by malice against Mr. Sullivan, and it cannot be said that the defamatory matter complained of (if true) was not relevant to the inquiry. I am of opinion that no reasonable cause has been shown to empower the High Court to take proceedings under s. 10 of the Letters Patent (amended), and I think therefore that this petition should be dismissed.

BRANDT, J.—As stated in the few words delivered at the hearing in dismissing the application, we were all agreed that Mr. Norton was protected in what he said by the privilege of counsel, but that this was a proper case for inquiry under the 10th section of the Letters Patent (amended).

We were all further agreed as to the contention that a rule could not legally be made by a Divisional Bench of the Court calling on Mr. Norton under that provision of law to answer and explain in respect of the matters alleged against him being untenable.

I entirely concur with the learned Chief Justice and my learned colleagues that there were not grounds for calling upon Mr. Norton for any explanation in respect of any thing said or done by him in proceedings prior to trial or during the course of the trial in which his client was concerned prior to the conclusion of the evidence taken therein.

As regards counsel's speech to the jury on the whole case, I was and remain of opinion that in the case of an issue to be tried as to whether by inuendo or implication the Honorable Mr. Sullivan was indicated in the several passages of that speech there would have been sufficient evidence to lay before a jury with a view to their giving a verdict. As however on mature considera-

tion I could not undertake to say that question should be answered beyond doubt in the affirmative, the further question whether, if it were beyond all reasonable doubt that the imputations were directed at that gentleman, there would be reasonable cause for exercising the powers conferred upon this Court by the Letters Patent does not call for decision.

Mr. Norton did not disclaim an intention on his part to imply that he reiterated and emphasised the allegations which under instructions he had made prior to and during the preceding part of the trial against the Honorable Mr. Sullivan, and it certainly is not going too far to say that the jury might, whether rightly or wrongly, understand that those observations were directed at that gentleman.

As we are agreed that there are not grounds on which Mr. Norton should be censured even, I abstain from saying anything further than it is in my opinion a question whether his client's interests might not have been equally well protected without suggesting that the conspiracy, if there was one, was the result of personal feelings of enmity on the part of individuals indicated with more or less precision.

As to the law on the subject the English cases are sufficiently stated by the learned Chief Justice. There are among them authorities which I can accept without hesitation as sufficient for the disposal of the matter before us, without expressing any opinion as to whether we should be bound to go to the extreme length to which the case of *Munster* v. *Lamb* has carried the law as now expounded in England.

As regards the arguments of the learned Acting Advocate-General, first that the courts in this country are not bound absolutely to follow the English precedents, or to adopt them as conclusively applicable to all libel or slander suits, *Abdul Hakim* v. *Tej Chandar Mukarji*,(1) but that regard may and should be had to the provisions of law, if any, *in pari materiâ*, specially applicable to this country, and secondly that some consideration should have been had for the position and presumably high character of the petitioner in this case, I am by no means prepared to express entire dissent from the several propositions propounded in the case cited; and as to the second, I consider it sufficient to say that the legal

(1) I.L.R., 3 All., 815.

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maxim quoted in Court that "all men are equal in the eye of the law" though it undoubtedly is true, absolutely true in one sense, is after all but a maxim, and such maxims are from the nature of the case capable of misleading and of being misapplied unless applied with reservation and nice discrimination; and this particular maxim is in my opinion by no means of itself conclusive in respect of the proposition put forward by the learned Advocate-General.

I would refer to one instance only in which the maxim is not and cannot be adhered to to the letter an instance of every-day occurrence: when there is a question as to the probable truth or untruth of a particular statement, and a statement in one sense has been made by a person of hitherto high accredited probity and truth, and of position such as presumably to place him above temptation to speak untruly, and a contradictory statement on the other side by one whose character is not above suspicion and whose circumstances might lay him open to temptation, a Judge who on these grounds accepted the statement of the former in preference to that of the latter would not, I presume, be obnoxious to a charge of having violated the legal maxim above enunciated.

Again, having regard to probabilities, experience shows that there is at least equal truth in the proposition *nemo repente fuit turpissimus*: men of good character do not as a rule at one bound become absolutely depraved. To the extent that under instructions counsel might suggest the possibility of such a change, I am willing to accept the applicability of the maxim, but not further, in this particular case.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1886. April 21. Sept. 7.

THE SECRETARY OF STATE FOR INDIA and THE MUNICIPAL COMMISSIONERS OF THE CITY OF MADRAS.*

City of Madras Municipal Act, s. 123—Tax on buildings—Hospital built by Government—Standard of hypothetical rent.

Under s. 123 of the City of Madras Municipal Act, the gross annual rent at which a building might reasonably be expected to let from month to month or from

* Referred Cases 2 and 3 of 1886.

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year to year is for the purpose of assessment to house-tax under the Act, to be deemed to be the annual value of such building. The Lying-in Hospital at Madras, built and supported by Government, having been assessed by the President of the Municipality as on a rental of Rs. 1,000 a month, the Magistrates on appeal reduced the assessment, finding, that Rs. 7,920 per annum would be a reasonable rent, having regard to the letting value of the buildings in the neighbourhood, but, at the request of the Municipality, referred the following questions to the High Court:

Whether (as contended by Government) the property in question should be valued and assessed on the rent which, on the property being offered in the open market without reserve, a person desirous of securing it would have to pay; or

Whether (as contended by the Municipality) it should be valued and assessed on the highest reserve rent which an owner of the property offering it in the open market would reasonably demand, and below which sum he would not be willing to let:

Held, that the standard value was what the hypothetical tenant requiring the building for use as a hospital would be willing to pay rather than rent a less suitable building and adapt it to his requirements at his own expense, and that in this sense the contention of the Municipality was correct.

CASE stated and referred to the High Court under s. 193 of the City of Madras Municipal Act.

The facts are set out in the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.).

The Acting Advocate-General (Mr. *Shephard*) for the Secretary of State.

Mr. *Wedderburn* for the Municipality.

The following authorities were referred to in argument:—*Rosher's Parochial Assessments Act*, pp. 83, 86, 87, 91, 99, 100, 101, 106, 122, 133; *The Queen* v. *London and North-western Railway Co.*; (1) *Mersey Docks* v. *Liverpool*; (2) *Brown on Rating*, pp. 26, 27, 30.

It was contended by the Acting Advocate-General that if a lease of the Lying-in Hospital were put up to auction, Government could secure it for a sum just in excess of that which would be offered by persons who might require the building for ordinary purposes, *i.e.*, purposes other than that for which the building was specially built and adapted, and that such sum was the amount at which the building should be assessed.

For the Municipality it was urged that as in the hypothetical market there was one person who required the building for a special purpose and no other suitable building, the hypothetical

(1) L.R., 9 Q.B., 134. (2) L.R., 9 Q.B., 96.

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landlord might reasonably demand and could obtain a higher rent than would be offered if the auction were without reserve.

JUDGMENT:— This is a case referred to this Court for decision under s. 193 of Madras Act I of 1884. The buildings which compose the Lying-in Hospital in the town of Madras were valued at Rs. 12,000 per annum, and the Superintendent's residence at Rs. 1,248 per annum, for the purpose of calculating the tax due upon them under s. 119. The Government preferred an appeal against this valuation to the President of the Municipality under s. 190, on the ground that it was not in accordance with the provisions of s. 123. The President, however, confirmed the valuation.

Again the Government appealed from his decision to the Magistrates under s. 192. Mr. Chisholm, the Government Architect, originally valued all the buildings, including the Superintendent's residence at Rs. 10,488 per annum. He stated in his evidence before the Magistrates that, if the special character of the buildings alone were considered, Rs. 1,000 per mensem would be a fair rent for Government to pay for the Hospital, including the Superintendent's residence and Apothecary's quarters, which, he said, would fetch Rs. 190 a month, and that, ordinarily, a fair rental for Government in such circumstances to pay would be Rs. 833 a month. It was contended for the Municipality that though the Government might have much difficulty in obtaining tenants for these buildings if they were to let them, yet the present value of the buildings to the hypothetical tenant was the true test of ratable value, and that the consideration of what the Government might get, if they rented the buildings to others who might not require them for use as a hospital, was immaterial.

The Lying-in Hospital must, for the purpose of this reference, be taken to be a building occupied by the owner himself. Admitting the principle that the value to the owner, whether he occupies the building himself or lets it to a tenant, is to be measured by the amount of rent per annum it would be worth to a hypothetical tenant on the terms laid down by the Act as the standard, the Magistrates came to the conclusion that such amount could be pretty accurately calculated only by considering the letting value of other buildings in the same locality, that is, by considering the demand for the Lying-in Hospital in the open market. In this view, and also taking into consideration the value of the premises

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to the present tenant, the Magistrates reduced the rateable value (excluding the Superintendent's residence and the Apothecary's quarters as to which the parties were not at issue) to Rs. 660 per mensem, or Rs. 7,920 per annum. But, at the request of the respondent's solicitor, they referred for our decision the following question:—

Whether the property in question should be valued and assessed on the rent which, on the property being offered in the open market without reserve, a person desirous of securing it would have to pay; or, whether it should be valued and assessed on the highest reserve rent which an owner of the property offering it in the open market would reasonably demand and below which sum he would not be willing to let.

Our decision must depend on the provisions of section 123 of Madras Act I of 1884, which provides that "the gross annual rent at which a building or land might reasonably be expected to let from month to month or from year to year shall for the purposes of assessment under this Act be deemed to be the annual value of such buildings or land." The letting value from year to year is the standard prescribed also in the Parochial Assessments Act (6 and 7, Will. IV, cap. 96,) and the words used in it are that the rates are to be made upon an "estimate of the net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year," &c. The intention of the Legislature in referring to a tenancy from month to month or from year to year was evidently to establish in regard to all buildings a uniform rule for assessing the value of the occupation. The standard of value is certainly, as observed by the Magistrates, the value of the property to the owner, which is to be measured, whether he occupies the property himself or lets it to a tenant, by the amount of rent per annum it would be worth to a hypothetical tenant on the terms laid down by the Legislature. Having regard to the course of decisions under the English Statute, there are several matters which ought to be kept in view in fixing the rateable value. The standard value is the rent which the building would be worth to a hypothetical tenant on the terms laid down by the Statute. The terms on which any particular property is in fact let are therefore immaterial, and the tenancy from month to month or year to year is prescribed as the standard by which all buildings should be valued in order that their assessments

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might be equal. Again, the standard value is the value which the building possesses at the time the assessment is made. Hence the value of the property in the past or future is immaterial. The present value is not the value of any exceptional year but the value which under present circumstances the building would be worth to let in an average year or taking one year with another. Neither exceptional repairs nor exceptional profits made in a particular year are to be considered. In letting a building from year to year, the rent would ordinarily be regulated by two matters as observed by Blackburn, J., in *The Queen* v. *London and North-western Railway Co.*;(1) on the one hand by the benefit which the tenant could be likely to derive from the occupation, because he would not give more; on the other hand, by the nature of the property, such as local situation, or the number of persons there are who could supply him with an equally eligible building and be willing to let it to him; for, while he would not be willing to give more than he expects to gain by the occupation, he would not give even that if he could get a similar building at a lower price. Further, in rating property, it must generally be assumed that the hypothetical tenant would be in the same position and use the building in the same way as the party rated, for, the object is to ascertain its intrinsic value to the owner in its present condition. In *The Queen* v. *The School Board for London*(2) it was contended, *inter alia*, for the respondent, before a Divisional Court of Queen's Bench, that the rent which the School Board might be supposed to be willing to give for the school premises if the Board were in the market anxious to rent premises suitable for use as school, was a fair test of rateable value. On the other hand, it was urged for the appellant—1st, that the School Board owning the premises should not be supposed to be in the market anxious to rent premises, but should be excluded from the number of hypothetical tenants who might be supposed to be willing to rent the school premises, and 2ndly, that the only true indication of rateable value was the rent for which the premises could in their present condition be let to a hypothetical tenant from year to year, supposing they were not used for Board Schools but were applied to any other use or purpose for which they could be made available by a tenant. The respondent's contention was allowed and the appellant's objections were overruled. Cave, J.,

(1) L.R., 9 Q.B., 134. (2) 55 L.J.(Q.B.D.), 53.

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said: "when you want to find what a hypothetical tenant will give, you must not take a man who does not want the premises for the use for which they are built, but wants to use them for some other purpose, unless you can first show that they cannot be let for the purpose for which they are built. If they cannot be let for the use for which they are built, then, no doubt, you may go and see what you can do with them for some other purpose and the best subsidiary purpose you could put them to. But, as long as they can be let for the purpose for which they are built, it seems to be idle to say "well if this man were not occupying them, they could not be let to anybody else."

The Court of appeal confirmed the decision (the case is not yet reported). Lord Esher, M. R., observed: "In this case there was no tenant as the Board were owners and occupiers. All possible tenants must be looked at. In estimating the rent, no tenant was excluded and the actual occupier might be included, and the owner, if he was occupier, as to whom it might be considered what rent he might be reasonably expected to pay. The School Board might be tenants, and therefore the rent they would be willing to pay might be considered."

Lord Justice Brown says: "the test of rateable value was the rent for which the premises might reasonably be expected to let to a tenant. In estimating that, in the present case, the rent for which the premises might be reasonably expected to let to the Board themselves may be considered, for how could the only body likely to require the premises be excluded from the estimate, that is, why should the only body likely to require or use the premises be excluded from the estimate of rent payable?"

Having these principles in view, we are of opinion that the Lying-in Hospital should not be valued at the rent which it would fetch if it were offered in the open market without reserve. Admittedly there is but one building in Madras specially eligible for use as a Lying-in Hospital, and it is occupied by the owner. If the owner, the only person likely to require the premises, were excluded from the market, then the hypothetical tenant would take advantage of the absence of demand for it and pay no more than those who require it for use other than as a hospital would choose to pay. No prudent landlord, who is aware of the fact that only one person requires the building for use as a hospital, would offer it in the open market without reserve.

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Nor can any reserve rent which the landlord may arbitrarily demand be taken to represent the standard value. If such demand is far in excess of the special convenience or benefit which the hypothetical tenant can expect to derive from the occupation, the tenant would prefer to rent less suitable buildings and adapt them to his requirements, though at some expense, or to forego the special convenience if it is not indispensable.

The standard value is then what a tenant requiring the building for use as a hospital would consider it reasonable to pay from year to year rather than resort to renting a less suitable building and adapting it to his requirements at his expense. In this sense, the standard value is the higher reserve rent which the owner of the property offering it in the open market would reasonably demand and below which sum he would not be willing to let.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. April 13, 15.

KRISHNA AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS IN APPEAL NO. 127,

THE COLLECTOR OF SALEM (DEFENDANT NO. 1), APPELLANT IN APPEAL NO. 130,

and

MEKAMPERUMA AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Regulation X of 1831, ss. 1, 2, 3—Regulation V of 1804, s. 14 (4), s. 20—Sale for arrears of revenue of mitta held by tenants in common during minority of some of the owners—Minority no bar to sale—Civil Procedure Code, s. 32.

A mitta held by tenants in common was sold for arrears of revenue at a time when the owners of a moiety thereof were minors.

In a suit brought by the mother of these minors on their behalf against the Collector to set aside the sale, the District Court held that Regulation X of 1831, s. 2, absolutely debarred the Collector from selling the estate of the minors during their minority and set aside the sale so far as their interests were concerned:

Held, on appeal, that, the minors not being sole proprietors, their estate was not one of which the Court of Wards could assume the management and, therefore, s. 2, of Regulation X of 1831, did not affect the sale.

* Appeals 127 and 130 of 1885.

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In the above-mentioned suit the plaintiffs impleaded also the other previous owners of whom one was the purchaser at the sale. Two others in their written statement pleaded that the purchase had been made in fraud of their rights, and claimed to be still entitled to their shares in the mitta on the ground that the purchaser must be held to have purchased for their benefit (Indian Trusts Act, 1882, s. 90) They further claimed that should the sale be set aside so far as the plaintiffs' interests were concerned, the sale of their interests also should be held to be null and void.

Before the suit came on for hearing the District Judge *suo motu* ordered that these two defendants should be made plaintiffs in the suit under s. 32 of the Code of Civil Procedure.

At the date when this order was made, the claim of these defendants, had they sued to set aside the sale in their own interest, was barred by limitation:

Held that the order was illegal.

APPEALS from the decree of C. W. W. Martin, District Judge of Salem, in suit No. 9 of 1884.

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

Bháshyam Ayyangár and *Kaliánarámayyar* for appellants.

The Acting Advocate-General (Mr. *Shephard*) and *Rámasámi Ayyangár* for respondents.

JUDGMENT:—The plaintiffs' father, Mekaperuma Udayan was the owner of half the Senthamangalam mitta. He died in 1876, and the plaintiffs, Mekaperuma and Rámasámi, were then registered as the owners of his moiety. The other sharers were Krishna Chetti, defendant No. 2, who owned $\frac{1}{12}$ (which he purchased in 1880); Solamuttu, Karuppa and Varada Udayan, defendants Nos. 4—6, who jointly owned another $\frac{1}{12}$; Vela Gounden, defendant No. 7, who owned $\frac{1}{4}$; and Malayandi Pillai, defendant No. 8, who owned the remaining $\frac{1}{12}$.

On the death of plaintiffs' father, one Varadaperuma Udayan was appointed their guardian by the District Court under s. 20, of Regulation V of 1804. The kists due to Government were allowed to fall into arrears for faslis 1290 and 1291, in consequence of which the whole mitta was attached, and was sold on 9th March 1882 by revenue auction. It was purchased by plaintiffs' guardian, Varadaperuma Udayan, for Rs. 65,000 on behalf of plaintiffs, but as he did not pay the balance of the purchase money, the sale was ultimately cancelled.

The plaintiffs' guardian died on 1st December 1882 and shortly afterwards a fresh attachment of the mitta was made for arrears which had accrued subsequent to the first attachment. At the

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date of this attachment no new guardian had been appointed by the Court for the minor plaintiffs under s. 20 of Regulation V of 1804. The Collector did write to the Judge on 2nd March 1883, suggesting that a fresh appointment should be made (exhibit IX); but this letter appears to have been despatched subsequent to the attachment which was made in January. From the endorsement made by the District Judge upon this letter (dated 16th July 1883), it would appear that he proposed to consult the Collector as to the fitness of Subbaraya Udayan (plaintiffs' brother-in-law) to be appointed guardian, but there is nothing to show whether any further steps were taken. At any rate when the mitta was brought to sale a second time on 14th September 1883, no fresh guardian had been appointed by the Court.

At that sale the mitta was knocked down to defendant No. 2 for Rs. 1,50,800. Plaintiffs' mother and Subbaraya Udayan above mentioned attended the sale and bid for plaintiffs, but their last bid was Rs. 50 less than that of defendant No. 2. It would appear that they had in hand at that time some Rs. 15,000, which was nearly double the amount of the arrears of kist due on the mitta but plaintiffs' mother and defendant No. 2 would appear to have been equally desirous that the mitta should be sold, each hoping to become the successful purchaser of the whole estate.

The plaintiffs' mother, Sellammal (the unsuccessful bidder), now sues on their behalf to set aside the sale, on the ground that the whole proceedings were illegal and not binding on the plaintiffs. The plaint was filed on 12th March 1884, and alleged, among other things, that the Collector (defendant No. 1) was bound to have attached the movable property of the registered holders in the first instance; that the demand notice was not served upon any properly constituted guardian to the minor plaintiffs, nor was it legally served; that the sale of the whole of this valuable mitta for so small an arrear was unnecessary and illegal, and that the minors' interests were not liable to be sold at all. The plaint impleaded the Collector as defendant No. 1 and the other joint owners (before the sale) as defendants Nos. 2—8.

Defendant No. 2 and his undivided nephew, Rámasámi Chetti, defendant No. 3, upheld the validity of the sale.

Defendants Nos. 4 and 7 put in written statements, in which they alleged that they were still entitled as co-owners to their respective shares, and that defendant No. 2, having purchased in

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fraud of their rights, must be held to hold the estate for their benefit as co-owners (s. 90, Indian Trusts Act II of 1882). They contended, however, that should the plaintiffs succeed in the suit, the sale of the interest of themselves also should be held null and void.

The other defendants were *ex parte*. It will be seen from this that defendants Nos. 4 and 7 claimed to be still entitled to their shares on grounds utterly inconsistent, and whether the sale itself was valid or invalid as regards the plaintiffs. They did not ask to be made plaintiffs and throw in their lot with plaintiffs to set aside the sale, but they asked for the benefit of the decree should plaintiffs succeed, and, if plaintiffs failed, they claimed a relief on a totally different cause of action on which they had never sued.

The only issue framed was the general one, whether the sale was valid and binding on plaintiffs and defendants Nos. 4 and 7. Some time after this issue was settled, and before the suit came on for hearing, the District Judge *suo motu* ordered that defendants Nos. 4 and 7 should be made plaintiffs in the suit instead of defendants, and directed them to pay stamp duty upon the relief which they apparently wished to obtain should they be considered as not being in the same interest with plaintiffs. Defendant No. 4 was willing to pay the stamp duty, but defendant No. 7 was not, and ultimately the Judge ordered them to be entered plaintiffs Nos. 3 and 4 under s. 32 of the Code of Civil Procedure without the payment of any stamp duty.

At the trial the District Judge held that the provisions of Regulation X of 1831 absolutely debarred the Collector from selling the plaintiffs' estate during their minority, and therefore set aside the sale as far as their share was concerned. He held, however, that it was valid as regards the shares of the other co-owners so far as the Collector was concerned, but that it was not binding on plaintiffs Nos. 3 and 4 as regards the relations between them and defendant No. 2. The decree after setting aside the sale of plaintiffs' share, directed defendant No. 2 to execute reconveyances to plaintiffs Nos. 3 and 4.

Against this decree defendants Nos. 2 and 3 in Appeal Suit No. 127 and the defendant No. 1 (the Collector) in Appeal Suit No. 130 have appealed. In the former appeal we are constrained to hold that the procedure of the District Judge in transforming defendants Nos. 4 and 7 into plaintiffs Nos. 3 and 4 was, under

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the circumstances, irregular. It does not appear that either of them desired to become a plaintiff, nor could they in this suit have been granted relief on the same cause of action as that set forth by plaintiffs Nos. 1 and 2. Their position as plaintiffs could only date from 14th March 1885, which was the date of the Judge's order. On that date a suit by them to set aside a sale for arrears of Government revenue would have been barred (art. 12-C, sch. II of the Limitation Act); while a suit based on s. 90 of the Trusts Act would set forth a totally different cause of action in which plaintiffs Nos. 1 and 2 were not interested, and which was altogether foreign to their claim. Defendants Nos. 2 and 3 can, under s. 591, of the Code of Civil Procedure, dispute the validity of the order passed on 14th March 1885, and we must set aside the order passed under s. 32 and restore plaintiffs Nos. 3 and 4 to their original positions on the record.

The sole ground on which the District Judge has allowed the claim of plaintiffs 1 and 2 is the legal one that Regulation X of 1831 debars the Collector from selling for arrears of revenue the estates of minors which are not subject to the Court of Wards. Defendant No. 1 and the auction purchasers (defendants Nos. 2 and 3) appeal against this decision, and it is contended that the prohibition enacted in Regulation X of 1831 only applies to estates which have been, or which legally might have been, taken under the charge of the Court of Wards.

If the minor plaintiffs were the sole proprietors of the Senthamangalum mitta, there could be no doubt that their estate was one of which it was competent to the Court of Wards to assume the management. Had such management been assumed, it could not be sold for arrears of revenue (s. 14, cl. 4, Regulation V of 1804); nor could it be so sold even if the Court of Wards had not chosen to assume the management—(s. 2, Regulation X of 1831).

But the minor plaintiffs are not the sole proprietors, but are joint proprietors with others, who are not incapacitated from the management of their inheritance. Their case is therefore governed by s. 20, Regulation V of 1804; and the duty of appointing a guardain for them devolves not upon the Court of Wards, but upon the Zila (now the District) Court.

The law imposes upon the Collector the duty of reporting the case to the District Court, but having done that, the Collector

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would appear to be *functus officio*. It was held in *Subramânyan, in re* (1) that a District Court had no jurisdiction, under s. 20, Regulation V of 1804, to appoint a guardian to the estate of a minor when the estate pays revenue to Government. In that case the minor was the sole proprietor. The converse of the proposition would appear also to be true, that where the law imposes upon the District Judge, as in the case of a minor co-owner under s. 20, the duty of appointing a guardian, the right of the Court of Wards to appoint a guardian is *ipso facto* excluded. The words of s. 20 are imperative as to the procedure to be followed.

The estate of the plaintiffs is not therefore one of which the Court of Wards could assume the management, and we have to consider whether the Government is debarred from selling it for arrears of revenue under Regulation X of 1831.

The preamble (s. 1) of that Regulation shows that the enactment was passed for two distinct purposes—(1) to remove doubts as to the liability of the estate of a minor, not taken under the management of the Court of Wards, to be sold for arrears of revenue; (2) to extend, for the protection of minors and other incapacitated persons, the provisions of s. 20, Regulation V of 1804, to property of every description not subject to the Court of Wards.

Section 2 is the enacting section for the first of these purposes and s. 3 for the second.

It is quite clear that s. 14, cl. 4, Regulation V of 1804, had previously forbidden the sale of minors' estates which had been taken under the Court of Wards, and the second clause of s. 2, Regulation X of 1831, shows that it was with reference to such estates (which might have, but had not, been taken under the Court of Wards) that the doubts had arisen which are set forth in the preamble. The estate of the minor plaintiffs is not such an estate. The 3rd section of Regulation X of 1831 deals with the second object set forth in the preamble and extends the powers of the Zila Courts to appoint guardians to cases in which incapacitated persons are possessed of property of every description not subject to the jurisdiction of the Court of Wards, *i.e.*, that does not pay revenue to Government. Section 20, Regulation V of 1804, had limited the Zila Judges' power to act to

(1) I.L.R., 6 Mad., 187.

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cases in which the estate was held by joint possessors and subject to an undivided assessment of the public revenue, but it was then extended to the heirs of single as well as of joint possessors of all kinds of estates, provided only they were not subject to the jurisdiction of the Court of Wards.

It appears to us that the District Judge has confused together the two separate purposes for which Regulation X of 1831 was passed. It is intelligible that the Government should legislate so as to forbid the sale of the property of minors whose estates were under the management and control of their own officers, but to forbid the sale of property not subject to such control and guarantee would be to place the State, alone of all legal creditors, in a position of inability to exact its dues. It is no doubt true as urged by the Acting Advocate-General that the words "The property of a minor not under the charge of the Court of Wards" in s. 2, cl. 1 of Regulation X, are wide enough of themselves to include estates of every description, but the term "such estates" in the 2nd clause of the same section makes it clear that the Legislature only intended to refer to estates of which the Court of Wards might have originally assumed the management. We must therefore set aside the decree of the District Judge in plaintiffs' favour, which is based upon this preliminary point. There are however other points arising in the suit, on which plaintiffs have based their claim, and these must now be remitted for the consideration of the Court of First Instance. The points raised are several and cannot conveniently be met by an issue so general in its terms as that on which the suit has been tried. We observe that, under clauses 5 and 6 of the sanad-i-milkeut istimrár, under which this mitta is held, the personal property of the holder is liable in the first instance to attachment for arrears of revenue, and under s. 6, Act II of 1864, the procedure against the defaulters should be in accordance with the terms of this sanad. The plaintiffs complain that this has not been done, and they further complain that s. 44 of the same Act would prevent the sale of the whole of so valuable a mitta for a comparatively small arrear.

Another point raised is that the demand notices were not served upon any one legally competent to represent the minors, and it is argued that the plaintiffs' mother, though their natural and personal guardian under Hindú Law, could not take for such purposes the position of a person duly appointed by the Court

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under s. 20, Regulation V of 1804. Further objections are raised as to the publication and conduct of the sale.

We merely indicate these as some of the points which will require the attention of the Judge in framing fresh issues. The appeals of the Collector (No. 130) and of defendants Nos. 2 and 3 (No. 127) must be allowed and the decree of the Lower Court reversed. The names of plaintiffs Nos. 3 and 4 must be restored to their original positions in the suit, which must be retried on the merits after framing fresh issues. The respondents must pay the costs of these appeals, but the costs in the Lower Court will abide and follow the result.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

JIVRÁJI (JUDGMENT-DEBTOR), PETITIONER,

and

PRAGJI (DECREE-HOLDER), RESPONDENT.*

1886. Sept. 24.

Civil Procedure Code, ss. 203, 622—Error of law—Application to bring decree into conformity with judgment—Limitation Act not applicable.

Applications to the Court under s. 206 of the Code of Civil Procedure are not governed by the Limitation Act.

A Small Cause Court rejected an application made under s. 206 of the Code of Civil Procedure to bring a decree into conformity with the judgment, on the ground that a former application had been dismissed for default and the petitioner was bound to apply within one month from the date of dismissal and was now too late. On an application to the High Court under s. 622 of the Code to set aside this order:

Held that the High Court could not interfere.

APPLICATION under s. 622 of the Code of Civil Procedure to set aside an order of the Subordinate Judge of North Malabar, made in Small Cause suit 722 of 1885.

Khimji Jivráji Shett, defendant No. 1 in the suit, applied under s. 206 of the Code of Civil Procedure to have the decree amended and brought into conformity with the judgment by reducing the amount of the decree from Rs. 446-7-3 to Rs. 239-7-0.

* Civil Revision Petition 29 of 1886.

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The Judge rejected the application, on the ground that two former applications for the same purpose made to the Judge who passed the decree had been dismissed for default and that petitioner should have, and had not, applied within one month from the date of the dismissal of the first application.

Srinivása Ráu for petitioner.

The second application was not dismissed for default, nor does the Limitation Act apply (Referred case 18 of 1885).

Mr. *Wedderburn* for Purushotam Dass Pragji Shett, respondent.

This court has no jurisdiction to entertain this application. The error of the Judge, if any, was an error of law, viz., that the application was barred by limitation—*Amir Hassan Khan* v. *Sheo Baksh Singh.*(1) If the second application was not dismissed, the proper course was to proceed with it, and, in that case, this application was properly rejected.

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT:—Though the Subordinate Judge states that both the previous applications were dismissed for default, there is nothing on the record or the diary to show that the application of 5th December 1883 was ever disposed of, or when it was disposed of. If it had not been disposed of, the Subordinate Judge should have taken it up again and heard the application.

If that application was dismissed for default, there is nothing to prevent the Subordinate Judge hearing another application to amend the decree. It has been held in referred case No. 18 of 1885 (not reported) that it is a ministerial function to bring the decree in accordance with the judgment, and that there is no period of limitation—see also *Vithal Janardan* v. *Vithojirav Putlajirav.*(2) This, however, is an error in law which will justify an application for review, but not one under s. 622 of the Code of Civil Procedure.

We therefore dismiss this petition with costs.

(1) I.L.R., 11 Cal., 6. (2) I.L.R., 6 Bom., 586.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

SEVU (PLAINTIFF), APPELLANT,

and

MUTTUSÁMI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1886. Sept. 8, 11.

Civil Procedure Code, ss. 318, 335—Suit to recover possession of property sold in execution of decree.

S. attached certain land and a house in execution of a decree against R. M. put in a claim under s. 278 of the Code of Civil Procedure, alleging that he was in possession as purchaser from R. The claim was rejected. No suit was brought by M. to contest this order. S. purchased the said land and house in execution, and obtained a sale certificate. In 1884 S. sued M. to recover possession of the land and house alleging that in execution proceedings in 1882 he had been put into possession of the land, but not of the house, which was found locked up by the Court amin, and that M. prevented him from enjoying both the land and house. M. pleaded that S. had never been put into possession, and again set up his title as purchaser from R. and possession under such title.

The Múnsif found that S. had been put into formal or constructive possession of the land, but not of the house, and decreed the claim.

On appeal the District Judge held that S. was bound to proceed according to the provisions of s. 335 of the Code of Civil Procedure to recover possession, and could not bring a separate suit:

Held that, whether there had been legal delivery or not, the suit was not barred.

APPEAL from the decree of J. A. Davies, Acting District Judge of Tanjore, reversing the decree of T. Rangácháryár, District Múnsif of Tiruválúr, in suit No. 183 of 1884.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Brandt, J.).

Mr. *Wedderburn* for appellant.

Bháshyam Ayyangár for respondents.

JUDGMENT.—The plaintiff, appellant, purchased the plaint properties in execution of a decree against one Rámasámi Pillai. The respondents (Muttusámi Pillai and Dorasámi Ayyangár) raised objection to the lands, &c., being attached, setting up a claim on

* Second appeal No. 72 of 1886.

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their own account. Their objections were disallowed in execution proceedings, and they filed no suit to set aside the order made against them; and it is admitted that they cannot raise any objection on the merits to the appellant's claim to the lands or to his obtaining possession of them.

In 1882, the appellant obtained a sale certificate, and he also obtained delivery, not actual delivery under s. 318, Civil Procedure Code, but symbolical delivery, presumably given under s. 319. The District Múnsif passed a decree in plaintiff's favor, but in appeal that decree was reversed, the plaintiff's claim being disallowed on the grounds, apparently taken for the first time in argument in appeal, that the plaintiff accepted symbolical delivery only when he was entitled to and might have had actual delivery; that express provision for summary remedy in the case of obstructions offered to an auction purchaser in obtaining possession is provided in the Code of Civil Procedure, and that the plaintiff is therefore precluded from bringing a separate suit for possession; and reference is made to *Lolit Coomar Bhose* v. *Ishan Chunder Chuckerbutty*.(1) It is further observed by the District Judge that even if resisted the plaintiff could still obtain redress under s. 335, Civil Procedure Code.

It is contended in appeal that the decision of the Lower Appellate Court is wrong in law, that there is no express provision in the Code of Civil Procedure in bar of a suit like the present, and that it therefore lies on the respondents to show affirmatively that such a suit is not maintainable; and with reference to the case mentioned by the District Judge, it is pointed out that this case is not reported in the authorized Law Reports, and that there are other subsequent decisions by the same Court, *Krishna Lall Dutt* v. *Radha Krishna Surkhel*,(2) and *Shama Charan Chatterji* v. *Madhub Chandra Mookerji*,(3) to the contrary.

For the respondents it is urged that the decision in *Lolit Coomar Bhose's* case only follows another in *Kristo Gobind Kur* v. *Gunga Pershad Surmah*,(4) and that it is correct in principle, and may be distinguished from the other cases above cited.

Section 244, Civil Procedure Code, has no bearing on the present case, as the respondents were no parties to the suit in which the

(1) 10 C.L.R., 258.
(2) I.L.R., 10 Cal., 403.
(3) I.L.R., 11 Cal., 93.
(4) 25 W.R., 372.

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decree was passed, in execution of which the appellant purchased the plaint lands.

Section 13 has no application, as there has not been any previous suit between the parties to this suit in respect of the plaint lands.

The case of *Lolit Coomar Bhose* v. *Ishan Chunder Chukkerbutty* differs from the present case, in that there was no application made for delivery in execution. The case in the Weekly Reports above referred to and followed in *Lolit Coomar Bhose's* case is on all fours with this, assuming it to be correctly held therein that the symbolical delivery here given is in fact no delivery at all. But the correctness of this latter decision was questioned by Garth, C.J., in *Lolit Coomar Bhose's* case; and in *Shama Charan Chatterji* v. *Madhub Chandra Mookerji* (in which the question was whether a plaintiff, who obtains a decree for possession against a defendant and in execution obtains formal, *i.e.*, symbolical delivery, has a fresh starting point as regards limitation, and also a fresh cause of action) reference is made to the case of *Seru Mohun Bania* (1) as authority for the proposition that an auction purchaser is not confined to the remedies provided by s. 318 and 319 of the Code, but may sue without proceeding under those sections, or if the possession obtained under them be infructuous, the decision in *Kristo Gobind's* case being thereby overruled, at all events as regards an auction purchaser.

We have to observe that *Seru Mohun Bania's* case is not precisely the same as that now before us, seeing that the auction purchaser had failed to obtain any sort of delivery whatever by reason of alleged errors in boundaries and of opposition by the defendants on this score; in other respects it is an authority in favor of the appellant.

We are then certainly not met with any unquestioned authority for the decision of the Lower Appellate Court in this case, and we are of opinion that the appellant's suit is maintainable.

The appellant certainly might have had delivery under s. 318, the respondents being actually and physically ejected from the land if necessary.

Delivery under s. 319 could properly be made only in the case of there being tenants or other persons entitled to occupy the

(1) I.L.R., 9 Cal., 602.

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land in occupation: it is not alleged there were any tenants on it, and the respondents were not entitled to occupy it. Either then there was a delivery of some sort, or there was legally no delivery at all. If there was no delivery at all, then certainly the appellant is in our opinion not debarred from maintaining the suit. If there was delivery—whatever the nature of that delivery may have been—the respondents either remained in possession or occupation, having no right thereto, or they re-entered and their re-entry was wrongful and a trespass.

There are in our opinion no grounds for holding that a suit like the present is barred by reason of the Civil Procedure Code containing special provisions for putting an auction purchaser in possession in execution proceedings.

Section 244 specifies the cases in which questions arising in execution of decrees shall be decided in execution and not by separate suit, and this is not one of those questions.

This disposes of the argument that the appellant, having been resisted by persons not claiming in good faith, has his remedy under s. 335 of the Civil Procedure Code. He might, perhaps, apply to the Court under that section: on the other hand, the Court might hold that having given delivery before, on which occasion no resistance or obstruction was offered, it is *functus officio* and has nothing more to do in execution with the conduct of the purchaser and those opposing him; and, as is pointed out by the learned counsel for the appellant, if the latter did apply and obtain an order in his favor under that section, the respondents, as parties against whom the order was made, might perhaps claim to institute a suit to establish their right.

However this may be, unless the suit is clearly not maintainable by reason of some express provision of processual law, it cannot be held to be barred: we have not been referred to any such provision.

The decree of the Lower Appellate Court should be reversed, that of the Court of First Instance being restored, and the appellant should have costs in the Lower Appellate Court and in this Court.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

LAKSHMI (APPELLANT)

and

KUTTUNNI (RESPONDENT).*

1886. Sept. 24, 29.

Civil Procedure Code, s. 311—"Decree-holder" not restricted to decree-holder who has attached, but includes one entitled to ratable distribution under s. 295.

Where one decree-holder had attached certain land and another decree-holder against the same debtor had entitled himself to ratable distribution of the assets under s. 295 of the Code of Civil Procedure:

Held that the latter was entitled to apply under s. 311 of the Code to set aside the sale on the ground of material irregularity.

APPEAL against an order of J. A. DeRozario, District Múnsif of Kutnád, under s. 588 (16) of the Code of Civil Procedure.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (Kernan and Brandt, JJ.).

Gopálan Náyar for appellant.

Anantan Náyar for respondent.

KERNAN, J.—In suit No. 537 of 1884 the plaintiff therein got a decree, applied for execution and sale of Palisseri and other lands held by the defendant. The land was attached. One P. V. Kuttunni proved a claim, by way of mortgage, before the Múnsif against the lands for Rs. 300. Owing to an error in the Múnsif's Court, the proclamation issued by the Court stated that the property was to be sold subject to the mortgage debt of Rs. 430, whereas the admitted amount was only Rs. 300. At a sale by auction on the 14th of December 1885 under that proclamation, the mortgagee, P. V. Kuttunni, was the highest bidder for the sum of Rs. 125.

Before the sale took place, Lakshmi Amma Anakkara Vadaketh, the appellant, had obtained three Small Cause decrees in suits Nos. 343 and 312 of 1882 and No. 390 of 1884 for Rs. 300, and had applied before the sale to the Court of the same District Múnsif for execution against the defendant of those decrees by sale

* Appeal against Order 78 of 1886.

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of the same land and did not get satisfaction. On the 18th December 1885 the appellant applied to the Múnsif to set aside the sale by reason of the irregularity of the statement that the land was sold subject to Rs. 430 instead of Rs. 300, and alleged that if the property had been sold subject only to the proper amount of the incumbrances, both the petitioner in No. 537 and appellant would have been paid in full. The Múnsif by order of the 9th January 1886 recorded the mistake and his opinion that the irregularity vitiated the sale. But he held that appellant had no right to apply under s. 311 for cancellation of the sale, on the ground, as it appears, that she was not a "decree-holder" within the meaning of s. 311, and that the decree-holder within the meaning of that section is the decree-holder at whose instance the lands were first attached.

I think however that, upon the construction of the provisions of the Code, the expression "decree-holder" in s. 311 is not limited to the decree-holder at whose instance the lands were first attached. If such limited construction is the only correct one, then the right of the other decree-holder who applied for execution would, in certain given events, be prejudiced. For instance, if the first decree-holder dies, and if no representative of his applied under s. 311, or if that decree-holder did not, as in this case, choose to point out to the Court the irregularity and apply for a re-sale, then, if no other decree-holder could apply, the irregularity and consequent loss would be incapable of remedy. The excess amount of the mortgage stated is small in this case, still that sum of Rs. 130 and the Rs. 125, the purchase money, would be sufficient, it is alleged, to pay the petitioner and the previous decree-holder. But suppose a case occurred when the excess amount was large, the loss would be serious. If the sale now stands, the purchaser (the mortgagee) will get the land for Rs. 130 less than he contracted to pay, and will retain that sum which ought to be distributed under s. 295.

The definition of "decree-holder" in s. 2 of the Code applies certainly in terms to the case of the present appellant, and although in ordinary circumstances, probably the first attaching decree-holder would be the most proper decree-holder to apply under s. 295 for re-sale if he was willing to do so; but that is no valid reason for holding that an application by any other decree-holder is not provided for by s. 311. It was suggested that if *any*

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decree-holder could apply, all or any number of decree-holders might apply. But in such case, the Judge to whom the application should be made could either refuse to hear the application of any other decree-holder, if the first decree-holder was willing to proceed; or if he was not willing to proceed, then the Judge could appoint any of the other decree-holders to apply under s. 295, as he should think fit.

The rights of all the decree-holders under s. 295 are the same, and the same proceeding must be taken by the subsequent decree-holders to apply to the Court for execution as the first decree-holder took.

From the date that the Court grants the order to execute the decree under s. 245, all proceedings to attachment and sale are directed by the Code to be taken by the *Court*, and the first attaching creditor has no more to do with the attachment and the sale than the subsequent decree-holders. The first attaching decree-holder could not stay the sale even if he was paid *in full* after the other decree-holders had applied to the Court for execution. It was certainly open to the appellant to have informed the Múnsif before the sale that proclamation was wrong, if the appellant was in fact aware of the error before the sale. But apparently the decree-holders were not aware of the error until the sale, or if they were aware of the error, neither applied to have the error corrected. I do not, however, think the omission to do so affects the question.

For the above reasons, I think that the power of any decree-holder to apply under s. 311 is essential to the rights of all decree-holders. I also think that upon the ground on which the Múnsif put his order, it is wrong. I would therefore reverse it and instruct the Múnsif that he is at liberty to entertain the application of the appellant and act on the facts, if he thinks it is a proper case to set aside the sale. Costs to be provided for in the revised order.

BRANDT, J.—It is admitted that the appellant has a right to appeal in this case if she is "the decree-holder" or "a decree-holder" within the terms of s. 311, Civil Procedure Code, and not otherwise.

She is a person holding three decrees for money against the judgment-debtor in execution of a decree against whom another judgment-creditor (the plaintiff in Original Suit No. 537 of 1884)

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attached and eventually brought to sale certain immovable property; and prior to realization of the "assets," *i.e.*, the purchase money paid for the property sold, the appellant had applied to the Court which ordered the sale for execution of his decree against the same judgment-debtor.

The property sold was subject to an encumbrance; inquiry was held by the Court as to this, and the Court allowed the claim of the encumbrancer to the extent of Rs. 300; but, by a mistake in the execution department, it would seem the property was advertised for sale as subject to an encumbrance of Rs. 430.

The encumbrancer himself purchased the property. The appellant applied to the Court which executed the decree to set aside the sale on the grounds that if the amount of the charge on the land had been correctly stated, the property would have sold for a higher price, for a price sufficient to satisfy the appellant's claims in full, and that the mistake constituted a material irregularity, by reason of which the appellant had sustained substantial loss.

The District Múnsif held that there was such an irregularity as would vitiate the sale, but that, as the appellant is not the holder of the decree in executing which the property was attached and sold, she has no *locus standi* under s. 311 of the Code.

If we are to hold that the District Múnsif is wrong in this respect, we must hold that the words "the decree-holder" in that section include "any decree-holder" who has made an application under s. 295.

The Code deals with the sale and delivery of property in sections commencing with 286. There are, first, general rules, ss. 286 to 295 inclusive; then ss. 296 to 303 deal with sale of movable, and s. 304 *et seq.* with the sale of immovable, property. In these sections the holder of a decree is referred to first in s. 293 as "the judgment-creditor;" in s. 294, it is provided that "no holder of a decree" shall purchase without the leave of the Court, and prescribes what shall be done in case of a decree-holder who purchases with such permission; up to s. 320 (beyond which we need not go for present purposes) the only section which contains a reference to the decree-holder is s. 311; and the only persons at whose instance a sale of immovable property under the chapter can be set aside are "the decree-holder," any person whose immovable property has been sold at such sale, and the auction-purchaser.

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It appears to me then that, according to the ordinary rules of construction, the words "the decree-holder" should apply to the decree-holder at whose instance the property has been brought to sale. On the other hand, it is contended that even if the words cannot be read as "any decree-holder,"—and this certainly cannot be, for it could not be contended that a decree-holder who had taken no steps whatever in execution could come under s. 311—they do include any decree-holder who has taken action under s. 295. Section 295 is very curiously worded. The "assets" therein specified are not "assets" until the property had been sold and the proceeds realized; and there cannot strictly speaking be any application "to the Court by which such assets are held, prior to realization" thereof, for there are, according to the terms used, no assets until the purchase money is in the hands of the Court. Some reasonable construction must however be placed on the wording.

The section requires that application be made "for execution" by those holding decrees and desirous of coming to share ratably; it appears to have been generally assumed, and I do not say wrongly, that there is a sufficient application for execution if such decree-holders simply ask to share ratably in the net proceeds when realized.

It is said that great hardship may be inflicted on such decree-holders if they have no means of having sales set aside on good and sufficient grounds.

If the balance of convenience clearly is in favor of the more extended construction to be put on the words "the decree-holder" in s. 311, and such construction is not evidently not allowable, such extended construction should be given. I think that no inference either way can be drawn from the definition of "a decree-holder" in s. 2 of the Code; appellant certainly is *a* decree-holder within the meaning of the term as used in the Code; the only question is as above stated.

Under s. 271 of Act VIII of 1859, the first attaching creditor, even though he proceeded no further and a subsequently attaching creditor brought the property to sale, had priority; s. 295 of the present Code was intended to prevent this and to provide for ratable distribution, after deduction of the costs of the proceedings necessary for and anterior to sale, and of the sale; and the holders of decrees for money only come in last, so that the

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preferential claims of decree-holders having superior rights and of the creditor, at whose cost the sale is carried out, are provided for.

These are difficulties which occur to me from the peculiar wording of s. 295 which I have above indicated; but on the whole, I am not prepared to dissent from my learned colleague in the conclusion arrived at by him, viz., that it is open to us to hold petitioner to be entitled to call the sale in question under s. 311.

I, therefore, concur in the proposed order—*Girdhari Singh* v. *Hurdeo Narain Singh* (1) being authority that a material error in describing the encumbrances on the property sold may be a material irregularity in publishing and conducting the sale.

(1) L.R., 3 I.A., 230.

It appears to me then that, according to the ordinary rules of construction, the words "the decree-holder" should apply to the decree-holder at whose instance the property has been brought to sale. On the other hand, it is contended that even if the words cannot be read as "any decree-holder,"—and this certainly cannot be, for it could not be contended that a decree-holder who had taken no steps whatever in execution could come under s. 311—they do include any decree-holder who has taken action under s. 295. Section 295 is very curiously worded. The "assets" therein specified are not "assets" until the property had been sold and the proceeds realized; and there cannot strictly speaking be any application "to the Court by which such assets are held, prior to realization" thereof, for there are, according to the terms used, no assets until the purchase money is in the hands of the Court. Some reasonable construction must however be placed on the wording.

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1886. July 19. Sept. 29.

YELLAYA (PLAINTIFF), APPELLANT,

and

VIRAYA (DEFENDANT No. 2), RESPONDENT.*

Revenue Recovery Act, s. 59—Limitation—Sale of land subject to mortgage—Suit by mortgagor.

Land which was subject to a mortgage having been sold for arrears of revenue under Act II of 1864 (Madras), the mortgagee's assignee sued to enforce the terms of the bond by sale of the land more than six months after the date of the sale of the land:

Held that the suit was barred by s. 59 of the said Act.

APPEAL from the decree of Venkata Rangayyar, Acting Subordinate Judge at Ellore (Godávari) confirming the decree of K. Venkatáchalam, District Múnsif of Ellore, in suit 759 of 1882.

The facts necessary for the purpose of this report are set out in the judgment of the Court.

Subba Ráu for appellant.

Respondent did not appear.

JUDGMENT.—The appellant Nidadavolu Yellaya is the assignee of the mortgage bond A which was executed by defendant No. 1

(1) L.R., 3 I.A., 230.

* Second Appeal 896 of 1885.

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to defendant No. 4 on the 29th June 1879. By that document the mortgage debt was secured on 68½ cents of inám land now in suit. The revenue payable to Government on some jiráiti land owned by the mortgagor, defendant No. 1, for fasli 1290 fell into arrear. It was considered that if that piece of land was put up to sale, no one might purchase it and the arrear might not be recovered. The land in suit was therefore attached and sold to defendant No. 2, the respondent, under Act II of 1864. The revenue sale took place on the 24th November 1881. When the land was under attachment, the original mortgagee, defendant No. 4, brought to the notice of the tahsíldár the existence of the mortgage, but he was informed that if he paid the arrear, the attachment would be raised. As he failed to do so, the land was sold, and Umidi Viraya (defendant No. 2), the respondent, became purchaser. On the 10th August 1882, the appellant accepted the assignment of the bond A and brought this suit on the ground that what actually passed by the revenue sale was only the right of redemption which the mortgagor had at the date of the sale.

The District Múnsif passed a personal decree in favor of the appellant as against the mortgagor, and also directed payment to the former of the surplus sale proceeds in the hands of the Collector of the District (defendant No. 3), but he exonerated the property in suit from all liability for the debt.

On appeal, the Subordinate Judge confirmed the decree of the District Múnsif on the ground that the suit, which was instituted after the expiration of six months from the date of the sale, was barred by s. 59 of Act II of 1864, and that under s. 42 of the same enactment, the property in the land sold passed to the purchaser free of prior encumbrances.

It is urged in second appeal that both the grounds relied on by the Lower Appellate Court are not good in law. It cannot be denied that what was really intended to be sold and what was sold in fact was, not the mortgagor's right of redemption, but the entire property under mortgage. It would become necessary to determine whether more than the right of redemption was liable to be sold only in case the suit is not barred by s. 59. This section provides that "nothing contained in this Act shall be held to prevent parties aggrieved by any proceedings under this Act, except as hereinbefore provided, from applying for redress; provided that Civil Courts shall not take cognizance of any suit

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instituted by such parties for any such cause of action unless such suit shall be instituted within six months from the time at which the cause of action arose." In the case before us the sale of a larger interest than what was liable to be sold is, according to the appellant, the grievance for which he seeks redress; and the claim, therefore, that the sale was illegal so far as it purported to convey more than the right of redemption appears to us to fall under that section. It may be that the appellant does not seek to annul the sale *in toto*; but its cancelment *pro tanto*, so far as the interest conveyed is in excess of the right of redemption, is also a remedy for an injury caused by a proceeding under the Act. We are of opinion that the suit was properly held to be barred by limitation and dismiss this second appeal.

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. Sept 3.

REFERENCE FROM THE BOARD OF REVENUE UNDER S. 46 OF THE INDIAN STAMP ACT, 1879.*

Stamp Act, sch. II, art. 15 (a)—Receipt—Endorsement of payment on mortgage deed.

An endorsement on a mortgage, acknowledging the receipt of the sum thereby secured is exempt from stamp duty under sch. II, art. 15 (a), of the Indian Stamp Act, 1879.

REFERENCE to the High Court by the Board of Revenue under s. 46 of the Indian Stamp Act, 1879.

On the 1st April 1886 the Collector of Tanjore (J. B. Pennington) made the following reference to the Board of Revenue:—

"The Sub-registrar of Tirukattupalli has impounded an instrument which purports to be a receipt endorsed on a deed of mortgage without possession, whereby the mortgagee acknowledges the receipt of the principal of the original instrument *plus* the interest due on it.

* Referred Case No. 3 of 1886.

REFERENCE UNDER STAMP ACT, S. 46.

"Now, under art. 15 (*a*), sch. II of Act I of 1879, this receipt would appear to be exempted from the payment of any duty; but the Sub-registrar considers that this provision of the Act has been narrowed in its scope by the terms of the resolution of the Board, in their Proceedings, dated 19th December 1883, No. 3852, paragraph 3. He makes a distinction between receipts endorsed on simple bonds and receipts endorsed on mortgage deeds whether simple or usufructuary, and considers that these latter receipts should be duly stamped with one-anna stamp; but I do not know whether this is the opinion of the Board, or, judging from the words 'custody of any specified property,' whether they only distinguish between usufructuary mortgages and mortgages creating only an encumbrance on property without involving its custody or possession. And before drawing the distinctions referred to in paragraph 2, I would submit that the terms of art. 15 (*a*), sch. II, of the Act, are so plain that I do not understand how any reservation in the class of exempted receipts can be made. The wording of art. 15 (*a*), sch. II, of the Act, viz., 'receipts endorsed on or contained in any *instrument* duly stamped' seems wide enough to cover any kind of document.

"I request therefore that the Board will be good enough to inform me whether any distinction was contemplated in their Proceedings, dated 19th December 1883, and, if so, to instruct me as to what classes of receipts are exempt from stamp duty and what not."

The resolution of the Board, dated 27th May 1886, was as follows:—

"The position taken by the Board in their Proceedings of 19th December 1883, No. 3852, was that receipts endorsed on deeds, *which involved the custody of specified property*, amounted to and, therefore, were releases.

"As at present constituted, they doubt whether they were justified in so deciding, or whether, as in Board's Proceedings, dated 27th October 1879, No. 3028, they should, before holding a receipt to be a release, have demanded the additional words of actual relinquishment.

"The present deed, as a case in point, they resolve therefore to refer to the High Court for decision; its *wording* is the receipt of money, its effect the release of land; is it to be exempted as the former, or stamped as the latter?"

REFERENCE UNDER STAMP ACT, s. 46.

The Acting Government Pleader (Mr. *Powell*) for the Board of Revenue.

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

COLLINS, C.J.—We are of opinion that the endorsement on the mortgage bond is exempted from stamp duty under sch. II, art. 15, of the Stamp Act of 1879, it being a receipt within the terms of the exemption.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. [Sept. 24, 25.

KURUPAM ZAMÍNDÁR (PLAINTIFF), APPELLANT,

and

SADASIVA (DEFENDANT), RESPONDENT.*

Limitation Act, sch. II, arts. 178, 179 (3)—*Civil Procedure Code, s.* 583—*Application for refund of moneys levied under decree reversed on appeal—Review rejected—Time not excluded from computation.*

Where a review of judgment has been applied for, and, after notice to the other side, refused, the period during which such application was pending cannot be excluded in computing the period of limitation for execution of the decree under art. 179 (3) of sch. II of the Indian Limitation Act.

Semble.—An application for refund of moneys levied in execution of a decree subsequently reversed on appeal is not governed by art. 179 but by art. 178 of sch. II of the Limitation Act.

APPEAL against an order of J. Kelsall, District Judge of Vizagapatam, in execution proceedings in suit 11 of 1878.

The facts necessary for the purpose of this report appear from the judgment of the Court (Collins, C.J., and Parker, J.).

Subba Ráu for appellant.

Mr. Powell for respondent.

JUDGMENT.—In this case Sri Rájá Vyricherla Suryanáráyana Rázu Bahadur, zamíndár of Kurupam, had sued defendant, Kuchibhotla Sadasiva Parabrahman, for mesne profits, and had got a decree, which was subsequently reversed by the High Court

* Appeal against Order 56 of 188 6.

in Appeal Suit 71 of 1881 on September 26th, 1881. Pending the appeal the zamíndár had collected in execution Rs. 7,100 from defendant.

The zamíndár petitioned the High Court to review the appeal decree, but after notice to defendant the review was refused on October 2nd, 1882.

The present application under s. 583 of the Code of Civil Procedure, for recovery of the Rs. 7,100 levied in execution, was presented on August 6th, 1885, and the appellant contends that it is barred except as to Rs. 70, the costs of the review proceedings.

If the application be regarded as falling under art. 179, sch. II of the Limitation Act, the period of limitation will run from the date of the High Court decree (September 26th, 1881), since clause 3 only applies to cases in which there has been a review of judgment, and in this case the review was refused.

We are disposed however to think that the application is governed by art. 178, since it is not one for execution of a decree or order, but to enforce a benefit by way of restitution under a decree passed in appeal. Such execution is governed by the rules prescribed in the Code for the execution of decrees, and limitation will run from the date when the right to apply accrues. This was on September 26th, 1881, and the pendency of an application for review by the other side did not debar defendants from applying for the refund. The application is therefore barred in either case, except with regard to Rs. 70, the costs of the review proceedings.

The order of the District Court must be modified accordingly, and the respondent must bear appellant's costs in this appeal. It is not necessary now to consider the claim for interest, but we do not think the Judge should have awarded a higher rate than 6 per cent. per annum.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

1886. October 1.

ABDUL RAHIMAN (RESPONDENT), PETITIONER,

and

KUTTI AHMED (PETITIONER), RESPONDENT.*

Act XIX of 1841, *s.* 3—*Civil Procedure Code, s.* 622.

Where a District Court purporting to act under s. 4 of Act XIX of 1841 directed an inventory of the estate of a deceased person to be taken without conforming to the requirements of s. 3 of that Act, the High Court set aside the order under s. 622 of the Code of Civil Procedure as made without jurisdiction.

APPLICATION under s. 622 of the Code of Civil Procedure to set aside an order made by J. W. Best, District Judge of South Canara, on a petition presented under Act XIX of 1841.

On an application made under Act XIX of 1841 by the next friend of Kutti Ahmed, a minor, alleging that he was entitled to the estate of Kunhamed, deceased, his grand-uncle, and praying that an inventory of the estate left by the deceased might be taken, Abdul Rahiman opposed, claiming to be entitled to the said estate under an agreement executed by the deceased which he produced in Court. This agreement was impugned by the minor's mother's sister, Biyatumma, a party to it, who was examined by the Court. The District Judge under these circumstances held that the case was a proper one for the taking of an inventory of the movables and made an order to that effect.

To set aside this order Abdul Rahiman made the present application.

The Acting Advocate-General (Mr. *Shephard*) and *Gopála Ráu* for petitioner.

Mr. *Subramanyam* and *Nárâyana Ráu* for respondent.

JUDGMENT.—In our opinion the District Judge has acted without jurisdiction in making the order to which exception is taken. He has not set forth the facts necessary to show jurisdiction, having regard to the requirements of s. 3 of Act XIX of 1841. On the contrary, after citing the parties and having them before him, he has himself recorded that they may properly be left to their remedy by means of a regular suit, so far as the dispute between them is concerned.

In these circumstances, his jurisdiction under Act XIX of 1841 ceased. The order for taking an inventory had not been made prior to the time when he decided that the parties should be referred to a regular suit, and the Judge had no jurisdiction then to make an order for such inventory to be taken. He directs that the inventory is only to be taken in certain circumstances and under certain conditions; but the Act does not contemplate such an order being made subject to conditions. The order appears to us to be made without jurisdiction and must be set aside on that ground. The respondent must pay the petitioner's costs in this Court.

* Civil Revision Petition 119 of 1886.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. Aug. 20. Oct. 8.

TELLIS (PLAINTIFF), APPELLANT,

and

SALDANHA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Indian Succession Act, 1865, *effect of, on estates of Native Christians previously following Hindú law.*

A and J, brothers, Native Christians, descendants of Brahmans, were living in coparcenary and owned certain land on the date when the Indian Succession Act, 1865, came into force. In 1872, no partition having been made, A died:

Held that J did not take the whole estate on the death of A by survivorship.

APPEAL from the decree of C. Venkoba Ráu, Subordinate Judge at Mangalore (South Canara), modifying the decree of A. Venkataramana Pai, District Múnsif of Mangalore, in suit 286 of 1883.

The facts of the case, so far as they are necessary for the purpose of this report, are set out in the judgment of the Court (Collins, C.J., and Parker, J.).

* Second Appeal 1053 of 1885.

TELLIS v. SALDANHA.

The Acting Advocate-General (Mr. *Shephard*) and *K. Nárá-yana Ráu* for appellant.

Bháshyam Ayyangár and *Strinivása Ráu* for respondents.

JUDGMENT.—The first question raised in this second appeal is a very important one. The question is whether the Hindú rule of survivorship obtains in the families of Native Christians, who were living in undivided coparcenership at the time of the passing of the Succession Act and who have not since effected a partition.

The plaintiff, José Tellis, and Augustine Tellis, the late husband of defendant No. 1, were Native Roman Catholic Christians and were living in coparcenership as to their ancestral lands when the Indian Succession Act came into force in 1866. Their father had died previous to 1866. Augustine Tellis died in 1872, leaving a widow, defendant No. 1, and a daughter, Anna Tellis, defendant No. 2. The plaintiff's contention is that, by the rule of survivorship, he became sole owner of the ancestral property on the death of his brother in 1872 to the exclusion of defendants Nos. 1 and 2.

Both the Courts below have disallowed the plaintiff's claim. The District Múnsif held, on the authority of *Ponnusámi Nádan* v. *Dorasámi Ayyan*,(1) that the succession to the property of Augustine Tellis—including his share in the ancestral estate—was governed by the Succession Act. He referred to a case decided by the same Judges reported in 8, Indian Jurist, page 30, which appeared to him inconsistent with the former ruling, but considered himself bound to follow the ruling in the authorized reports.

On appeal, the Subordinate Judge, though not considering the Jurist case inconsistent, also followed *Ponnusámi Nádan* v. *Dorasámi Ayyan*.

The learned Acting Advocate-General, on second appeal, argues that both these cases are really in favor of the plaintiff's contention. He points out that in the latter case the plaintiff's father died after the Succession Act came into operation and urges that plaintiff may at his birth have acquired an interest to which the rule of survivorship gives effect, and of which the subsequent enactment of the Succession Act will not deprive him. It was urged that the Jurist case was on all fours with the present, since in that case also the father had died subsequent to the passing of

(1) I.L.R., 2 Mad., 209.

the Succession Act; and with regard to joint family property there was properly speaking no succession, but the rule of survivorship applied. The Succession Act, it was said, applied only to property which was inheritable.

Against this Mr. *Bháshyam Ayyangár* urges that the term "joint tenants," as applied to Hindú coparceners with respect to their ancestral property, is misleading, since among them the joint tenancy with rights of survivorship is by operation of law and not by consent of the parties. He argues that, under the law of the Mitákshará, the chance of an increased share on partition accruing by the rule of survivorship is merely a contingent or possible right, and not a vested right; that if it were a vested right it might be attached and sold by a creditor, but it is not attachable (s. 266, cl. (*k*) of the Code of Civil Procedure); that the cases to which the Succession Act does not apply are cases in which the parties are Hindús by religion—*Joseph Vathiar's case*; (1) and hence that it is impossible, where the Succession Act is in force, to give to a Christian a contingent right which could only accrue to him were he a Hindú by religion and governed by Hindú law.

In reply the Acting Advocate-General argues that when two persons have come into such a relation that the rule of survivorship applies there can be no question of inheritance, and that whatever would be the case under the Bengal law, the plaintiff's claim by survivorship is good under the law of the Mitákshará. (Mayne, s. 242.)

The passage relied on by the plaintiff in *Ponnusámi Nádan* v. *Dorasámi Ayyan* does not appear to us to carry the proposition further than this—that where a Native Christian, whose family had up to 1866 observed the Hindú law of succession, had by such law acquired at his birth an interest in ancestral property, the subsequent enactment of the Succession Act would not divest him of such interest. It would still be open, therefore, to a son to sue his father and brother for a partition and separation of such share in the ancestral family estate. But it does not follow from this that until a partition was made all the rules of Hindú law would remain applicable after the passing of the Succession Act. It will be hardly contended that a managing member could bind the shares of the others, or that it would not be open to each member to give

(1) 7 M.H.C.R., 121.

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or bequeath his share to a stranger, and yet such alienation would be opposed to, and inoperative under, Hindú law, though valid under the Succession Act.

In the Jurist case the present point did not arise. That was a suit brought by one of three brothers (Roman Catholic Christians), whose family had adhered to the Hindú law of succession up to 1866 and had not afterwards effected any partition. The father died in 1869 and the ancestral property continued to be managed by the second son as joint family property. On a suit brought by one of the brothers for partition, it was held that the Indian Succession Act did not apply, since on the father's death the estate which had been held by him and his three sons jointly continued to be held by the survivors, and that as there was no separate estate, no letters of administration were required. It was also held that the plaintiff's share was one-third, not one-fourth.

In that case no widow or daughter appeared to put in any claim under the Succession Act, and the three brothers had of course under either law equal rights in the father's share. As the only property in suit was property which the members of the family had practically agreed among themselves to treat as if it were joint family property under Hindú law, it would naturally follow that the plaintiff was entitled to one-third, and the question now in issue did not arise.

We are of opinion that coparcenership and the right of survivorship are incidents peculiar to Hindú law, which law, as far as it affected Native Christians, was repealed by the Succession Act. The Succession Act did not however take away any vested rights, and Augustine Tellis had a vested interest on 1st January 1866. That interest continued to vest in him till his death in 1872, when a case of intestacy arose which was governed by the Succession Act and not a case of coparcenary and survivorship governed by Hindú law. The right of survivorship pre-supposes that the rule of Hindú law is the rule of decision at the date of the coparcener's death, but the effect of the Succession Act was to convert vested coparcenary rights into individual rights and to subject such rights in cases of intestacy to the rules of succession provided by that Act. We are of opinion that the decision of the Courts below was right.

The next point is whether defendants Nos. 1 and 2 are liable to account to plaintiff for half rent for land No. 2 for three years or six. The Subordinate Judge ruled that the claim was governed

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by art. 61 (apparently a clerical error for 62) of schedule II of the Limitation Act, and it is argued for the plaintiff that the case is similar to *Gooroo Das Pyne* v. *Ram Narain Sahoo.*(1)

Per contra Johuri Mahton v. *Thakoor Nath Lukee* (2) and *Kundun Lal* v. *Bansi Dhar* (3) were referred to. The Calcutta case does not apply. The Allahabad case was one in which one of two heirs (each entitled to a moiety of deceased's estate) received the whole of a certain sum of money in a banker's hands. It was held that art. 62 there governed the case.

The present case is that defendants Nos. 1 and 2, who were jointly entitled with plaintiff to the whole of rent for land No. 2, are called upon to give up to plaintiff his moiety. We think art. 62 will govern the case.

Lastly, it is urged that the Subordinate Judge improperly refused to enforce the clause for forfeiture against defendants Nos. 3 and 4. It is found that plaintiff refused to accept from these defendants a moiety of the rent, which was really all he was entitled to, and in any case it would be extremely unjust to enforce such a clause under present circumstances against tenants who have been holding on a mulgaini lease since 1841. The case is similar to *Nárayana* v. *Nárâyana*,(4) and we think the penalty is one which should be relieved against.

The second appeal, therefore, fails and we dismiss it with costs.

PRIVY COUNCIL.

APPA RAO, *In re.*

P.C.
J.C.*
1886.
July 17.

Re-hearing—Infancy of party at the time of the hearing of appeal—"Res noviter" not itself a ground for a re-hearing.

There may be exceptional circumstances which will warrant the Judicial Committee in allowing, even after an order of Her Majesty in Council has issued upon their report, a re-hearing at the instance of one of the parties. But this is an indulgence with a view mainly to doing justice when by some accident, without any blame, the party has not been heard, and an order has been made, inadvertently, as if he had been heard.

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(1) I.L.R., 11 I.A., 59.
(2) I.L.R., 5 Cal., 830.
(3) I.L.R., 3 All., 170.
(4) I.L.R., 6 Mad., 327.

* *Present:* Lord WATSON, Lord HOBHOUSE, Sir BARNES PEACOCK, and Sir RICHARD COUCH.

APPA RAO, *In re.*

In one of two appeals in suits relating to the same estate, judgment was given by the Judicial Committee after a hearing on the merits. In the other, judgment was given to the same effect as in the first, it being conceded between the parties that the questions in both suits were the same. After both judgments had been reported to Her Majesty, and confirmed by her orders in Council, a petition for a re-hearing was presented:

Held, that, even assuming that a case of *res noviter* had been made out (which was not, however, the fact), the orders were final, and the petition must be rejected.

PETITION for the re-hearing of two appeals in which orders of Her Majesty in Council (15th December 1879 and 3rd May 1882) had issued.

The question decided in the two suits in which the above orders were made, related to the partibility of the new zamíndári of Nuzvid, in the Kondapalli Circar, granted by sanad on the 8th December 1802. After the death of Rájá Shobhanadri, the son of the grantee, in 1868, leaving six sons, his third son Narasimha brought the first of the two suits against the eldest son Narayya, joining the other four as defendants, for a declaration of his share in the zamíndári. In 1874, while this suit was pending, Narayya died, and the Court of Wards, on behalf of his minor son Gopala, the present petitioner, maintained the defence that the zamíndári was, as it had been decided to be by the High Court, impartible. This was not upheld by the Judicial Committee, it being held by their Lordships, on 13th December 1879, that as the original zamíndári of Nuzvid had been declared forfeited, and the new zamíndári (consisting of six parganas, part of the old) had been granted without any provision for its descent otherwise than according to the prevailing law, it descended according to the ordinary rules of inheritance, and was not impartible; *Rája Venkata Rao* v. *Court of Wards.*(1) The second of the two suits was instituted in 1873 by three of the brothers for their shares in the same zamíndári. This was pending in 1879, when the above decision was given; the defendants, one of whom was the present petitioner, no longer contested the question of partibility; and judgment went against him in this suit also on 15th March 1882; *Appa Rao* v. *The Court of Wards.*(2)

Both judgments having been followed in due course by orders of Her Majesty in Council, the petitioner now alleged that,

(1) I.L.R., 2 Mad., 128; L.R., 7 I.A., 38.
(2) I.L.R., 5 Mad., 237; L.R., 9 I.A., 125.

having been an infant at the hearing of the above appeals in 1879 and 1882, he attained full age on 4th December 1882. Also, that he had discovered that there were official papers at Madras, showing that the old zamíndári of Nuzvid, never having been declared by the Government to have been forfeited, was held by it only with a view to certain re-imbursements being made out of the revenue; and, further, that previously to the sanad of the 8th December 1802 having been granted, the Government had already ordered that the zamíndári should be restored to the family. The reports of Revenue officers in charge of Nuzvid at the time, and other documents were specified.

Mr. *H. M. Bompas, Q.C.* (with whom was Mr. *Nanda Lal Ghose*), in support of the petition relied mainly on (1) the minority of the petitioner at the time of the hearings in 1879 and 1882, and inability to defend his interests himself, coupled with (2) the discovery of fresh evidence, which had it been forthcoming would, it was contended, have altered materially the case presented. Reference was made to the English rules of equity in regard to suits against infants, they being allowed on coming of age to answer afresh as defendants, and to give fresh evidence in support, although the guardian might have appeared and answered; *Kelsall* v. *Kelsall.*(1) The Indian High Courts admitted reviews on an infant party attaining majority; *Dabee Dutt Shahoo* v. *Subodra Bibee.*(2) Again, the Civil Procedure of the Indian Courts had always allowed reviews on the discovery of fresh evidence, and the Code now in force, Act XIV of 1882, provided for this in s. 623. The petitioner, accordingly, might have obtained a review in the High Court, had the decision been against him, and had the question come up in India. The Judicial Committee, however, could re-hear the appeals. Re-hearings were within its discretion, and had been allowed even after orders in Council had confirmed the Committee's reports; see *Rajunder Narain Rae* v. *Bijai Govind Sing,*(3) the precedents cited in the argument of Sir J. D. Coleridge in *Hebbert* v. *Purchas,*(4) and "*The Singapore*" (5), in which last the authorities were all collected in the argument. Reference was also made to Macpherson's Practice of the Judicial

(1) 2 Myl. & Keen, 409.
(2) 25 W.R., 449.
(3) 2 M.I.A., 181.
(4) L.R., 3 P.C., 664.
(5) L.R., 1 P.C., 378; see pp. 386, 387.

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Committee, p. 165, where the case of *Raja Deeda Hossein* v. *Ranee Zahuran Nissa* was stated.

The Judicial Committee having power to re-hear the appeals, the fresh evidence would affect the result, and would negative the premiss of fact on which the judgment of 1879 had proceeded. That was that the Nuzvid zamíndárí, as granted in 1802, could not be identified with any estate, or title, existing prior to the issue of the sanad of 1802, which put Nuzvid on the same footing with ordinary estates. So far from this being the fact, the fresh evidence would show that the Government had virtually restored the zamíndárí before the sanad was granted, and the order of the Government, not the sanad, constituted the actual grant of the estate. This was the main point to which the fresh evidence had reference; and by it the supposed disconnection between the old and new Nuzvid would be found not to exist. This want of connection between the new and the old zamíndáris formed the main distinction which had been taken between the Nuzvid case and that of the Sivaganga zamíndárí; see the judgment in *Muttuvadaghanada Tevar* v. *Dora Singha Tevar*,(1) viz., that in the latter case the istimrár zamíndár received his estate back on no other terms than the old terms. The evidence would show this distinction to be unfounded, and it would appear that Nuzvid was impartible as Sivaganga had been held to be; the latter being, also, but a portion of the larger impartible zamíndárí of Ramnád, as the new Nuzvid was of the old.

In regard to whether the Judicial Committee should consider the evidence itself, or send the case back to the Indian Courts, to take the evidence, and deal with it, reference was made to *Meer Mahomed Hossein* v. *Forbes*,(2) *Muttusawmy* v. *Vencataswara*,(3) *Juveer Bhaee* v. *Vuruj Bhaee*.(4)

Their Lordships' judgment was delivered by

LORD WATSON.—Their Lordships are of opinion that this petition must be refused.

The petitioner asks a re-hearing of the judgment of this Board in these two appeals which was finally approved by Her Majesty in Council in the year 1883. The ground upon which he makes the application is, that he has discovered certain new matter which

(1) I.L.R., 3 Mad., 290, at pp. 304, 305; L.R., 8 I.A., 99.
(2) L.R., 2 I.A., 1. (3) 12 M.I.A., 203. (4) 3 M.I.A., 324.

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would, if it had been produced in these appeals, have materially affected the judgment of the Board. After hearing a very full explanation from counsel at the bar, it appears to their Lordships to be exceedingly doubtful whether the documentary evidence, which is said to be new, could have had any bearing or any effect upon the decision of the Board. But it is hardly necessary to consider that point, because some of the documents which are alleged to be new are printed at length in the record formerly before this Board; and that which is now represented by the petitioner to be the most important of them all is a recommendation of the Special Commissioner, approved of by the Governor in Council on December 3rd, 1802. That document is fully and correctly described in the record, so that its existence was known to the parties. In short, it is certain that most of the documents were well known to the parties, and were actually produced, and that, with reasonable care and diligence, all of them might have been recovered and made evidence, by the ordinary methods of procedure.

Their Lordships are unwilling to dispose of this application on these grounds alone. They are willing to assume, for the purposes of this petition, that a relevant case of *res noviter* is set forth in it,—new matter which would, if it had been submitted to the consideration of this Board, possibly have led to a different decision from that which was formerly arrived at. But in considering the petitioner's motion for a re-hearing, the following facts must be kept in view. It is not alleged that there was any informality in the conduct of these suits from their inception to their close. Both parties appeared before the Committee; they were fully heard upon the merits of the appeals, the petitioner being at that time represented by the Court of Wards. It is not said that there was any error in framing the judgment of this Board, or that it did not fully and accurately express what the Board intended to decide. Then it was reported to Her Majesty, and was confirmed by regular orders in Council, dated the 3rd May 1882, and the 19th July 1883. No authority has been cited to their Lordships which can warrant them in granting a re-hearing under such circumstances as these. It is quite true that there may be exceptional circumstances which will warrant this Board, even after their advice has been acted upon by Her Majesty in Council, in allowing a case to be re-heard at the instance of one of the parties. The cases

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in which that may be competently done are explained by Lord Brougham in the case of *Rajunder Narain Rae* v. *Bijai Govind Sing.*(1) His Lordship properly describes this privilege, when allowed, not as a right, but as an indulgence. At page 220 of the second volume of Moore's Indian Appeals, his Lordship says: "It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, where, by some accident, without any blame, the party has not been heard, and an order has been inadvertently made as if the party had been heard." Even before report, whilst the decision of the Board is not yet *res judicata*, great caution has been observed in permitting the re-hearing of appeals. In the last case to which we were referred, that of *Hebbert* v. *Purchas*, in Moore's Reports, volume 7, N.S., where a litigant alleged, before report and approval, that he had been disabled by want of means from appearing and maintaining his case, the Lord Chancellor said:—"Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finality of the decisions of the Judicial Committee, their Lordships are of opinion that expediency requires that the prayer of the petitions should not be acceded to, and that they should be refused." There is a salutary maxim which ought to be observed by all Courts of last resort—*Interest reipublicæ ut sit finis litium.* Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this.

Petition rejected.

Solicitors for the petitioner—*Scott & Spalding.*

(1) 2 M.I.A., 181.

APPELLATE CIVIL.

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

1886. July 15. October 18.

SRI DEVI (DEFENDANT No. 10), APPELLANT,

and

KELU ERADI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Malabar law—Decree against karnavan and senior anandravan not binding on junior members—Civil Procedure Code, s. 13, expl. 5, s. 30.

A decree having been obtained against the karnavan and senior anandravan of a Malabar tarwad whereby the tarwad was dispossessed of certain land, the junior members of the tarwad who had not been impleaded in the suit sued to recover the land:

Held, that the plaintiffs were entitled to recover upon proof that the decree in the former suit was not substantially correct, and that they were not bound to prove *mala fides* on the part of their karnavan in defending the former suit as a condition precedent to recovery.

APPEAL from the decree of H. J. Stokes, Acting District Judge of South Malabar, reversing the decree of J. A. D'Rozario, Acting District Múnsif of Angadipuram, in suit 514 of 1883.

Suit by Kelu Eradi and seven others, junior members of the Patharikat Arikkare tarwad, against (1) their karnavan Unni, (2) their senior anandravan Manissa, (3) Sri Devi, Valia Thamburatti of the Puthia Kovilagam, and six others, to recover seven parcels of land.

In 1880, the predecessor of defendant No. 3 obtained a decree for the possession of this land in a suit to which defendants 1 and 2 were parties, and Krishnan, Cheria Thamburan of the Puthia Kovilagam (defendant No. 4), purchased this decree and obtained possession of the land.

Defendants 5—9 were tenants of defendant No. 4.

Defendant No. 3 having died, her representative was impleaded as defendant No. 10.

The Múnsif dismissed the suit. Plaintiffs appealed.

The District Judge decreed the claim. Defendant No. 10 appealed.

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

* Second Appeal 982 of 1885.

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Gópálan Náyar for appellant.

The Acting Advocate-General (Mr. *Shephard*) for the respondents.

JUDGMENT.—The lands in suit originally belonged to the tarwad now consisting of the plaintiffs (respondents) and defendants Nos. 1 and 2, the karnavan and senior anandravan of the tarwad.

It is the case for the appellant that the jenm right was in 1839 sold to her predecessor in title the then Thamburatti of the Puthia Kovilagam ; that at the time of this sale they were held on an outstanding kánam by one Unnian ; and having been demised back on kánam by the Kovilagam to defendant No. 1 as karnavan of his tarwad, the latter in 1858 sued the tenants in occupation to eject them, on which occasion defendant No. 1 in his plaint sued as holding on a kánam demise, from the Puthia Kovilagam. This was in original suit 680 of 1858. The Kovilagam, in original suit 172 of 1879, sued the present defendants, Nos. 1 and 2, and others, tenants.

The defendants in that suit denied the alleged sale of the jenm right to the properties then and now in suit ; and the present defendant, No. 2, pleaded that the admission of his karnavan (present defendant No. 1) in the suit in 1858 was false and fraudulent; and the junior members of the tarwad now sue to establish their jenm right.

In the suit in 1879 the appellant's jenm title was held proved, though the finding was that a document which was produced to prove it was not genuine: the admission of defendant No. 1 in 1858 coupled with other facts was, however, considered sufficient to entitle the Kovilagam to a decree: in execution of which the tarwad was dispossessed.

In the present suit the District Múnsif held that the admission of defendant No. 1 in 1858 was made in good faith, and is binding on the tarwad. A document, purporting to be the jenm deed of 1839, was produced in this case, and the District Múnsif thought it certainly was not a genuine document, but the introduction of a fabricated document was held not sufficient to prove that the admission of defendant No. 1 in 1858 was the result of fraud and collusion between the defendant No. 1 and the Kovilagam against the rest of the tarwad.

The District Judge held that the other members of the tarwad

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are not bound, nor even affected, by the admission of their karnavan in 1858 ; and that that admission was false, there having been no sale of the jenm right to the Kovilagam in 1839, and that it was made by defendant No. 1 in fraud of his tarwad to oblige the representative of the Kovilagam whose kariasthan (agent or manager) he was, and at a time when he was not managing the affairs of the tarwad, nor living with the family. As showing that the Kovilagam did not acquire the jenm title in 1839, the Judge says the plaintiff in the suit of 1879 did not know on what grounds or on what documents to base the alleged title; and this alone (he says) is sufficient to show the alleged deed of sale to be a forgery. Decree was accordingly passed in favor of the respondents.

It is contended in appeal that it lay upon the respondents to prove affirmatively that the admission of defendant No. 1 in 1858 was made fraudulently ; that a claim to set aside an admission as fraudulently made is barred by time ; that it is not alleged that there was any fraud on the part of defendant No. 2 in the matter of original suit No. 172 of 1879, to which he was a party ; that on the contrary, defendant No. 2 and the other defendants in that suit then pleaded that the admission of defendant No. 1 in 1858 was fraudulent, and the suit was fully contested in this respect; and that where a suit has been so defended, the tarwad should not be permitted to have the same issue tried over again on an allegation of fraud in respect of admission made by the karnavan in 1858, even if such suit be not barred by time.

For the respondents, it is contended that the District Judge finds fraud on the part of the karnavan established ; and, as to the senior anandravan being a party, that this cannot estop the other members from suing, as the anandravan could not represent the tarwad.

We shall later on refer in more detail to the Full Bench case ; *Ittiachan* v. *Velappan*.(1)

It was sought in the present appeal to distinguish the cases disposed of by the Full Bench from the present, as relating only to property attached or sold in execution of a decree ; but we must not overlook the fact that regard was had in the cases then under consideration to the laxity of procedure which for many years

(1) I. L. R., 8 Mad., 484.

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prevailed in Malabar, and to the extent to which concession might be made in such cases.

The substantial question then is, whether the defendants Nos. 1 and 2 sufficiently represented the respondents' tarwad in original suit 172 of 1879, and whether the decision therein bars the present suit. The issue whether the jenm title was in the appellant's Kovilagam or in the respondents' tarwad was also a material issue in the former suit, and the respondents' karnavan and senior anandravan were party defendants. The former decision would clearly be a bar if the respondents could be taken to have been parties to that suit, unless they showed that those who were actually parties did not defend the title of the tarwad *bonâ fide*. Whether this can be taken to be so in this case is the real question which we have now to consider.

The decision in *V. Narâyanan Nambudri* v. *V. Nârayanan Nambudri*(1) is a clear authority for the position that Explanation V of s. 13 of the Code of Civil Procedure is not limited to the case of a suit in which the provisions of s. 30 were complied with, and we should follow it if subsequent decisions did not throw doubt upon it. In that case it was also found as a fact that the plaintiff in the second suit assisted the karnavan in defending the first suit.

This decision was not followed in *Kombi* v. *Lakshmi*.(2) It was there held that the decree against a person who happened to be the karnavan of a tarwad is not necessarily binding on the tarwad in the absence of fraud, and that if it is sought to bind the tarwad, the procedure laid down in s. 30 must be followed. In that case, a sale in execution of a decree against one who was a karnavan was set aside at the instance of the other members of the tarwad.

The decision in *Gopalan* v. *Valia Tamburatti*(3) proceeded on the ground that a perpetual lease granted to a tarwad was forfeited by the denial of the landlord's title by the karnavan of the tarwad, and that, unless the karnavan was shown to have acted in fraud of the tarwad, in denying the title, the leasehold interest which was forfeited in law could not be restored at the suit of an anandravan. Alluding to s. 30 of the Code of Civil Procedure, the Court then observed that it might be doubted how far the

(1) I.L.R., 2 Mad., 328. (2) I.L.R., 5. Mad., 201. (3) I.L.R., 7 Mad., 87.

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practice would be now upheld whereby the karnavan was recognized as representing the tarwad and entitled to sue or defend suits as such representative, without the association of the other members of the tarwad, who were nevertheless held bound by decrees passed in such suits unless they showed *mala fides* in their representative.

In this state of decisions, the legal effect of the procedure which had prevailed in Malabar was considered by the Full Bench in *Ittiachan* v. *Velappan*.(1) The grounds of decision unanimously adopted by the Court were (I) when the karnavan of a tarwad was not impleaded as such in a suit, and there was nothing on the face of the proceedings to show that it was intended to implead him in his representative character, tarwad property could not be attached and sold in execution of a decree, even though it was proved that the decree was obtained for a debt binding on the tarwad, and (II) that, although the property of a tarwad might be attached and sold in execution of a decree when the karnavan was sued as representative of the tarwad, members of the tarwad who were not parties to the proceedings and had not been represented in the manner prescribed by the Code of Civil Procedure were not estopped from showing that the debt for which the decree was passed was not binding on the tarwad. The principles on which the grounds of decision were formulated are (I) that a decree can only operate *inter partes*; (II) that if it is desired to extend its operation to those who are not parties to the suit, or who do not claim under them, the procedure prescribed by s. 30 should be followed; and (III) that a concession can legally be made in view of the irregular practice in Malabar only to the extent indicated by the ruling of Privy Council in *Bissessur Lall Sahoo* v. *Maharaja Lachmessur Singh*.(2) In that case the Judicial Committee observed that, although there may have been some irregularity in drawing up the decrees then in question, they were substantially decrees in respect of a joint debt of the family, and against the representative of the family and might be properly executed against the joint family property. Hence it was held by the Full Bench that the intention to implead the karnavan as representative of the tarwad must appear from the proceedings in the first suit, and that the debt recognized by the decree must be binding on the entire tarwad.

(1) I.L.R., 8 Mad., 484. (2) L.R., 6 I.A., 237.

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Applying these principles to the case before us, we do not see our way to saying that the respondents were bound by the decree in the suit of 1879, on the ground that their karnavan then in good faith opposed the appellant's claim. There can be no doubt that the association of karnavan and the senior anandravan may be taken to disclose an intention on the part of the appellant to implead the respondents' tarwad; but upon the facts found, we must hold that the respondents have shown that the former decree was *not* substantially correct. The Full Bench decision precludes our holding that the decision against a karnavan is binding on the members of the tarwad unless they prove *mala fides* in him, in a suit to which they were not actually or constructively parties; if they were so, it would be immaterial whether the karnavan acted in good faith or otherwise: if they were not parties actually or constructively, it is open to them to show that the former decree is substantially incorrect, and therefore is not binding on them.

It is urged that the Judge was in error in directing that the mesne profits be ascertained in execution. But it is provided by s. 212 of the Code of Civil Procedure that the Court may determine the amount of mesne profits by the decree itself, or may direct an inquiry and dispose of the same by further orders. This objection to the decree appealed against must then be over-ruled.

Another contention is that the suit is barred by limitation. The respondents sued to recover certain lands of which they lost possession subsequent to 1883. Assuming that they are entitled to recover possession, their claim is certainly not barred by lapse of time. In referring to the admission made by defendant No. 1 in 1858 as fraudulent, the respondents only intended to anticipate a plea on the part of the appellant and to avoid it.

As to the objection that the burden of proving fraud lay on the respondents, the question does not arise upon the facts found, inasmuch as both parties produced evidence in support of their several contentions, and the respondents are found to have proved the jenm title of their tarwad. The result is that the second appeal fails, and we dismiss it with costs.

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.

REFERENCE FROM THE BOARD OF REVENUE UNDER S. 46 OF THE INDIAN STAMP ACT, 1879.*

Stamp Act, Sch. II, Art. 15 (b)—Receipt given by Secretary of Club to a Member for Club bill.

Where a receipt in writing is given by the Secretary or other Manager of a Club to a Member acknowledging a payment above Rs. 20 on account of a Club bill, it is liable to stamp duty.

CASE stated by the Board of Revenue under s. 46 of the Indian Stamp Act, 1879.

The case was stated as follows :—

"This case was referred by the Collector of Madras, on an application preferred to him by the Secretary of the Madras Club to determine the question whether receipts granted by him to Members of the Club for sums paid in liquidation of Club accounts exceeding Rs. 20 in amount are liable to stamp duty, or are exempt under cl. (*b*), art. 15, sch. II of the Act.

"The primary argument in support of exemption is 'no consideration,' because the property of the Club is the property of each of its members (all members being jointly and severally liable for the debts of the Club). In making a payment, therefore, a member is not paying the Secretary, but himself. It is further urged that, as members are not legally liable to be sued for their Club bills, a legal acquittance cannot be demanded for what is not a legal indebtedness.

"On the other hand, the argument of 'no consideration' is met by the assertion that the goods supplied represent the consideration for the money paid, it being pointed out that, granting the joint ownership of the whole body of members in the Club property, the purchase by an individual member of any portion of the com-

* Referred Case 3 of 1885.

REFERENCE UNDER STAMP ACT, s. 46.

mon property is an ordinary mercantile transaction, the receipt evidencing which becomes liable to stamp duty."

The Acting Government Pleader (Mr. *Powell*) for the Board of Revenue.

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

TURNER, C.J.—We assume that there is nothing in the rules of the Madras Club which distinguishes the liability of members of that Club from the liability of members of other similar societies.

The members of the Club agree that, in consideration of certain payments, they shall be supplied with certain advantages gratuitously and with accommodation and refreshments on payment of certain charges. A member engages to pay his subscriptions and also to pay for such accommodation and refreshments, as are supplied on credit, and this liability is a liability which arises out of a contract not prohibited by law.

It has been held that a Club is not a partnership and therefore that its members are not precluded from enforcing contracts made with a managing member or members in a Court of Law as distinguished from a Court of Equity; *Caldicott* v. *Griffiths*,(1) also *Ragget* v. *Bishop*,(2) *Ragget* v. *Musgrave*.(3)

It is merely a matter of procedure as to the form in which the liability of a member for debts due to the Club is to be enforced.

If therefore we are to hold that a receipt is only an acknowledgment of a payment made in satisfaction of a debt or demand, we should hold that on payment of a Club bill there is a satisfaction of a debt or demand, but the words of the Act are sufficiently large to cover other payments of money for consideration.

We therefore reply that, where a receipt in writing is given by the Secretary or other Manager of a Club to a member acknowledging a payment in amount above Rs. 20, it is liable to a receipt stamp.

(1) 8 Ex., 898. (2) 2 C. & P., 343. (3) 2 C. & P., 556.

APPELLATE CIVIL.

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

1886. Oct. 14, Nov. 12.

CHIDAMBARA (PLAINTIFF), APPELLANT,

and

THIRUMANI (DEFENDANT No. 2), RESPONDENT.*

Cause of action—Suit for damages caused by false statement of witness in a suit.

No action will lie against a witness for making a false statement in the course of a judicial proceeding.

APPEAL from the decree of T. Kánagasabai Mudaliar, Subordinate Judge at Tanjore, dismissing an appeal from the decree of H. Strinivása Ráu, District Múnsif of Kumbakonam, in suit 459 of 1883.

Plaintiff Chidambara Chetti sued Dandayuda Chetti for Rs. 1,292-6-0 damages. It was alleged in the plaint that, owing to a false statement made by defendant as witness in a suit brought by one Saminátha Chetti against plaintiff, to the effect that a certain deed was lost, the Court passed a decree against plaintiff, and plaintiff was obliged to pay the amount now sued for. It was also alleged in the plaint that defendant fraudulently induced Saminátha Chetti to bring the said suit.

Defendant died pending the suit, and his minor son, Tirumani Chetti, was made defendant.

An objection on his behalf, that the cause of action did not survive, was overruled, but the suit was dismissed on the ground that it would not lie.

On appeal the decree was confirmed on the ground that the damages were too remote.

Plaintiff appealed.

Rámachandra Ráu Saheb for appellant.

Rámá Ráu for respondent.

JUDGMENT.—The appellant and his brother, Saminátha Chetti, entered into a partition on the 19th March 1879, and it was arranged that the former was to pay the latter a sum of Rs. 595. The appellant borrowed Rs. 405 more and executed an unregistered

* Second Appeal 150 of 1886.

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hypothecation bond for Rs. 1,000 in favor of the latter. In May and June 1879 the appellant sold the hypothecated lands to the respondent, who undertook to pay Saminátha Chetti's debt out of the purchase money. It was provided by the partition-deed that Saminátha Chetti should redeem some 8 pangus of land mortgaged with possession to the respondent on the 15th February 1873 for Rs. 8,000; and, in accordance with this provision, Saminátha Chetti paid, on the 19th July 1879, Rs. 7,000 to the respondent; took credit for Rs. 1,000, due to him by the appellant, and redeemed the property. The appellant's case was that the respondent since colluded with Saminátha Chetti, who was his son-in-law, and instigated him to institute a suit against the appellant for the recovery of Rs. 590 with interest due thereon; that during the trial of the suit the respondent, who was cited by him as a witness to prove payment, falsely and fraudulently stated that the hypothecation bond for Rs. 1,000, which was returned to him by Saminátha Chetti on payment, was lost, and that by reason of its non-production the other evidence which he produced to prove payment was discredited, and that a decree was passed against him for the amount sued for with interest and costs in favor of Saminátha Chetti, and that on the 10th December 1882 he was obliged to pay in satisfaction of that decree Rs. 1,292-6-0, and that, as this loss entailed upon him was due to the false evidence which the appellant gave, viz., that the hypothecation bond was lost whilst it was really in his possession, he claimed a decree for compensation. Both the Courts below dismissed the suit with costs. The District Múnsif considered that it was not shown that the respondent's evidence was false, and assuming that it was, he was only liable to be prosecuted for giving false evidence. The Subordinate Judge observed on appeal that, though the hypothecation deed was suppressed, other means of proving payment was available to the appellant, and for his failure to use them, the respondent was not responsible. He rested his decision on the ground that the damage sustained by the appellant was not the direct and proximate result of the wrongful act imputed to the respondent. It is urged in second appeal, (I) that the appellant had a good cause of action against the respondent, and (II) that the means at his disposal of proving payment was used by him, and that they failed because of the non-production by the respondent of the hypothecation bond which he had in his possession.

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We do not think that this second appeal can be supported. No action will lie against a witness for making a false statement in the course of a judicial proceeding, and the proper remedy is a prosecution for giving false evidence. In *Barber* v. *Lesiter* (1) Erle, C.J., observed: "It has been decided that no action lies against a witness for uttering a false statement in the course of a judicial proceeding, even though it is alleged to have been done falsely and maliciously and damage results therefrom to the plaintiff, the proper course being a prosecution for perjury, which is probably what was meant by Lord Hale in *Vanderberg* v. *Blake* when he says that to allow the action whilst the judgment is in force would be to blow the judgment off by a side wind." In the case before us, the respondent stated in his evidence that he paid the debt due to Saminátha Chetti and he was not credited, not simply because his statement that he lost the hypothecation bond was regarded with suspicion, but also for other reasons which had nothing to do with the respondent. It was the action of the Court in not accepting the evidence as a whole as proof of payment that is the proximate cause of the damage sustained by the appellant. Against him no action can be maintained either for conspiracy or any other wrong, unless it is clearly shown that the damage to the appellant was the necessary and proximate result of the respondent's act. There were two causes to which the damage might be referred, viz., the suppression of the hypothecation bond by the respondent and the weight which the Court attached to the evidence which was produced by the appellant to show that it was fraudulently suppressed and that the plea of payment was true, and that of those causes the act of the Court was the proximate and direct cause. Further, it is found by the District Múnsif that in stating that the hypothecation bond was lost, the respondent probably spoke the truth and the Subordinate Judge accepted the finding. On this ground also, this appeal must fail, and we dismiss it with costs.

(1) 7 C.B.N.S., 187.

APPELLATE CIVIL.

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

1886. July 14, Oct. 16.

GANGAYYA AND OTHERS (PLAINTIFFS), APPELLANTS,

and

MAHÁLAKSHMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Specific Relief Act, s. 42—Suit by reversioners of Hindú widow.

The plaintiffs, uncle's sons of R, a deceased Hindú, brought a suit as reversioners of R, for a declaration that certain alienations made by M, the widow of R, were not binding beyond the lifetime of M.

The District Judge held on the strength of *Greeman Singh* v. *Wahari Lall Singh* (I.L.R., 8 Cal., 12) that the suit would not lie under s. 42 of the Specific Relief Act:

Held, that the suit would lie.

APPEAL from the decree of H. LeFanu, Acting District Judge of Kistna, confirming the decree of O. S. R. Kristnama, District Múnsif of Masulipatam, in suit 687 of 1883.

The facts necessary for the purpose of this report appear from the judgment.

The Acting Advocate-General (Mr. *Shephard*) for appellants.

Anandáchárlu for respondents.

The Court (Muttusámi Ayyar and Brandt, JJ.) delivered the following

JUDGMENT:—The appellants, Adusumilli Gangayya and two others, claiming to be entitled in reversion to certain property on the death of respondent No. 1 Mahálakshmi, the widow of one Pedda Ramana, whose uncle's sons the appellants allege themselves to be, sued for a declaration that certain alienations of the said property made by respondent No. 1 to Upalapati Seshayya and Sayana Subbanna, respondents Nos. 2 and 3, are void as against them except for the term of the widow's life. The respondents pleaded among other things that the suit is not maintainable, and the District Judge, on the authority of the case cited, *Greeman Singh* v. *Wahari Lall Singh*,(1) the reasoning of which, he says, he is unable to understand, allowed this objection.

* Second Appeal 966 of 1885.

(1) I.L.R., 8 Cal., 12.

He proceeded nevertheless to dispose of the appeal on the merits.

It is contended in appeal that the suit is maintainable, and it is urged that even if the decision quoted be correct, it may be distinguished from the persent case, inasmuch as here it is found as a fact that the appellants are the nearest, if not the only, reversioners, whereas in the Calcutta case there were contending reversioners.

We are unable to distinguish the cases on this ground. It is stated most distinctly in the case quoted that the suit was dismissed on the ground that the plaintiff was not entitled to a declaration, not because he was not a nearer reversioner than the defendants who also claimed to be reversioners, but that "a person who stands in the position of a presumptive heir upon the death of a Hindú widow is not entitled to maintain a suit for a declaration of his so-called reversionary right;" and this because "s. 42 of the Specific Relief Act refers only to existing and vested rights and not to contingent rights like those of a person who has only a chance of succeeding to the estate of a Hindú after the death of a female heir in possession."

We confess that we also are unable to follow the reasoning or to concur in the conclusion arrived at.

The language used in illustration (*d*) and (*e*) appended to s. 42 is referred to as supporting this conclusion. Illustration (*e*) appears to us to be conclusive that a suit like the present is maintainable. With illustration (*e*) before us, and reading the section itself apart from it, we entertain no doubt that the present suit is maintainable.

The alienation to respondent Nos. 3 was by way of sale, and the widow and her alienee pleaded that the sale was for purposes necessary and binding on the estate.

The case of respondent Nos. 2 is more complicated and altogether different.

He and the widow pleaded that Ramana brought the respondent No. 2, then a young boy, to his house 16 years before suit, promising the boy (or his parents) a share in his property during his (Ramana's) lifetime, and the whole of it after his death, according to the custom of the country, the boy to be married to the daughter of Ramana, and to help Ramana and to be a member of his family: they further said that the respondent No. 2

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"became (or was constituted) the heir of Ramana's property after his death."

It is admitted that Ramana's daughter died before she was married to respondent No. 2, and it is found by the District Múnsif that after she died Ramana selected another girl for him as wife, and, in accordance with his instructions, his widow had respondent No. 2 married to this girl.

The District Múnsif found that the respondent No. 2 was taken as an "illatam" son into Ramana's family, and that, as such, he is entitled to the whole estate of Ramana, being "constituted his son at a time when he had full power over his property" and that the appellants cannot call his right in question.

The District Judge called for findings on the following issues: (1) Does the custom of "illatam" prevail amongst Kammas in this district? If so, is it a valid and binding custom? (2) Can the relationship of affiliation, otherwise termed "illatam," be established in a Kamma family in this district in cases where the person said to be affiliated has not actually been married to a daughter of the family into which he claims to have been affiliated? If so, has defendant No. 2 been so affiliated? (3) Was there, subsequent to the death of the daughter of Ramana, any agreement that, in return of his taking part in the management of the estate, defendant No. 2 should receive a share, or be substituted as heir to Ramana? Supposing such agreement to be proved, is it valid and binding so as to avail to oust the claim of the reversioners?

He found that without doubt the respondent No. 2 is not an "illatam" son-in-law of Ramana, but in appeal the right of respondent No. 2 was put on the footing of a contract supported and evidenced by a nuncupative will made by Ramana on his death-bed, the consideration being Ramana's promise to give to respondent No. 2 his daughter in marriage and a share in his property; a promise after the daughter's death to affiliate him and to give him half his property in his lifetime and the whole after his death, which intention he instructed his wife to carry out after his death, and also that he directed his wife to marry the young man to a girl whom he had selected, or whom she should select.

In the event the District Judge considered that the respondent No. 2 is entitled to succeed on the ground of a contract, and a

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direction by Ramana to his wife—which, he says, may be considered a nuncupative will—to make over the property to respondent No. 2, and as to the alienation to the respondent No. 3 he held that it is open to the respondent No. 2 to repudiate or to ratify it, but that the appellants are not in a position to challenge it.

It is urged in appeal that the respondents Nos. 1 and 2 set up a special custom whereby respondent No. 2 was affiliated to, or made a member of, Ramana's family, and that they referred to certain promises said to have been made by Ramana to give respondent No. 2 a share in this property, or his property, only in proof of the alleged affiliation; that the District Múnsif to whom issues were referred found the alleged custom not proved, and that respondent No. 2 had no right by inheritance; and that as the District Judge did not express dissent from those findings the plaintiffs' claim should have been allowed; that the theory of a nuncupative will was an after-thought on which the District Múnsif declined to express any opinion upon the ground that he was called on for a finding as to the alleged custom only, whereas the Judge disposed of the case on considerations not arising out of the case originally stated, viz., was there a contract? and was there a will? and it is argued that there is no evidence of a contract or of a will, but only an agreement which was invalid, the basis of the agreement on the part of Ramana, viz., the intention to marry respondent No. 2 to his daughter, having failed by reason of her death.

We cannot look upon the instructions given by Ramana shortly before he died as in the nature of a testamentary disposition of property, because he only conferred a power upon his wife to execute a contract which he had made, but had not performed during his lifetime. The instructions given may, however, be regarded as given in furtherance of, or to complete, the prior promise, viz., either the promise to give respondent No. 2 half of his property during his lifetime and the rest after his death in consideration of respondent No. 2 leaving his own family and living with and helping Ramana, coupled with a promise to give his daughter to him in marriage if she lived, or a subsequent promise to do the same, notwithstanding that his daughter had died.

And the questions we have to decide are—whether there was consideration for such promise, whether there was a contract

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which could be legally enforced, or whether the agreement was altogether invalidated by reason of the daughter's death?

There is evidence that respondent No. 2 was allowed by his family to leave them and go permanently to Ramana's house, taking money with him, and to do service with and for him, and this of itself would constitute consideration. The giving of the daughter of Ramana to respondent No. 2 was part and part only of the consideration moving from Ramana to respondent No. 2, and if the two parties resolved to adhere to their mutual agreement notwithstanding the death of the daughter, and if respondent No. 2 relying thereon continued to work with and for Ramana, we do not see why they should not do so, nor why the contract should be regarded as at an end or incapable of enforcement or performance by mutual consent, nor why it should not be regarded as a fresh contract modified in reference to altered circumstances and acted upon by both parties.

As to the contention that the promises were referred to only in proof of the alleged affiliation we have to observe that in substance they imply a contract, although such contract was not formally set out as one of the grounds on which relief was claimed; at all events the question was distinctly raised by the issues referred by the District Judge, and the appellant cannot be held to have been taken by surprise or in any way prejudiced.

The result is that the appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. Aug. 4. Nov. 5.

POTHI REDDI (DEFENDANT), APPELLANT,

and

VELAYUDASIVAN (PLAINTIFF), RESPONDENT.*

Evidence Act, s. 91—Suit for money lent—Unstamped promissory note—Cause of action.

The terms of a contract to repay a loan of money with interest, having been settled and the money paid, a promissory note specifying these terms was executed later in the day by defendant and given to plaintiff. This promissory note was not stamped. In a suit brought to recover the unpaid balance of the loan on an oral contract to pay:

Held, that plaintiff could not recover.

* Second Appeal 149 of 1886.

POTHI REDDI v. VELAYUDASIVAN.

APPEAL from the decree of K. R. Krishna Menon, Subordinate Judge at Tinnevelly, reversing the decree of V. Strinivásácharlu, District Múnsif of Tuticorin, in suit 236 of 1884.

Plaintiff Velayudasivan Pillai sued the defendant Pothi Reddi for Rs. 590-10-10, balance of principal and interest due on account of a loan of Rs. 1,000, made on 28th March 1881, which it was alleged defendant promised orally to repay on the 12th July 1881.

Plaintiff alleged that, on the evening of the same day, defendant gave him a memorandum admitting receipt of the money and promising to repay the same on the 12th July 1881 with interest, and that defendant had paid three instalments amounting to Rs. 600 in 1881.

The Múnsif held that the memorandum was a promissory note, and that, as it was not stamped, it could not be admitted in evidence under s. 34 of the Indian Stamp Act.

Rejecting it as inadmissible, the Múnsif held that plaintiff could not give evidence of the oral promise made in the morning for which the written agreement was substituted in the evening.

The Múnsif held, however, that plaintiff was entitled to prove the payment of consideration which preceded the promise to pay and that he might have recovered had the suit not been barred by limitation, more than three years having elapsed from the date of the loan before the suit was filed.

The suit was dismissed.

On appeal the Subordinate Judge held that the memorandum was not a promissory note but merely additional evidence of the loan; that the oral contract on which plaintiff sued was proved; that the payments made subsequently were payments on account of interest as well as of principal, interest being due according to the contract, and that endorsements of such payment made and signed by the defendant on the memorandum were admissible though not stamped for the purpose of proving part-payment of principal.

The claim was decreed.

Defendant appealed on the grounds—

(1) That plaintiff's claim was barred by limitation.

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(2) That oral evidence was not admissible to prove the contract which was evidenced by a promissory note.

Bháshyam Ayyangár for appellant.

Subramanya Ayyar for respondent.

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT :—We are clearly of opinion that the writing is not simply a memorandum in a ledger as found by the Subordinate Judge, but that it is a promissory note, and being unstamped, it is not receivable in evidence.

It is then urged upon us on the strength of the ruling in *Krishnasámi* v. *Rangasámi* (1) that plaintiff may be permitted to prove the consideration which preceded the contract, and that the suit may be regarded as one for the return "of money lent" to defendant on 28th March 1881.

The ground on which that case was decided was that the cause of action was complete in itself before the giving of the note, and that therefore the case fell in the first class of those described by Garth, C.J., in *Sheikh Akbar* v. *Sheikh Khan*.(2) The facts of that case do not appear in the report further than this,—that the money for which the promissory note was given was borrowed for the purpose of paying a debt incurred in family trade. Beyond that we do not know the circumstances of the particular case, and we do not understand the learned Judges to have ruled that in all cases where the original cause of action is the bill or note itself, it is open to the plaintiff—if the note be lost or not receivable in evidence—to frame his suit as one "for money lent" independently of the note. We cannot assent to such a doctrine, and to do so would entirely nullify the provisions of s. 91 of the Indian Evidence Act.

As pointed out by Garth, C.J., there is no doubt as to the principle of the authorities, and the only difficulty is in the determination in individual cases to which class a particular case belongs. A plaintiff may sue on his original cause of action if the promissory note has been given *on account of* the debt, and has not been parted with under such circumstances as will render the debtor liable upon it to some third person,—as for instance, when the promissory note is given in payment for goods sold and delivered, or for an account rendered. But when a loan is made by plaintiff to defendant, and in consideration of that loan the

(1) I.L.R., 7 Mad., 112.

(2) I.L.R., 7 Cal., 250.

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defendant contracts by a promissory note to pay it with interest at a certain date, there is no cause of action "for money lent" or otherwise than upon the note, and if for want of a stamp the note is not receivable in evidence the plaintiff's claim must fail. This has before been held by this Court in *Muthalagan Ambalam* v. *Ramanadham Chetti*.(1)

It appears to us the present is precisely such a case. The term of the contract were settled in the morning and the rate of interest and the date for re-payment were agreed upon. The money was then handed over and later in the day the promissory note specifying these terms was written and left in the plaintiff's possession.

It is a necessary condition to every written contract that the terms should be orally settled before they are reduced to writing, and to hold when such a contract has been reduced to writing, that a plaintiff can take advantage of the absence of a stamp on the promissory note to sue at once for the return of money which he may have contracted to lend for a fixed period, would entirely defeat the provisions of s. 91 of the Evidence Act.

As pointed out by the learned Chief Justice in *Sheikh Akbar* v. *Sheikh Khan* one very material distinction between the two classes of cases may be found in the investigation of the point on whom lies the burden of proving the note. In the case before us there can be no doubt that the *onus* must fall on the plaintiff.

Upon this ground the suit must fail, though we may further point out that even had it been open for the plaintiff to bring the suit as "for money lent," the receipts for the part-payments being unstamped, would not be receivable in evidence, and the bar of limitation is therefore not removed under s. 20 of the Indian Limitation Act.

The decree of the Lower Appellate Court must be reversed and the suit dismissed. Each party should bear his own costs throughout.

(1) 4 Ind. Jur., 368.

APPELLATE CIVIL.

Before Mr. Justice Parker.

1886. Nov. 17, 25.

VENKATÉSWARA, *in re.**

Act XX of 1863, *s.* 18—*Civil Procedure Code, s.* 622—*Order refusing permission to sue not appealable, nor subject to revision under s.* 622 *of the Code of Civil Procedure.*

An order passed under s. 18 of Act XX of 1863, refusing leave to sue, is not appealable, nor if the Judge has exercised his discretion, liable to revision under s. 622 of the Code of Civil Procedure.

APPLICATION under s. 622 of the Code of Civil Procedure to set aside an order of T. Weir, District Judge of Madura, refusing permission to one Venkatéswara Ayyan to bring a suit under s. 18 of Act XX of 1863 against the members of the Madura Temple Committee.

Mr. *Brown* for petitioner.

It was contended that even if the application under s. 622 would not lie, the order was appealable.

The Court (Parker, J.) delivered the following

JUDGMENT :—This is an application under s. 622 of the Code of Civil Procedure, asking the Court to revise the order of the District Judge of Madura refusing leave to file a suit under s. 18, Act XX of 1863. The learned counsel referred to the decisions in appeals 48 of 1885 and 49 of 1886, urging that these appeals had not been argued, and pointing out that an appeal had been allowed against an order under s. 5 of the same Act ; *Sultan Ackeni* v. *Shaik Bâva Malimiyar.*(1)

The decisions quoted followed the Full Bench decision of this Court in Civil Revision Petition 101 of 1882 (*a*) given on March

* Civil Revision Petition 243 of 1886.

(1) I.L.R., 4 Mad, 295.

(*a*) Turner, C.J. (Innes, Kernan, Kindersley and Muttusámi Ayyar, JJ., concurring). The petitioner applied to the District Court, under Act XX of 1863, s. 18, for leave to file a suit under the Act.

The Judge refused leave. The petitioner then applied to this Court, under s. 622 of the Civil Procedure Code complaining that the Judge had referred his application on grounds other than were contemplated by the Act.

It was objected that no application lay to this Court, under s. 622, inasmuch as the order is open to appeal.

The question referred to the Full Bench is whether or not an appeal lies from the grant or refusal of leave to sue.

21st, 1883, but which by an oversight would appear not to have been reported.

In that decision the case reported at IV Madras, 295, was discussed and was distinguished from the present on the ground that it was a proceeding analogous to a decree in a suit. The grant or refusal of leave under s. 18 of the Act, to institute proceedings, is not analogous to a decree, but the sanction is a statutory condition precedent to the exercise of the right of suit.

In *Kavirâja Sundára Múrtiya Pillai* v. *Nalla Náikan Pillai*, 3 M.H.C.R., 93, this Court held that no appeal lay against a grant of leave, and that decision the High Court of the North-West Provinces has approved and followed ; *Hajee Kaheb Hossin* v. *Sheikh Deen Ali*, 4 N.W.P., 3.

The Legislature, in conferring on parties interested facilities for the institution of suits against persons charged with the management of temple property, has imposed the condition that leave should be obtained from the principal Court of original civil jurisdiction in the district. The Act directs that Court, on the perusal of the application to determine whether there are sufficient *primâ facie* grounds for the institution of a suit, and if in the judgment of the Court there are such grounds, to give leave for its institution. It is to be inferred from the language of the Act that the Legislature did not intend that the grant or refusal of leave should be interfered with by an Appellate Court. A suit cannot be instituted under the Act without leave of the Court mentioned in the Act, and if leave has been given by that Court, the condition imposed by the Legislature has been complied with.

The grant of leave by the Appellate Court would not satisfy the requirements of the Act ; the refusal of leave by the Appellate Court would not override the sanction accorded by the Court mentioned in the Act. It is left to the discretion of the Court empowered by the Act to determine, whether or not there exist *primâ facie* grounds for the institution of a suit, and the Appellate Court has no power to constrain the judgment of the prescribed Court to pronounce affirmatively or negatively, in accordance with the views of the Appellate Court.

Where the Legislature intends that the Appellate Court shall have concurrent power with the Court of original jurisdiction to grant sanction to the institution of proceedings, it has expressly conferred the power.

It is, however, argued that an appeal is given by the provisions of the Code of Civil Procedure, enacting that the procedure prescribed by the Code shall be followed in all proceedings in any Court, other than suits and appeals, s. 647, that except when otherwise expressly provided by that Code or by any other law for the time being in force, an appeal shall lie from the decree of a Court exercising original jurisdiction, and that the refusal or grant of leave to institute a suit under the Act is a decree.

It was held by this Court in *Sultan Ackeni Sahib* v. *Shaik Bâva Malimiyar*, I.L.R., 4 Mad., 295, that in virtue of the sections of the Civil Procedure Code above referred to, an appeal lay from an order passed by the District Court, under s. 5 of the Act appointing trustees, on the ground that the order was analogous to a decree as defined in the Code of Civil Procedure. We are, however, unable to hold that the grant or refusal of leave under s. 18 of the Act to institute proceedings of a special character is analogous to a decree.

The sanction is a statutory condition precedent to the exercise of the right of suit and not an adjudication of any matter *inter partes* on a right claimed, and, on this ground, we hold that no appeal is given by the Procedure Code.

The case will be returned to the Division Bench for the disposal of the application, under s. 622.

VENKATÂ-WARA, *in re.*

There is, therefore, no appeal, and as the Judge has not declined jurisdiction, but has merely exercised a discretion vested in him by law, there is no ground for the interference of this Court on revision.

The petition is therefore dismissed.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. Oct. 25, 28.

SESHAYYA AND OTHERS (PLAINTIFFS), APPELLANTS,

and

ANNAMMA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Limitation Act, sch. II, art. 132—Registered hypothecation bond—Personal remedy barred after six years.

Article 132 of sch. II of the Indian Limitation Act, 1877, by which a period of 12 years is allowed to enforce payment of money charged on immovable property, refers only to suits to enforce payment by sale of the property charged and not to a claim to enforce the personal remedy on a registered bond by which immovable property is pledged as security for the debt.

APPEAL against the decree of W. F. Grahame, District Judge at Cuddapah, modifying the decree of M. Jayaram Ráu, District Múnsif of Nandalúr, in suit 176 of 1885.

In 1885, the plaintiffs, Bandaru Seshayya and three others, sued the defendants, Kuravi Annamma and Ravanayya, to recover Rs. 858-4-0, principal and interest, due under a registered bond of 1873 executed by Kesava Bhotlu, deceased, the undivided brother of Krishnayya, deceased husband of defendant No. 1.

By the bond certain land was made security for the payment of the debt.

Defendant No. 1 was alleged to have succeeded to, and taken possession of, the estate of Kesava Bhotlu. Defendant No. 2 was made defendant as being a distant dayadi of Kesava Bhotlu.

The Múnsif decreed that the defendants should pay the amount sued for before January 1st, 1886, and in default that the property pledged should be sold, and that if any balance remained

* Second Appeal 571 of 1886.

SESHAYYA v. ANNAMMA.

due to plaintiffs after sale, it should be recovered from the estate of Kesava Bhotlu in possession of defendants.

The defendants appealed on the ground that six years having elapsed since the date of the bond, the plaintiffs could only proceed against the lands mortgaged.

The District Judge allowed the appeal on the strength of the decision of the Privy Council in *Ram Din* v. *Kalka Prasad*.(1)

Plaintiffs appealed.

Mr. *Norton* for appellants.

Mr. *Shephard* and *Venkoba Ráu* for respondents.

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT:—The only point in the present appeal is whether art. 132 of sch. II of the Limitation Act of 1877 gives the plaintiffs 12 years in which to sue to enforce the personal remedy against defendants as well as to enforce the charge against the property. The District Judge held that the decision in *Ram Din* v. *Kalka Prasad* (1) settled the question, but it was urged by the learned counsel that that decision was given under the Limitation Act of 1871, and that the wording of art. 132 had been altered in the corresponding section of the new Act. It was pointed out that whereas the description of suit formerly was "for money charged upon immovable property," the present words were "to enforce payment of money charged upon immovable property," and it was suggested that the object of the Legislature in making the alteration was to overrule the course of decisions in which six years had been held to be the period of limitation in a suit to enforce the personal remedy.

We are of opinion that the language of the present Act, viz., "to *enforce, &c.*," is more in favor of the contention that the article in question refers only to suits "to enforce payment of money charged upon immovable property" *by the sale of that property*, and we are fortified in this conclusion by finding that the High Court of Calcutta has taken a similar view in *Miller* v. *Runganath Moulick*.(2) The grounds on which the Privy Council based their judgment in *Ram Din* v. *Kalka Prasad* appear to us equally to apply to suits brought under the present Limitation Act. There would appear no reason why a secured creditor should be put in a better position than an unsecured creditor with respect

(1) I.L.R., 7 All., 502. (2) I.L.R., 12 Cal., 389.

SESHAYYA v. ANNAMMA.

to obtaining a money decree capable of execution against the general property of a judgment debtor other than the property comprised in his mortgage.

We are of opinion that the decision of the District Judge was right and dismiss this second appeal with costs.

APPELLATE CIVIL.

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

1886. Nov. 4, 11.

VARATHAYYANGÁR (PLAINTIFF), APPELLANT,

and

KRISHNASÁMI (DEFENDANT), RESPONDENT.*

"Res judicata"—Estoppel.

V. sued to eject K. from certain land, alleging that K., having entered under a lease, held as a trespasser. K. pleaded that he held as mortgagee. It was found that K. obtained possession under a mortgage deed for Rs. 1,000, which had not been registered, and that he held also a second mortgage for Rs. 50, and it was held on second appeal that K. was entitled to defend his possession by virtue of the mortgage for Rs. 50 and, as V. had not offered to redeem the charge but had sued on false averments, the suit was dismissed.

V. then sued K. to recover the land on payment of Rs. 50.

In his plaint V. stated that, though the mortgage deed for Rs. 50 was fabricated, the High Court had decided that he was bound to pay Rs. 50 before recovering the land from K. The District Court on appeal dismissed the suit on the ground, *inter alia*, that as V. denied the genuineness of the mortgage, he could not sue for redemption:

Held that V. was entitled to redeem.

APPEAL from the decree of D. Irvine, District Judge of Trichinopoly, reversing the decree of C. G. Kuppusámi Ayyar, District Múnsif of Trichinopoly, in suit 95 of 1884.

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

Mr. *Shephard* for appellant.

Bháshyam Ayyangár for respondent.

JUDGMENT:—The appellant Varathayyangár is the owner of one pangu of land now in litigation. It is in respondent's possession and has been in the possession of his family from August

* Second Appeal 394 of 1886.

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1865. On the 22nd July 1865 the appellant executed two documents in favor of Rámáyyangár, the respondent's grandfather. One of those documents purported to be a mortgage for Rs. 1,000 and the other to be a loan bond for Rs. 50. Exhibit II, which is the loan bond, contains the following provision: "I shall repay the principal, Rs. 50, within 30th Ani Vibhava, the time fixed for the redemption of my one pangu which I have mortgaged to you this day and redeem the said pangu and this bond." Shortly after the execution of these documents a disagreemet arose between the appellant and Rámayyangár. The former refused to register the mortgage bond for Rs. 1,000 and the latter applied to the District Registrar, who referred him to a regular suit under Act XVI of 1864, which contained the registration law then in force.

Thereupon Rámayyangár instituted O.S. 373 of 1866 on the file of the District Múnsif of Perambalur, but the plaint in that suit as originally framed prayed for a declaration of his right as mortgagee. According to his own statement he was then in possession as mortgagee and he was not therefore in a position under the Code of Civil Procedure then in force to maintain a suit for a declaratory decree. He then asked leave to convert that suit into one to compel the appellant to register the instrument of mortgage for Rs. 1,000. The District Múnsif considered that this could not be done, but the District Judge held that it might be done. It was, however, held in special appeal that the suit was unsustainable on the ground that the then plaintiff was in possession. The special appeal was decided in 1877. Meanwhile the respondent's grandfather died and the respondent, a minor, passed under the guardianship of his mother, Janaki Ammál. The appellant brought O.S. 259 of 1877 in the District Múnsif's Court of Trichinopoly, and grounded his right to reject the respondent on the averment that part of the land was let to Rámayyangár in 1865 on lease for a year or two only, and that the remainder was usurped by him. The respondent denied the alleged lease and trespass and referred his possession to the mortgage of 1865. The second issue framed in that suit was whether the lease or mortgage was true and which should prevail. The District Múnsif considered the lease proved and held that the instrument of mortgage which was unregistered was not admissible in evidence and that the other oral and documentary evidence which tended to prove the mortgage was the secondary evidence of the contents of a docu-

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ment which was not admissible in evidence under the Registration Act then in operation. On appeal the District Judge reversed the decree of the District Múnsif and remanded the suit for re-trial on certain issues, one of which was whether Exhibit II was duly executed by the appellant and the statement contained in it constituted in law and in fact an admission of existence of the mortgage set up by the respondent within the purview of s. 65, cl. 6, of the Evidence Act, and if so, whether the mortgage actually took place. At the re-trial the District Múnsif found this issue in respondent's favor and held that the lease set up by the appellant was not proved. From this decision an appeal was preferred and the District Judge dismissed the appeal; but he observed that Exhibit II was not admissible for the purpose for which it was used, but that the lease and the trespass alleged by the appellant were not proved, and that, unless the appellant, then plaintiff, made out his case, he was not entitled to succeed. In the concluding paragaraph of his judgment he remarked, "the result will be, I think, that plaintiff can at any time have his land on redeeming the mortgage which I have not the slightest doubt he created on this land. It may seem incongruous and illogical to say this when proof of the mortgage is inadmissible, but proof of the defendant's admissions of the mortgage would certainly be admissible, and I see nothing in the judgment illogical or otherwise than in strict accordance with the ordinary rule that the plaintiff must prove his case and succeed on the cause or causes of action set fourth in the plaint and not otherwise, and it is satisfactory at the same time to think, as I do think, that substantial justice will also have been done." From this decision second appeal 151 of 1882 was preferred. The High Court observed that the averments on which the appellant then came into Court were untrue; that the respondent obtained possession in virtue of a mortgage for Rs. 1,000 and of a second mortgage for Rs. 50; that the first mortgage was not registered and could not be admitted in evidence; that the original instrument not having been registered, the secondary evidence of its existence and contents was practically valueless for the purpose of sustaining a charge on immovable property exceeding in value Rs. 100; and that, although the language of Act XVI of 1864, s. 13, "no instrument..... shall be received in evidence in any civil proceedings or any Court or shall be acted on by any public officer" was not so

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explicit as the language of the subsequent Act of 1866 in which there are added the words "or shall affect any property comprised therein," yet its effect was not less prejudicial to the person claiming under the instrument; for the Courts were prohibited from acting on an instrument which should have been, but has not been registered. The learned Judges then concluded that the respondent was unable to defend his possession in virtue of the original mortgage for Rs. 1,000, but that he might rely on the further charge of Rs. 50, which was proved by an instrument of which the registration was optional, and, inasmuch as the appellant had not offered to pay that charge but had come into Court on averments which were not true, they affirmed the decrees of the Courts below and dismissed the second appeal. This decree was passed on 30th October 1882 and the present suit was commenced by the appellant in August 1883. In his plaint he stated that the High Court set aside the mortgage for Rs. 1,000; that though document II was fabricated by the respondent's ancestor, the High Court decided that he should pay the sum of Rs. 50 due under it and redeem the land, and prayed for a decree directing the respondent to receive Rs. 50 and make over the land to him. The respondent contended, *inter alia*, that the claim was barred by limitation and that the appellant could only be declared entitled to redeem on payment of Rs. 1,050, but not Rs. 50 alone. The District Múnsif decreed the claim, but on appeal the Judge reversed the decree on the ground that the present suit was without any cause of action at all, and if it were held that he could rest his suit on the bond for Rs. 50, then he should consider that the suit was barred by ss. 13 and 43 of the Civil Procedure Code. He observed that, as a matter of fact, the land was really mortgage not for Rs. 50 but for Rs. 1,050 and referred to the remarks of the District Judge in his judgment in the previous suit for ejectment. The Judge also drew attention to the averments in the present plaint and remarked that, inasmuch the appellant denied the second mortgage, he could not sue for redemption. He also considered that the remark in the judgment of the High Court could not give the appellant any fresh cause of action and that it only declared that the respondent might rely on the charge for Rs. 50 and that it did not declare that the appellant could recover the land by paying that amount.

It is argued in second appeal that the effect of the High

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Court's judgment has been misapprehended, that the suit is barred neither by s. 13 nor by s. 43 of the Code of Civil Procedure; that the Judge omitted to refer to the suit brought by the respondent's grandfather and the decree therein; and that inasmuch as the land is admittedly held as a security for the sum of Rs. 50, the appellant was entitled to the decree he claimed. I do not consider that the decree appealed from can be supported. The appellant is admittedly the owner of the land in dispute and he is entitled to recover possession in virtue of such ownership unless the respondent is able to defend his possession by referring it to some valid transaction. In S.A. 151 of 1882, the High Court referred to two such transactions as named by the respondent, viz., the first mortgage for Rs. 1,000 and the second mortgage for Rs. 50 and proceeded to consider whether they operated to create a charge on the land and a right to retain possession until the charge was satisfied.

After discussing the effect of the Registration Act of 1864 upon the mortgage for Rs. 1,000, the learned Judges held that the respondent was unable to defend his possession in virtue of that mortgage. They next referred to the second mortgage for Rs. 50 and considered that it was proved by an instrument of which the registration was optional and that the respondent might rely on the charge created by it for Rs. 50 in support of his possession. They then referred to the fact that the appellant came into Court on averments which were untrue and concluded that the second appeal should be dismissed.

The decision that the respondent could not defend his possession in virtue of the mortgage for Rs. 1,000 but could only defend it in virtue of the second charge for Rs. 50 was a decision on an issue the determination of which was material to the purposes of that suit. It was an action of ejectment, and the appellant being the admitted owner, would be entitled to a decree for possession, unless the respondent showed a special right to remain in possession, even though the former failed to prove the specific lease and trespass mentioned in his plaint. The learned Judges therefore proceeded to determine whether he might defend his possession as contended by him under the mortgage for Rs. 1,000 and if not under any other and what transaction. They determined that the mortgage for Rs. 1,000 was inoperative and that Exhibit II made the payment of Rs. 50 a con-

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dition precedent to redemption of the land and thereby created a valid charge for that amount. Having arrived at this conclusion they next held that they should not treat a suit to eject as a suit for redemption, especially as the appellant came into Court with untrue averments and accordingly dismissed his suit. The decision of the question, however, whether respondent could defend his possesion under the mortgage for Rs. 1,000 and if not under document II was conclusive and binding upon the parties to that suit and the respondent is therefore estopped from now alleging the contrary.

The conclusion we come to then is that the appellant was entitled to redeem on payment of Rs. 50. As to the objection to the frame of the plaint we consider that it ought to be construed as a whole. It should be remembered that the appellant alleged in the former proceedings that document II was not true and that he might have feared that if he departed from his former statements except to the extent that document II was decided by the High Court to have created a charge for Rs. 50 and that he was bound to pay that amount before he could lawfully claim possession, he might render himself liable to prosecution for perjury. In the view we take of the effect of the decision of the High Court in S.A. 151 of 1882, the suit can be barred neither by limitation nor by s. 43 of the Code of Civil Procedure. As to the observation that the mortgage for Rs. 1,000 was true, we have only to observe that the respondent's grandfather failed to comply with the provisions of the Registration Act or pursue the remedy provided by it for enforcing compulsory registration, and that we are precluded from ignoring the policy of the Registration Act. We set aside the decree of the District Judge and restore that of the District Múnsif and direct in the special circumstances of the case that each party do bear his own costs.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

1886. Sept. 2, 13.

QUEEN-EMPRESS

against

NÁRAYANASÁMI.*

Army Act, 1881 (44 & 45 *Vict.*, *c.* 58), *s.* 156.

Under the Army Act, 1881 (44 & 45 Vict., c. 58), s. 156, any person who takes in pawn a military decoration from a soldier is liable to punishment:

Held that this section of the Army Act, 1881, is applicable to a person who takes a medal in pawn from a sepoy in India.

THIS was an application under s. 439 of the Code of Criminal Procedure against an order passed by H. R. Farmer, Acting District Magistrate of Trichinopoly, dismissing a complaint against one Náráyanasámi Pillai, under s. 203 of the Code of Criminal Procedure.

The facts necessary for the purpose of this report are set out in the judgment of Brandt, J.

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

The accused was not represented.

The Court (Kernan and Brandt, JJ.) delivered the following judgments

KERNAN, J.—The Indian Articles of War relative to the Native Army are in Act V of 1869, which does not contain a clause prohibiting, in terms, a person not subject to the Articles of War from taking in pledge, &c., any regimental equipments, medals, &c., of a native soldier.

Section 47 prohibited the pledge, &c., by the soldier and made the act punishable.

That Act related to the Native Indian Forces alone.

The Army Act, 1881 (44 & 45 Vict., c. 58), is an Imperial Act, and, except when specially excepted, applies to the regular forces, which expression by s. 190, sub-section (8), includes Her Majesty's Indian forces. Sub-section 2 (*h*) of s. 180 provides that Part Two of the Act shall not apply to Her Majesty's Indian forces. Therefore all the Act, except when excepted, does apply to the Indian forces.

* Criminal Revision Case 106 of 1886.

The Act of 1881 in sub-section (6) of s. 190 provides that the expression "soldier" applies to any person subject to the Articles of War, and therefore to the native soldier. There is nothing in s. 156 inconsistent with the context of s. 190: therefore the term "soldier" in both sections applies to all soldiers within s. 190. The Acts of 1879 and 1881 are *in pari materiâ* and to be construed together. The subsequent Act enacts a new provision, s. 190, which is in no wise contrary to, or inconsistent with, the prior Act, nor does it, within s. 180 of the Act of 1881, sub-section (2) (*a*), prejudice or affect the India military law respecting officers or soldiers or followers in Her Majesty's Indian forces, though s. 156 no doubt affects persons *not* officers, soldiers or followers.

The order of dismissal by the District Magistrate must be set aside, and the case retried.

BRANDT, J.—The District Magistrate of Trichinopoly on the 24th November 1885 dismissed, under s. 203, Criminal Procedure Code, a complaint against a civilian shopkeeper charged with having received in pledge a medal from a sepoy, an offence, as the case for the prosecution was, under the Army Act, 1881, and under Act VII of 1867.

It appears that in a precisely similar case tried by the predecessor in office of the District Magistrate, the accused was convicted.

The District Magistrate states that, for reasons given, he is, in his opinion, more likely to be wrong than right in the decision finally come to by him.

The reasons given for his conclusion are that it does not clearly appear that the Legislature intended to make the act an offence, and that the word "soldier" when used in s. 156 of the Army Act, 1881, does not include a native soldier, *i.e.*, a sepoy of Her Majesty's Indian troops; the reasons given for arriving at the latter conclusion are that it is provided in s. 180 of that Act that "nothing in that Act shall prejudice or affect the Indian military law respecting soldiers * * * in Her Majesty's Indian forces being natives of India:" that the Indian Articles of War provide expressly for the punishment by a Court Martial of a sepoy, and of any other person subject to those Articles who pawns any medal, granted for service in the field or for general good conduct, while, unlike the Army Act, 1881, they contain no provision for the punishment of any person, not being an officer, soldier, or

QUEEN-EMPRESS v. NÁRÁYANA-SÁMI.

follower, who knowingly receives a sepoy's medal in pawn; and the question therefore arises whether if a man is punished under the Army Act, 1881, for receiving in pawn a medal from a sepoy, such act, not being punishable under the Indian Articles of War, does not affect the Indian military law respecting soldiers in Her Majesty's Indian forces, being natives of India, in which case the punishment would, with reference to clauses (*a*) and (*b*), sub-section (2), s. 180 of the Army Act, be illegal.

It was decided in *Nathud Bi* v. *Jafar Hussain*(1) that there is nothing in the provisions of clause 1 of s. 145 of the Army Act, 1881, which prohibits the application of that section to soldiers of Her Majesty's Indian forces; and that clause 2 also applies. The decision turned on the interpretation to be placed on the third clause with which we are not here concerned; and agreeing with the learned Judges who decided that case as to the effect of s. 190, the only question we have to determine is whether, as the District Magistrate holds, the effect of clauses (*a*) and (*b*), sub-section (2), s. 180, is to protect any person taking in pawn any military decoration of a sepoy from the penalities provided in that section.

The proviso in s. 180 on which the District Magistrate bases his decision makes an exception in the case of officers, soldiers and followers in Her Majesty's Indian forces being natives of India: it does not make any exception in the case of persons other than the above; and the object of it clearly is to secure to such officers, and others being natives of India, in trials by Court Martial convened in pursuance of the Act, reference to the Indian military law and to the established usages of the service: no special provision is made in the case of persons other than such officers, soldiers and followers being natives of India in respect of such law or usages.

This appears to be sufficient for the disposal of the question before us; but we may refer to the concluding sub-section in s. 156 as additional, if not conclusive proof that that section applies to the case of any person taking in pawn a military decoration from a sepoy.

I would accordingly set aside the District Magistrate's order and direct him to restore the complaint to his file and to dispose of it in due course.

(1) I.L.R., 8 Mad., 365.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

ALAGIRISÁMI AND OTHERS (PETITIONERS), APPELLANTS,

and

RAMANÁTHAN AND OTHERS (RESPONDENTS), RESPONDENTS.*

1886, Sept. 17.

Civil Procedure Code, s. 292.—Pleaders not officers of the Court within the meaning of that section.

Pleaders of parties to a suit are not debarred by s. 292 of the Code of Civil Procedure from purchasing property sold in execution of the decree.

APPEAL against an order of A. J. Mangalam Pillai, Subordinate Judge of Madura (West), rejecting an application to set aside a sale of land in execution of the decree in suit 36 of 1878.

Alagirisámi Náyak and two others, defendants 2, 3 and 5, presented petitions to the Court to set aside the sale on the ground, *inter alia*, that the sale of some of the land was illegal, inasmuch as it was purchased by the vakíl of the plaintiff and that such purchase was opposed to s. 136 of the Transfer of Property Act.

Bháshyam Ayyangár and *Kaliánarámayyar* for appellants.

Rámá Ráu and *Subramanya Ayyar* for respondents.

The Court (Collins, C.J., and Brandt, J.) delivered the following

JUDGMENT:—There is no evidence whatever of any loss or injury to the appellants in consequence of irregularity in the proceedings even if there were such irregularities, as to which we need express no opinion.

The appeal then fails as against respondents Nos. 1 and 3 and is dismissed as against them with costs.

It is contended that a vakíl is an officer of the Court having a duty to perform in connexion with a sale in execution of a decree in a suit in which he is engaged by a party to the suit. If this is so, the sale in so far as the three items of property purchased by R. Ráma Subbayyar, respondent No. 2, are concerned must be set aside as void.

* Appeal against Order 186 of 1885.

ALAGIRISÁMI v. RAMANÁTHAN.

It is true that vakíls are spoken of, and are in some sense officers of the Court, but we think that the words used in s. 292 of the Code of Civil Procedure are not used in this sense, and that a vakíl cannot be said to have a duty to perform in connexion with the sale as therein required. *Goshain Jug Roop Geer* v. *Chingun Lal*(1) has been cited as indicature of the probable intention of the Legislature, but it appears to us that if the Legislature having that case in view had intended to prohibit vakíls generally from purchasing, they would have said so in plain language as they have in the Transfer of Property Act.

We must have regard rather to being assured that a civil right has been expressly taken away from a class or section of the public than to what may or may not be desirable.

We consider the appeal fails as against the respondent No. 2 also and dismiss it with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Kernan.

1886. Sept. 30. Oct. 5.

VENKATAVARAGAPPA (DEFENDANT), APPELLANT,

and

THIRUMALAI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Landlord and tenant—Hindú law—Wells dug with consent of landlord—Compensation.

Where tenants from year to year, with permission of the landlord, sank wells in the land demised:

Held, that they were not entitled under Hindú law to any compensation therefor from the landlord after the determination of the tenancy.

APPEALS from the decrees of K. R. Krishna Menon, Subordinate Judge at Tinnevelly, modifying the decrees of G. Rámasámi Pillai, District Múnsif of Tinnevelly, in suits 167, &c., of 1883.

The facts necessary for the purpose of this report are set out in the judgment of the Court (Collins, C.J., and Kernan, J.).

Bháshyam Ayyangár for appellant.

Subramanya Ayyar for respondents.

(1) 2 N.W.P., 46.

* Second Appeals 56 to 61, 65, 66 and 73 of 1886.

VENKATA-VARAGAPPA v. THIRUMALAI.

JUDGMENT.—In these several cases the appellant is the defendant in several suits brought by different respondents hereto.

There is, however, one point in each case, the determination of which by this Court will decide the rights of the parties respectively.

That point is whether tenants holding from fasli to fasli, who by permission of the landlord during the tenancy sunk wells in the land demised, are entitled at the end of their tenancy to be compensated by the landlord for their expenditure laid out in sinking the wells.

It is not alleged in any of the cases that the landlord ever contracted to pay for such expenditure or to compensate the tenants therefor at the termination of their tenancy. Neither is it alleged that there exists any custom in the country that the landlord should, in such circumstances, make such compensation.

The wells are found to be not built-up wells, but wells sunk in the following manner, viz., first 6 feet in clay, then for 1¼ yards in gravel, and then down to the bottom in quarried rock.

It was argued that, according to Hindú law, the tenants were entitled to such compensation; but no authority in Hindú law has been cited so as to support such proposition.

The authority of Nárada cited in *Thakoor Chunder Paramanick, in re*(1) refers to the right of a person, who erected a house under the *bonâ fide* belief he was entitled to the land, and who when ejected, Nárada held, was entitled to take away the house, or to be compensated therefor. To a similar effect is the extract from the Hidayah cited in the same case when land is let for building or for planting.

Shib Doss Banerjee v. *Baman Doss Mookerjee*(2) is to the same effect in the case of an expired tenancy.

These authorities refer merely to cases where there is at the time of the expiration of the tenancy a house, or other building of any sort which has been erected on the land by the tenant, and which remains there when the tenancy expires, and which is capable of being removed by the tenant.

In this case there was nothing to remove, as the clay, the gravel, and the rock are part of the freehold and belonged to the landlord and never belonged to the tenant.

(1) B.L.R., Sup., vol. 596.

(2) 15 W.R., 360.

VENKATA-VARAGAPPA v. THIRUMALAI.

The Transfer of Property Act does not affect this case, the facts of which took place in 1877.

In the absence of contract or of custom, the tenants had no right to be paid for their expenditure in sinking the wells, though the landlord assented to such sinking.

The appeals in these several cases must, therefore, be allowed.

In each case the following decree will be made: the decree of the Lower Appellate Court, so far as it awards compensation to the respondent (or respondents) for sinking the well, as claimed in this suit, and costs in relation thereto, will be reversed with costs throughout including the costs of this appeal; the decrees of the Lower Appellate Court in other respects are confirmed.

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. October 26.

POKALA (PLAINTIFF),

and

MURUGAPPA (DEFENDANT).*

Presidency Small Cause Courts' Act, 1882, s. 18—Suits for maintenance cognizable.

Presidency Small Cause Courts, constituted under Act XV of 1882, are not debarred from entertaining suits for maintenance not based on contract or declaratory decree.

CASE referred by the Judges of the Small Cause Court of Madras.

The question referred was whether a suit for maintenance, where the amount had not been fixed by contract or declaratory decree, is cognizable by Presidency Small Cause Courts.

Ambrose for plaintiff.

Defendant did not appear.

The Full Bench (Collins, C.J., Kernan, Muttusámi Ayyar, Brandt and Parker, JJ.) delivered the following

JUDGMENT:—It was by oversight, no doubt, that the Court, in their letter of November 1882, stated that in Presidency Small Cause Court suits for maintenance could not be maintained. It

* Special Case 81 of 1885.

POKALA v. MURUGAPPA.

was so under the old Presidency Small Cause Court Act IX of 1850.

The Presidency Small Cause Court Act XV of 1882, section 18, authorizes the Court to entertain all suits of a civil nature, except those specially set out, and a suit for maintenance is not one of the latter.

The practice of the Small Cause Court before the Act of 1882 to entertain such suits was justified by the jurisdiction given by the words of the Act 26 of 1864, viz., "debt, damage or *demand*." The words used in Act IX of 1850 were "debt or damage."

We answer the question referred in the affirmative.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Kernan.

1886. Sept. 14. Oct. 21.

ALUBI (PLAINTIFF), APPELLANT,

and

KUNHI BI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act, Sch. II, arts. 131, 132, 140, 144—Claim for arrears of revenue by grantee from Government.

The right to the revenue on certain land having been granted to the trustees of a mosque, the said grant was confirmed by Government in 1866.

In 1883, a suit was brought to recover arrears of revenue from the owners of the land. It was found that no payment of revenue had ever been made by the defendants to the trustees, and the suit was dismissed as barred by limitation under art. 144, sch. II of the Limitation Act:

Held, that the suit was not barred and that the plaintiff was entitled to recover 12 years' arrears of revenue.

APPEAL from the decree of L. Moore, Acting District Judge of North Malabar, confirming the decree of B. D'Rozario, District Múnsif of Pynád, in suit 19 of 1883.

The facts necessary for the purpose of this report are set out in the judgment.

Bháshyam Ayyangár and *Anantan Náyar* for appellant.

Juga Ráu Pillai for respondents.

The Court (Collins, C.J., and Kernan, J.) delivered the following

* Second Appeal 115 of 1886.

ALUBI v. KUNHI BI.

JUDGMENT:—This is a suit by the plaintiff (Valagath Syed Alubi bin Hassan Hydros Koya Thangal) as inám-holder and manager of a mosque to recover revenue of Rs. 8 per annum charged on the plaint paramba. It is admitted by the defendants (Kunhi Bi and two others) who are the jenmis of the paramba, that it is charged perpetually with Rs. 8 per annum in favor of Government. It is also admitted that the Government transferred the revenue of the paramba very many years ago in the time of Tippu Sultan to the trustees of the mosque. The inám Commission deed is dated the 23rd April 1866. The trustees of the mosque therefore became, on the transfer by Government, entitled to recover from the jenmis of the paramba the revenue which thereafter became due and payable. It has been found that the rent or revenue of Rs. 8 per annum has not been paid by the jenmis to the trustees of the mosque at any time, although payment was demanded more than 12 years before suit. The question raised in the Courts below and here is whether the right of the trustees of the mosque is barred by limitation.

The District Judge has decided that the relation of landlord and tenant never subsisted between the plaintiff and the trustees of the mosque and the jenmis, and that the plaintiff's suit is barred by adverse possession under art. 144 of the Limitation Act. But it is clear that there has been no adverse possession of the land by the defendants, inasmuch as the defendants are entitled to hold the land, and plaintiff does not seek to recover possession.

The possession of the land by defendants is not adverse to plaintiff, as defendants admit they hold the land subject to the payment of the revenue to the party entitled. The plaintiff is the person entitled to the revenue which defendants are bound to pay. Article 140 of the Limitation Act does not apply. The plaintiff does not seek to recover the possession of immovable property or any interest therein within the meaning of art. 140.

What the plaintiff seeks to recover is rent or revenue which has accrued. Each year's rent or revenue is a recurring right within art. 131. It is not correct to say that the relation of landlord and tenant did not subsist between the trustees of the mosque and the jenmis, inasmuch as the plaintiff is the party entitled to recover the rent or revenue payable out of the land, and the defendants as the jenmis in possession of the land are bound to pay the plaintiff

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such rent. We think the plaintiff is entitled to recover 12 years' rent or revenue up to the date of suit under art. 131 as a recurring right, and also under s. 132 as money charged on land. The fact that the trustees of the mosque did not proceed to recover rent which accrued more than 12 years before suit cannot bar their right to the rents accrued during 12 years before suit.

We reverse the decrees of the Lower Courts and make a decree for payment by the defendants who admit their possession of the lands during the accruing of the 12 years' rent or revenue with costs of this suit and appeal.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

1886. August 18. November 4.

RAVUNNI MENON (PLAINTIFF), APPELLANT,

and

KUNJU NÁYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 244.

R having obtained a decree for money against K, the karnavan of the defendants, K died and the defendants were made parties to the suit as representatives of K.

Tarwad property was then attached by R, and the defendants having objected, the Court raised the attachment. R sued for a declaration that the property released was liable to be sold:

Held, that the suit was barred by s. 244 of the Code of Civil Procedure.

APPEAL from the decree of V. P. D'Rozario, Subordinate Judge of South Malabar, reversing the decree of T. Subbannáchárya, District Múnsif of Kutnád, in suit 77 of 1884.

The facts appear sufficiently from the judgment of the Court (Collins, C.J., and Brandt, J.)

Párathasaradhi Ayyangár and *Sankaran Náyar* for appellant.

Sankara Menon for respondents.

JUDGMENT.—Padinharam Kunnath Ravunni Menon, the appellant (plaintiff), obtained a decree for money in original suit 314 of 1882 on the file of the District Múnsif of Chowgat against Kondi Menon, the late karnavan of the defendants (respondents).

* Second Appeal 297 of 1886.

RAVUNNI MENON v. KUNJU NÁYAR.

The judgment-debtor having died, the respondents were brought upon the record in original suit 314 of 1882, on the application of the appellant: when the latter proceeded to execute the decree by attaching certain immovable property, the respondents objected on the ground that the property attached was tarwad property and therefore not liable in execution of the decree: on their petition of objection, an order, purporting (as we are informed) to be passed under s. 280, Civil Procedure Code, was made on the 13th April 1883, releasing the property from attachment. On the 12th February 1884, the appellant filed this suit.

The respondents pleaded, first that the judgment-debt was not incurred by Kondi Menon in his capacity of karnavan; that if it was, it was incurred for purposes not binding on the tarwad; and that the properties were not, as alleged by the plaintiff in the suit, the self-acquisition of Kondi Menon.

The Court of First Instance gave decree for the appellant. On appeal, the Subordinate Judge dismissed the suit on the ground that the questions in dispute between the parties are questions arising between them in execution of the decree in original suit 314 of 1882, and must therefore be decided in execution, under the provisions of s. 244, Civil Procedure Code, and cannot be made the subject of a separate suit; and he refers to the case of *Kuriyali* v. *Mayan*.(1)

It is contended in appeal that the present suit will lie: that an order having been made against the appellant under s. 280, Civil Procedure Code, he must either file a suit as allowed under section 283 or accept the decision as final; and reference is made to *Arunáchala* v. *Zamindár of Sivagiri*,(2) to *Rámakrishna* v. *Namasivaya*,(3) and to *Ittiachan* v. *Velappan*.(4)

On the other side, it is urged that *Kuriyali* v. *Mayan* is directly in point, and concludes the appellant, and that the other cases cited are not to the point or may be distinguished.

The Full Bench case of *Rámakrishna* v. *Namasivaya* is not in point here: the two members of the undivided family who had hypothecated the family property were alive; the sons of those members had not been made parties to the original suit, either before or after decree.

(1) I.L.R., 7 Mad., 255. (2) I.L.R., 7 Mad., 328.
(3) I.L.R., 7 Mad., 294. (4) I.L.R., 8 Mad., 468.

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One of the learned Judges who took part in the case of *Kuriyali* v. *Mayan* also sat on the bench which decided *Arunáchala* v. *Zamindár of Sivagiri*, but no reference is made in the latter to the former case. It is to be presumed then that the learned Judge who heard both cases was of opinion that there is nothing contradictory in the two decisions; and if there is not, then there is nothing to prevent us from following the decision in *Kuriyali* v. *Mayan*.

A claim may be preferred by a judgment-debtor, as well as by a stranger, under s. 278, Civil Procedure Code, provided that the claim be of the nature specified in the following sections, *e.g.*, on the ground that the property when attached was in the possession of the judgment-debtor, not on his own account, but in trust for a third party (see *Shankar Dial* v. *Amin Haidar*(1) and cases there cited); but where, as in this case, the objection that the property attached is not liable to attachment is made, not on one of the grounds specified in s. 281 or in s. 282, but on a ground which rises a question determinable under some other special section, *e.g.*, under s. 234 and s. 244, in execution, then the order made should not be passed under s. 280; and the fact that an order was passed purporting to have been made under that section cannot give the appellant a right to file a separate suit, whether under the provisions of s. 283 or otherwise. It remains to decide whether *Arunáchala's case* is clear authority for the proposition that a suit of the nature before us will lie; and we are of opinion that it is not.

The transactions out of which the suit in that case arose were very similar to those which led to the suit eventually disposed of in appeal by the Privy Council, *Muttayan* v. *Zamindár of Sivagiri*.(2) The latter suit was in the first instance thrown out on the ground that the questions therein raised could be disposed of in execution of a decree in another suit in which the plaintiff had already taken out execution, but this Court reversed that judgment stating that "the questions raised..... are the liability of the property in the hands of the present zamindár to satisfy the decree obtained by the plaintiff against the late zamindár..... The question of liability and of its extent being one of very considerable difficulty.....a suit regularly conducted was the

(1) I.L.R., 2 All., 752. (2) I.L.R., 6 Mad., 1.

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most appropriate method of determining it," and the suit was determined by their Lordships on the merits.

This fact, however, clearly cannot be taken as authority for the proposition that any and every question at issue between parties in execution of the decree should, even if it might, be determined by separate suit.

The decision in *Arunáchala's case* was based, in the first instance, on the ground that the Judicial Committee had allowed a similar suit in precisely similar circumstances against the same judgment-debtor, and that after that decision of the Privy Council, it could not be denied that the zamíndári ought to be made available, if not in execution (and in proceedings in execution, the defendant had succeeded in his contention that the zamíndári was not assets in his hands available in execution) than in a separate suit; and, secondly, that after the death of the original debtor-zamíndár "since it had been decided that the estate did not constitute assets which could be seized in execution," it was open to the creditor by a separate suit to enforce the debt, so far as it was binding on the deceased debtor, against his successor.

In the case before us, it is not clear on what ground execution was refused, whether on the ground that the properties attached did not constitute assets of the deceased decree-debtor in their hands, or that being tarwad property it was not liable in execution of a decree not passed against the deceased in his capacity of karnavan of the tarwad: but it does appear that the appellant then pleaded that the property was the separate property of the deceased (in which case, supposing that it was undisposed of at his death, it would have become the property of the tarwad) and it is to be presumed, the contrary not being shown, that the finding on this point, viz., whether or not the property was the separate property of the deceased was against the appellant, and had the order then made been made, as it could and should have been made, not under section 278 but under section 244, the appellant would have had a right of appeal against that order, and of second appeal from any order passed in appeal therefrom, and as before said, the erroneous passing of an order purporting to be made under section 280 cannot give him a right to bring a separate suit.

From the decision in *Ittiachan* v. *Velappan*, it does no doubt appear that a separate suit was held to lie for a declaration that

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tarwad property attached in execution of a decree obtained by the plaintiff in another suit, and released from attachment on the objections of two members of the family, defendants in the second suit, was liable in satisfaction of the decree in the original suit: but in that case, the debtor who had contracted the debt was alive, and was a party to the second suit; and what was decided by the lower courts was that the circumstances were insufficient to invalidate the obligation created by the karnavan, the original debtor, and that the money having been raised and used for the benefit of the tarwad, and the property being tarwad property, it was available for sale to satisfy the original decree.

It was held eventually by this court that the original debtor not having been in the first suit impleaded as karnavan, and there being nothing on the face of the proceedings to show that he was impleaded as karnavan, the suit must fail. But this is immaterial for our present purpose.

In the present case, however, it is, as before stated, not shown that the question in issue in execution between the judgment-creditor and those whom he had himself brought on the record, as the representatives of the deceased judgment-debtor, was not one which could not have been, and ought not to have been, decided in execution and in execution alone, and we hold that it was rightly decided that the present suit will not lie; and we dismiss this appeal with costs.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

against

KAMANDU.*

1886. April 12. July 28. October 29.

Boat Rules in Madras Ports—Refusal to carry cargo without reasonable excuse.

By the Boat Rules of a certain port it was provided, (1) that all licensed boats must carry such number of passengers and quantity of goods as should be expressed in the license; and (2) that the owner of a licensed boat who should refuse to let his boat on

* Criminal Revision Case 706 of 1885.

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hire without assigning reasonable and satisfactory grounds for such refusal should be liable to a penalty :

Held, that a refusal by a person in charge of a licensed boat to receive goods on board unless a tally-man was sent with them, on the ground that he could not count, was not a reasonable and satisfactory cause.

CASE referred under s. 438 of the Code of Criminal Procedure by A. L. Lister, Sessions Judge of Godávari.

The facts are fully set out in the judgments of the Court (Muttusámi Ayyar, Brandt, and Parker, JJ.)

PARKER, J.—The defendant is the syrang of a boat at Cocanada and has been convicted by the Port Officer as Special first-class Magistrate for refusing to hire out his boat, punishable under s. 14 of the Boat Rules for that port.

The evidence shows that the cotton to be shipped was brought alongside the wharf, but the defendant refused to receive it on board without a tally-man. Mr. Wilkinson, the godown-keeper of Messrs. Simpson Brothers (the shippers), told him that the responsibility for the safety of the goods was on him, the syrang, but defendant would not admit this. In his defence he stated that he was not acquainted with English or Hindustani nor did he know how to count, and therefore he refused to ship the cargo unless a tally-man were given him to take the responsibility for the delivery of the goods off his hands. Defendant further stated that Mr. Wilkinson then told him he did not want his (defendant's) boat.

Section 14 of the Boat Rules provides a penalty for any owner of a licensed boat who shall refuse to let his boat on hire without assigning reasonable and satisfactory cause for such refusal. Mr. Wilkinson does not in his evidence say that defendant refused to let his boat, but that he refused to take the goods unless a tally-man were sent with them. The question is whether defendant assigned reasonable and satisfactory cause for such refusal.

It appears to me that he did. His inability to count and to speak English or Hindustani was an argument which a reasonable man might not unfairly assign for refusing to be held responsible for goods when for their proper custody such knowledge was required. It is not shown that the reasons assigned were untrue, and the Sessions Judge has explained that it was a physical impossibility for the defendant under the circumstances to perform the duty which Mr. Wilkinson sought to impose upon him.

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I observe that the Port Officer (Mr. Baker) allowed the complainant (Mr. Wilkinson) to put questions to the accused as to what took place on the occasion—apparently with a view of convicting defendant out of his own mouth. Such a procedure is quite unauthorized by law. Section 342 of the Criminal Procedure Code allows the Court,—but never the complainant,—to put questions to the accused ; but the power of the Court itself to put questions is limited to the single purpose of enabling the accused to explain circumstances which appear in evidence against him.

I would set aside the conviction and direct that the fine, if levied, be refunded.

BRANDT, J.—The Session Judge refers the conviction in this case as unsustainable on the ground that the accused had reasonable cause for refusing to let on hire for the carriage of goods a boat licensed to ply for hire at the port of Cocanada.

The grounds on which the Session Judge bases his reference are that the accused pleaded that not being acquainted with English or with Hindustani he could not count, or "tally" an account : that "the physical impossibility of a syrang counting bags or bales of goods, guarding them through the night, and watching them while he is steering the boat to the steamer and then seeing them delivered, is so apparent that the hesitation of the syrang to incur criminal responsibility for short delivery seems natural," that is, that his refusal to carry the goods unless a tally peon was sent by the shippers in charge, to relieve him from responsibility for custody of the goods was "reasonable and satisfactory."

The Session Judge says, "the question at issue really is whether a syrang is responsible for the safety of the goods placed on his boat ;" and he refers to a case in which another syrang at the same port was convicted of criminal breach of trust as a carrier in respect of one bag of jaggery, which conviction was reversed in appeal by this Court.

I am of opinion that the conviction in this case is not bad in law. Under the rules framed by Government under the provisions of Act VII of 1867, the owners of only such boats as are duly licensed are authorized to ply for hire at the several ports named, and this being so it is not unreasonable that under the terms of the license issued (which the rules provide shall be fully explained to the owners), they should be, as they are, bound to let their boats on

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hire for the carriage of goods or passengers, as the case may be, unless "reasonable and satisfactory" cause for refusal be shown.

There is no question here as to the "criminal" responsibility of the owner or syrang, and the fact that one syrang was charged with criminal breach of trust in respect of certain goods committed to his charge does not affect the question.

That the owner of a licensed boat, or person deputed by him, who is required under s. 14 to let his boat on hire for the carriage of cargo, is *primâ facie* responsible for the carriage, safe custody and delivery of such goods admits, as it seems to me, of no question; to what extent he is so liable may admit of question, having regard to the special circumstances of each case, but the ordinary rule would certainly seem to me to apply, viz., that when goods are bailed by one to another for carriage it is no answer to an action brought for recovery of damages for breach of the engagement, to say that the goods were lost on the way; the very fact of the loss affords *primâ facie* evidence of neglect and want of care.

In the criminal case to which reference was made above, the shippers had, it appears, voluntarily sent a tally-man or peon in charge of the goods shipped, and it was found that he had the key of the hold in which the goods were placed, and therefore had immediate custody of them, and the question was not as to the civil liability of the carrier, but as to whether the latter was guilty of the criminal offence imputed.

The excuse that the accused could not count the goods because he did not know English or Hindustani appears to me not reasonable: it does not follow that because he did not know those languages he could not keep count of such things as bales of cotton, to the number which his boat would hold; and acceptance of the license, in my opinion, implies an undertaking on the part of the owner of the boat to accept for conveyance goods to be carried from the port to vessels in the roads or harbour, and for delivery of such goods, at the side of such vessels, and *vice versâ*; if the excuse in the case is held to be reasonable and satisfactory, a person employing such a boat for hire must always provide a servant to have the goods counted as embarked, and again when disembarked. Even then the liability of the boat-owner or syrang as a carrier would remain the same between the time when receipt was given for the goods counted and delivered, and the time when they were again taken charge of by the tally-man for the purpose of unloading;

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unless, as the Session Judge would appear to suggest, the carrier can insist that he is under no liability for the safe custody of goods carried on his boat, but only for their conveyance, on the responsibility and in the custody of the shipper's servant in charge. For such a proposition there is, as it appears to me, no foundation.

I am then of opinion that the cause assigned by the accused for refusal to hire his boat for conveyance of the goods tendered in this case for carriage, viz., "that he would not ship the cargo unless a tally-man was given," was not reasonable and sufficient.

I agree with Mr. Justice Parker's remarks as to the impropriety of the Magistrate's procedure commented on at the end of his judgment.

Owing to the difference of opinion in the Court the case was referred to a third Judge under s. 429 of the Code of Criminal Procedure.

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

MUTTUSÁMI AYYAR, J.—The facts of the case are sufficiently stated by my learned colleagues in their judgments, and I do not consider it necessary to repeat them at length. It appears that some cotton to be shipped was brought alongside the wharf at Cocanada, but the accused refused to receive it in his boat without a tally-man. Mr. Wilkinson, the godown-keeper of Messrs. Simpson Brothers, the shippers, told him that the responsibility for the safety of the goods was on him, the syrang, but the accused denied that it was so. In his defence he said he was not acquainted with English or Hindustani and he did not know how to count, and that he therefore refused to ship the cargo unless a tally-man were given. It is provided by s. 14 of the Boat Rules that any owner of a licensed boat or person deputed by him refusing to let on hire his boat without assigning reasonable and satisfactory cause for such refusal should be liable to a penalty not exceeding Rs. 10. The question for decision is whether in declining to take in the cargo unless a tally-man were provided, the accused assigned a reasonable and satisfactory cause. It may be that if there was nothing in the rules themselves, a person who did not know how to count might reasonably require the assistance of a tally-man. But it is provided by s. 8 that if any boat is loaded with passengers or cargo beyond what is specified in the license, the tindal of such boat shall be liable to a fine, and by s. 7 that all boats must carry such number of passengers and

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quantity of goods as shall be expressed in the license, a refusal to take which will subject the owner to the loss of hire and suspension of license, if considered necessary. These sections presuppose that the person in charge of a licensed boat is able to count the number of passengers taken into the boat and compare it with the number mentioned in the license and to ascertain the quantity of cargo shipped and compare it with the quantity specified in the license. As all the sections must be read and construed together, I do not consider that the cause assigned by the accused for his refusal, viz., his inability to count, is a reasonable and satisfactory cause within the meaning of s. 14. The accused ought not to have taken charge of a licensed boat unless he knew how to count or was provided by the owner with men who knew how to count for him.

The conclusion I come to is that the refusal of the accused to let his boat on hire unless the shippers provided a tally-man was not a refusal for a reasonable and satisfactory cause within the meaning of s. 14. I am also of opinion that the criminal revision case mentioned by the Session Judge is not in point.

I quite agree with the remarks of Mr. Justice Parker on the Magistrate's procedure.

The result is the conviction will stand, and this Court must decline to interfere on revision.

APPELLATE CRIMINAL.

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

1886. Dec. 10, 29.

RATNA MUDALI *in re.**

Penal Code, ss. 295, 297—*Defiling a place of worship—Trespass on a place of sepulture.*

R, a Hindú, had sexual intercourse with a woman within an enclosure surrounding the tomb of a Muhammadan Fakir. He was convicted under s. 295 of the Indian Penal Code:

Held, that in the absence of proof that the place was used for worship or otherwise held sacred, the conviction was bad, and that it should be altered to a conviction under s. 297 of the said Code.

THIS was a case referred for the orders of the High Court under

* Criminal Revision Case 697 of 1886.

RATNA MUDALI *In re.*

s. 438 of the Code of Criminal Procedure by E. C. Johnson, Acting District Magistrate of Chingleput.

The facts necessary for the purpose of this report appear from the judgments of the Court (Muttusámi Ayyar and Brandt, JJ.)

Counsel were not instructed.

BRANDT, J.—The finding is that the accused had sexual intercourse with a woman within an enclosure surrounding a tomb or "in one corner of the sepulchre" under which the remains of a Muhammadan 'Fakir,' venerated by some of his co-religionists, are buried, and that finding must be accepted.

The accused has been convicted under s. 295 of the Indian Penal Code and sentenced to rigorous imprisonment for three months. The District Magistrate is of opinion that the First-class Divisional Magistrate's conviction cannot be supported in law, on the grounds (1) that there is not sufficient evidence on the record that the place is "held sacred by any class of persons," (2) that an intention to insult is not only not proved, but negatived by the evidence as to the time when and the circumstances in which the act was committed, (3) that it is at least doubtful whether a knowledge that any class of persons was likely to consider the act as "an insult to their religion" can legally be imputed to the accused. I concur with the District Magistrate in considering that *the intent* to insult is negatived by the time at which the act was committed, viz., 9 P.M., and by the fact that his detection was the result of a mere chance, and that the only reasonable inference is that the place was selected as one in which the accused might gratify his passion in reasonable hope or on a calculation that he would not be discovered. I am further of opinion that there is not sufficient legal evidence that this place is a place "held sacred by any class of persons," within the meaning of the words as used in s. 295 of the Penal Code; nor that the knowledge that the act, if detected, would be considered an insult to *the religion* of such persons, can be legally inferred.

There is a distinction, not arbitrary, between objects which are objects of respect and even veneration and objects which are held sacred; as an example of the former, I may refer to a place of sepulture (not actually consecrated, as in the case of ground specially consecrated for that purpose according to the rites of Christian churches), as distinguished from a place for worship to the deity or where an idol or altar is kept; and such distinction

RATNA MUDALI *In re*

appears to have been kept in view by the Legislature, for while s. 295 deals with the latter class of objects and places, s. 297 deals more especially with trespasses on places of sepulture and places set apart for the performance of funeral rites and as depositories for the remains of the dead.

Now there is no evidence before us that this place was specially consecrated, and though we are aware that Muhammadans not uncommonly resort to gardens and enclosures where their ancestors or holy men have been buried, for the purpose of saying their prayers, and from time to time to perpetuate the memory of the dead, there is no evidence that this place was so used, and we cannot take judicial notice of the custom.

I am then of opinion that there are not grounds on which it can be held that the accused must have been aware that his act was likely to be considered as an insult to *the religion* of any persons.

There was, however, undoubtedly a trespass in a place of sepulture, and the question is whether the accused must be held to have known that he was likely to wound the feelings of any persons by such trespass, and I am of opinion that the accused must be held to have had sufficient knowledge of the general sentiment and practice of the community amidst which he lived, and that he cannot be excused on the ground that perchance there were no persons specially interested, or none ready to resent the act and prosecute for it, or that his act might as likely as not escape detection; he was detected, and as the event proved there were persons whose feelings were likely to be wounded; the act was the result of culpable heedlessness and disregard for the feelings of others, resulting from a determination to gratify personal lust, despite the consciousness of the consequences of his act if discovered, and failure to exercise that circumspection which it was incumbent on him to exercise: he might then properly be convicted under s. 297, and as the accused will not be prejudiced by substitution of a conviction under that section in lieu of that under s. 295, I would set aside the conviction under the latter section and substitute a conviction under the former.

As regards the punishment, I think it is excessive, any positive intention being negatived, and consider that a sentence of one month's rigorous imprisonment would have sufficed; I would direct that the accused be released from jail on the completion of that period.

RATNA MUDALI *In re.*

MUTTUSAMI AYYAR, J.—In this case the accused, a Hindú, had sexual intercourse with a woman within an enclosure surrounding the tomb of a Fakir at 9 P.M. on the 5th October last. The District Magistrate considers that the accused selected the place as one in which his act was likely at 9 o'clock at night to pass undetected, and that he had no intention of insulting the religion of the Muhammadans in his village, and in this opinion I also concur. Though the primary intention of the accused was to gratify his lust in a place where his act was considered likely to escape detection, I cannot say that he had no knowledge that his act was likely, if detected, to be considered by the Muhammadans to be a defilement, insulting to their religion or to wound their feelings. There is, however, no evidence to show that the tomb in question was used as a place of worship or that any particular object held sacred was defiled, and therefore the conviction under s. 295 cannot be supported. But I also think that upon the facts found a conviction under s. 297 can be supported. The accused committed a trespass on a place of sepulture and knew that his act, if detected, was likely to wound the feelings of the Muhammadans. I do not consider that his belief that the act would probably not be detected would make any difference though it may no doubt well be taken into consideration in awarding punishment. I would alter the conviction to one under s. 297 and reduce the sentence as proposed by Mr. Justice Brandt.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KAVERI (JUDGMENT-DEBTOR), APPELLANT,

and

ANANTHAYYA (DECREE-HOLDER), RESPONDENT.*

1886. Dec. 3, 6.

Transfer of Property Act, ss. 2, 99—Attachment of property mortgaged prior to 1882.

In 1884, a mortgagee obtained a decree for arrears of interest due under a mortgage deed of 1879 and in execution of the decree attached and applied for the sale of the land mortgaged:

* Appeal against Order 87 of 1886.

KAVERI v. ANANTHAYYA.

Held, that by reason of s. 99 of the Transfer of Property Act, 1882, the land could not be sold otherwise than by a suit instituted under s. 67 of the said Act.

APPEAL from an order of J. W. Best, District Judge of South Canara, reversing an order of M. Mundappa Bangera, District Múnsif of Karkal, passed in execution proceedings in suit 199 of 1884.

The decree-holder, Ananthayya, having in 1884 obtained a decree for arrears of interest due under a mortgage deed executed in 1879 by the judgment-debtor, Kaveri Amma, applied to have the mortgaged property attached and sold in satisfaction of the decree.

The judgment-debtor objected to the sale under s. 99 of the Transfer of Property Act, 1882.

The Múnsif allowed the objection and dismissed the application.

On appeal the District Judge reversed this decree on the ground that, under s. 2 of the Transfer of Property Act, s. 99 was not applicable to the case.

The judgment-debtor appealed.

Srinivása Ráu for appellant.

Respondent was not represented.

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT:—The decree was obtained in 1884 for arrears of interest due for three years and in execution of that decree the plaintiff got the mortgaged property attached. The District Múnsif held that s. 99 of the Transfer of Property Act debarred the decree-holder from bringing the property to sale otherwise than by instituting a suit under s. 67 of that Act. On appeal the District Judge reversed this order and directed execution to proceed on the ground that s. 2 saved any right or liability arising out of a legal relation constituted before the Act came into force, or any relief in respect of such right or liability from the provisions of the Act.

Although the legal relation of mortgagor and mortgagee was constituted in 1879, the right to attach the property and bring it to sale and the relief in respect to such right arose only out of the decree in 1884 which was subsequent to the passing of the Transfer of Property Act. The right to enforce the decree is a substantive right, but the mode of enforcing it is a matter of procedure. By

the decree in 1884 the decree-holder did not, through the operation of s. 99 of Act IV of 1882, gain a right to have the property sold in satisfaction of the decree, and therefore his procedure must be governed by s. 67. See *Dinendra Nath Sannyal* v. *Chandra Kishore Munshi*,(1) and *Bhobo Sundari Debi* v. *Rakhal Chunder Bose*.(2)

The order of the District Judge must be set aside with costs, and that of the District Múnsif restored.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

against

BODAPPA.*

1886. Dec. 17.

Arms Act, 1878, *ss.* 5, 19.

B. having obtained a license under the Arms Act, 1878, for a match-lock, had the same converted into a percussion gun. He was convicted under s. 19 of the said Act, on the ground that the license did not permit him to keep a percussion gun:

Held that the conviction was bad.

CASE referred under s. 438 of the Code of Criminal Procedure by G. Stokes, Acting District Magistrate of Cuddapah.

The facts of the case were stated as follows by the District Magistrate:—

"The accused has been charged with possessing a cap gun, while the license he produced covered only a match-lock. The defence of the accused is, that the gun now in his possession and about which the question has arisen is the same that he had with him when he obtained the license, but that for convenience sake he had it altered from a match-lock to a cap gun after he obtained the license.

"In convicting the accused, the Joint Magistrate has not been without doubt as to the legality of the conviction. He has found distinctly that the license produced was granted for the very gun in question. I consider that the legality of the conviction is very

(1) I.L.R., 12 Cal., 436. (2) I.L.R., 12 Cal., 583.

* Criminal Revision Case 467 of 1886.

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doubtful and therefore refer the case for the orders of the High Court."

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

The Court (Muttusámi Ayyar and Brandt, JJ.) delivered the following

JUDGMENT:—The question is, whether the accused had in his possession an "arm" in contravention of the provisions of s. 19 of the Arms Act, 1878, that is, whether he had in his possession a firearm "not in the manner and to the extent permitted" thereby. As to the extent there is no question; that clearly refers to the number of arms or quantity of ammunition, &c., for which the license is given, and as to the manner the license does not cease to protect the possession by reason of its having been altered from a match-lock to a percussion gun; the word "manner" as used in s. 5 appears to us to have reference to the conditions under which a license for the weapon is given; *e.g.*, as to how it is to be kept and used, and as to its being produced at the times required. There is no distinction drawn in the Act between the various kinds of explosive firearms; and if reference is had to schedule II, it will be seen that a distinction is there drawn not between the different kinds of guns, as for example a rifle and a smooth-bore but between firearms and firearm barrels, and pistols and pistol barrels. We must hold that the conviction is not good in law, and we set it aside and direct that the fine, if levied, be returned to the accused.

It was suggested that the accused might have been and may now be convicted with reference to the provisions of s. 5 of the Act, which enacts that "no person shall manufacture, *convert*, or sell, or keep or offer for sale any arms, ammunition, &c., without a license." On referring to the statement made by the accused, we find he first said that he had the gun converted from a match-lock into a percussion gun; it is true he afterwards used the words "I changed it into a percussion-gun," but, reading the statement as a whole, we cannot say that he intended that he himself in fact converted it, and we are not prepared to convict him of an offence different from that which he was called upon to meet.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

1886. Sept. 2. Dec. 16.

KRISHNASÁMI CHETTI AND OTHERS (PLAINTIFFS), APPELLANTS,

and

VÍRASÁMI CHETTI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Custom—Caste usage—Expulsion of member of caste under mistake of fact and without notice.

In a suit relating to the management of the common property of the members of a Hindú caste, the plaintiff's right to sue was denied on the ground that, having violated the rules of the caste, he had been expelled from it:

Held, (1) that it was open to the Court to determine whether or not the alleged expulsion from caste was valid;

(2) that if the plaintiff had not in fact violated the rules of the caste, but was expelled under the *bonâ fide*, but mistaken belief that he had committed a caste offence, the expulsion was illegal and could not affect his rights.

Per KERNAN, J.—A *custom or usage* of a caste to expel a member in his absence without notice given or opportunity of explanation offered, is not a valid custom.

APPEAL from the decree of Muttusámi Ayyar, J., in civil suit No. 376 of 1883, dated 9th September 1885.

The facts necessary for the purpose of this report appear from the judgment of Muttusámi Ayyar, J., which was as follows:—

"The parties to this suit are members of the Beri Chetti caste in the Black Town of Madras. They belong to a class of Chettis or Vaisyas, consisting generally of merchants and tradesmen who are influential and enterprising. Beri Chettis are to be found throughout the Presidency, but it appears that in the City of Madras the class has a special caste organization. It is sub-divided into about 18 or 20 divisions, each division having its headman or headmen. Questions of caste are dealt with in the first instance at divisional meetings, and their resolutions are submitted either for revision by or for the information of the entire caste. The meeting of the entire caste, before which such resolutions are laid or which deals with questions concerning the whole caste, is designated as the Periyagramam meeting. The suit before me is instituted by four members of the caste in regard to the endowment

* Appeal 24 of 1885.

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of a religious and charitable institution, styled Dharmasiváchárya matham. The plaint prays, among other things, for an account being taken of properties constituting the endowment, for their being secured for the benefit of the institution, for a scheme of management being settled, for plaintiff No. 1 and other competent persons being appointed trustees, and for adequate provision being made for the due administration of the endowment. The plaint also specifies the several charities performed in the institution, as consisting in the maintaining of a priest called Dharmasivácháryar, in the performance of certain religious rites and ceremonies, and in the feeding of Brahmans on behalf and for the spiritual benefit of the whole caste.

"The account, however, given by the defendants, of the scope and object of the institution, is somewhat different. Whilst admitting that the institution is a purely caste institution, the defendants assert that a section of the caste called Maligaikarar Vaguppu is not entitled to the benefit of the endowment, as that section seceded from Dharmasiváchárya and became the disciples of another priest called Sattanáda Gurukkal, about 200 years ago. This averment is, however, immaterial to the present inquiry, the only issue which I have to decide being whether the plaintiffs continue to be members of the Beri Chetti caste. It is not alleged that they belong to the class of seceders mentioned above. It is further contended by the defendants that Dharmasiváchárya is bound to worship an idol called Visvesvarasámi and to perform all rites and ceremonies for the due performance of such worship for the benefit and on behalf of those of the caste who are his disciples, to pronounce benedictions upon those disciples and to advise and guide them in spiritual matters, and that the endowment belongs to Visvesvarasámi and the Dharmasiváchárya matham. However this may be, it is sufficient for the present inquiry to say that both parties agree in describing the institution as a caste institution, and that none but those who are in the caste and who belong to Dharmasiváchariyar matham are interested in the endowment and in the due performance of the charities for which the institution is maintained. In advertence to their status, the plaintiffs aver that they are members of the Beri Chetti caste and followers of the Dharmasiváchárya matham and contributors to that institution, that plaintiff No. 1 is also one of the hereditary headmen of the whole caste, and that all the plaintiffs are

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interested in the property and management of the institution. But it is denied by defendants Nos. 1 and 2 that the plaintiff No. 1 is a hereditary headman, though it is admitted that he was a hereditary councillor of the headman. It is next asserted that, though the plaintiffs were members of the Beri Chetti caste, they have violated the usages and customs of the said caste and thereby forfeited their privileges as members of such caste, and that they have been expelled from it. It is contended, therefore, that, by reason of such forfeiture and expulsion, their interest in the property and management of the institution has ceased and that they are not entitled to maintain the suit. An issue has been framed with reference to this preliminary contention and set down for trial in the first instance. The question then and the only question which I have now to decide in this are the plaintiffs competent to maintain this suit, or have they ceased to be members of the Beri Chetti caste, as alleged in the 67th paragraph of the written statement. At the commencement of the trial, a question was raised on the form of the issue as to the right to begin. As it is admitted that the plaintiffs were once in the caste and interested in the institution, and as the right to begin depends rather on the substance than on the form of the issue, I held that the *onus* of proof was on the defendants who resisted the claim and that they were, therefore, bound to begin. The next contention had reference to the precise questions of fact and law, which it is necessary to decide in coming to a finding on the preliminary issue. It was alleged for the defendants that the factum of removal from caste is the only one I have to investigate, and that otherwise Civil Courts would arrogate to themselves an appellate jurisdiction over caste assemblies, which it is not competent for them to do. It may be open to argument how far Civil Courts are entitled to examine into the reasons assigned for expulsion from caste, and this question I shall consider presently. But there is in my judgment no doubt that the issue in its present form raises a mixed question, a question of fact, viz., the factum of expulsion, and a question of law, viz., the legal effect of such expulsion in determining the interest which the plaintiffs admittedly had at one time in the property and management of the institution. As to the factum of the plaintiffs' removal from caste, there is considerable evidence on record. It is to be regretted that the fact was not at once admitted, for, in

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that case it would not have become necessary to record much of the voluminous evidence recorded at the trial. No less than 36 witnesses were examined for the defendants, and the evidence in so far as it relates to the fact of removal from caste is overwhelming. Some witnesses depose to the resolutions arrived at by the divisional meetings which they attended, to the effect that the plaintiffs should be removed from caste. Several depose that those resolutions were laid before the Periyagramam meetings which they attended and that they were either adopted or confirmed by those members of the caste who attended such meetings. A large number of witnesses deposed further to the intimation they had in regard to the plaintiffs' removal from caste and to their having acted upon that intimation and ceased to invite and be invited by the plaintiffs for meals and for auspicious and inauspicious ceremonies. There is also some evidence that the first plaintiff attended the first Periyagramam meeting held in regard to his removal from caste.

"In answer to this evidence, the plaintiffs only allege irregularities in the procedure followed on these occasions, and say in substance that they do not know whether they were put out of caste or not, and that what is alleged to be their expulsion from caste is not legal. They admit, however, that since 1881, they have not invited and been invited by the majority of the caste for meals and for auspicious and inauspicious ceremonies. This appears to me to corroborate materially the evidence adduced for the defendants in regard to the factum of expulsion. The conclusion I come to is that the division to which the plaintiffs belong and the Periyagramam resolved that the plaintiffs be put out of caste and that the majority of the caste acted upon the resolution and forbore to invite them for food and for auspicious and inauspicious ceremonies and still to continue to do so.

"The plaintiffs next impugn the validity of their removal from caste on the ground (i) that the procedure followed by the caste meetings was highly irregular, unreasonable and unjust, (ii) that they committed no caste offence, (iii) that no civil right could be forfeited by loss of caste under Act XXII of 1850, (iv) that the expulsion was the result of enmity and personal ill-will, and (v) that it is no bar to their maintaining this suit. It is urged on the other hand for the defendants that Civil Courts have no appellate jurisdiction over caste assemblies, and that the decision of such

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assemblies that a particular person has rendered himself liable to be expelled from caste is final and conclusive.

"It would appear that expulsions from caste were rare among Beri Chettis in this city, and that there were no caste dissensions prior to 1876. There are only two such expulsions mentioned in the evidence during this interval. One of them is the expulsion of Mylapur Kandasámi Chetti and of his son. The son was expelled from caste for renouncing Hindú religion and embracing Christianity, and the father was first expelled for associating with the son, but he was readmitted into caste on ceasing so to associate. It appears, however, that the father then endeavoured to readmit the son into caste on the performance of certain expiatory ceremonies, but this the caste was not prepared to sanction. An undertaking was taken from the father not to do so, but the latter acted in contravention of it and was again put out of caste. It appears that he has not since been readmitted into caste. The other expulsion is the one to which witness Rámasámi Chetti refers in his evidence. According to him, one Pákam Sabápathi Chetti was expelled from caste for illicit intimacy with a low caste woman. It appears also that in some of the divisions there were and there are still rival parties who originally differed from each other in regard to some secular matters. Though from party feud, these did not exchange meals and did not invite each other during auspicious and inauspicious ceremonies, still they were treated merely as rival factions and no caste taint was supposed to attach to them. This was the state of things in the caste until 1876, when Rámasámi Chetti's son, the late Ratnavélu Chetti of the Madras Civil Service, returned from England to Madras. On his return, the question whether he might not be readmitted into caste on performance of expiatory ceremonies engaged the attention of its leaders. It is stated by Rámasámi Chetti that there was some vacillation on this occasion among the members of the caste, that it was at first considered that Ratnavélu Chetti might be readmitted, but that it was finally decided that it could not be done. However this may be, it is a fact that Ratnavélu was not readmitted, that Rámasámi Chetti thought that Subraya Chetti and Somasundra Chetti opposed his son's readmission, that several members of his division who were in favor of readmission sympathised and sided with him, and that dissensions thus arose in the caste owing to the difference of opinion which existed on this

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occasion. In January 1877 those in Rámasámi Chetti's division who opposed Ratnavélu's readmission into caste put Rámasámi Chetti out of caste until he renounced caste intercourse with his son. Those persons who sympathised and continue to mix with him were also removed from caste. This split in Rámasámi Chetti's division extended to other divisions, and the sectarian feeling gained strength, and the number of persons put out of caste increased.

"Rámasámi Chetti continued to treat his removal from caste with indifference till 1878, when he considered it desirable to seek reconciliation with the caste. He was readmitted into the caste and continued in it till 1880. In 1879, a meeting of the caste was held for the election of a Dharmakarta for Kandasámi temple, and to this meeting some 28 persons were not invited. Defendant No. 5, one of those put out of caste for siding with Rámasámi Chetti, pointed out this irregularity to the High Court in a suit in which a motion was then pending. Subraya Chetti filed an affidavit justifying his conduct. He alleged that some of the persons not invited to the meeting had ceased by transgressing the usages of the caste to be its members, and that as the headman of the caste it was for him to decide who ought to be invited to the meeting of the caste. Rámasámi Chetti objected at the caste meeting to this portion of the affidavit. Some of those who were not invited sued the headman, Subraya Chetti, for damages in original suits Nos. 59, 203 and 204 of 1880, but these suits were dismissed. When they were pending, the headman, Subraya Chetti, convened a meeting to raise funds for defending those suits. At this meeting again Rámasámi Chetti opposed Subraya Chetti, and urged that the litigation should not be treated as one concerning the Periyagramam. Amarambédu Subraya, defendant No. 5, brought original suit 269 of 1880 against the headman of his division for not inviting him to the meetings of the caste; the headman justified his conduct and contended that he was one of those who were put out of caste for joining Rámasámi Chetti when he associated with his son, and that though Rámasámi Chetti was since readmitted into caste, defendant No. 5 did not seek readmission and continued to associate with persons who had been put out of caste, but not been readmitted. This suit was also dismissed.

"Palayam Somasundra Chetti, one of the leading members of

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the caste, instituted original suit No. 166 of 1880 against the present first plaintiff and others in regard to the dharmakartaship of the temple at Tiruvattur. But this suit also eventually failed.

"About the end of 1880, plaintiff No. 1 was put out of caste for taking part, as it was said, in the karmantram ceremony of the daughter of Mylapur Kandasámi Chetti. Early in 1881, Rámasámi Chetti was again put out of caste. There was a festival shortly before in honor of the idol Yagattal worshipped by the caste, and during this festival it was customary to take to the temple in procession certain presents as an offering to the idol. The headman, Subraya Chetti, desired that the procession should start from a place called Natakasala, whilst Rámasámi Chetti and the plaintiffs opposed the headman and started a rival procession from one Linga Chetti's house. A breach of the peace appeared imminent and both processions were stopped by the Police. Some time afterwards, plaintiffs Nos. 2 and 3 were put out of caste on the ground that they associated with Rámasámi Chetti. Subsequently plaintiff No. 4 was put out of caste for the reason that he attended the funeral ceremony performed by Rámasámi Chetti on the occasion of his son, Ratnavélu Chetti's death.

"It appears from the foregoing summary that it was usual in the caste to expel persons from it for caste offences, that renouncing Hindú religion, illicit intimacy with low caste women and association with expelled persons were treated as such offences.

"It shows also that Rámasámi Chetti considered that his son was not readmitted into caste owing to the opposition offered by Subraya Chetti and Somasundra Chetti, that he often opposed Subraya Chetti at caste meetings, that some of those who originally sided with him and were put out of caste sued the headmen for damages, and that there was thus no cordial feeling between Rámasámi Chetti and his adherents on the one hand and Subraya Chetti and his supporters on the other.

"I shall now consider the several grounds on which the validity of the plaintiffs' expulsion is impeached. As to the procedure followed at these caste meetings, it is admitted that it was not judicial. It appears that no evidence was taken, no formal record was kept, that the person accused of a caste offence was not invited to the meeting, that no explanation was demanded from him, and that no previous notice of the business done at each meeting was given to the members of the caste. It is not contended that the

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procedure was otherwise, but it is justified on the ground that it was in accordance with custom. Seeing that the members who attended the meeting were neighbours and fellow castemen, there is ground for the contention that according to custom more importance was attached to their opinions than to any formal procedure. It appears, however, to be the customary procedure of the caste, and there is nothing in the evidence to lead me to a contrary conclusion.

"In connection with this point, it is contended for the plaintiffs that there were two headmen for each division, and that it was competent to the Periyagramam to reverse or modify the decision of divisional meetings. In regard to the plaintiffs, there was no difference of opinion between the Periyagramam and the divisional meetings, and the contention is not material to the present inquiry. As to the contention that there were two hereditary headmen for each division and for the Periyagramam, it appears to me to be well-founded. The defendants do not deny that there was another person who assisted the headman, but they assert that the second was only an adviser or councillor, and that he was not recognized as one who possessed the privileges of the headman. This suggestion is, however, inconsistent with several documents which were executed before there were any dissensions in the caste and in which both are described as headmen. It appears also that Subraya Chetti referred to two headmen in several of the suits instituted against him. Though I consider that there were two headmen for each division, I think that, when proceedings are instituted against one of them, the meeting convened by the other is not incompetent to put him out of the caste. In this view it seems to me that the contention whether there was one headman or there were two headmen is immaterial.

"As to the allegation that no caste offence was committed, I do not think that it can be supported in regard to plaintiffs Nos. 1 and 4. Several witnesses for the defendants depose that they saw plaintiff No. 1 attend the funeral ceremony performed on account of Kandasámi's daughter, and that though the ceremony was performed in the house of Kandasámi's son-in-law, Ladu Chetti, both he and his wife, it is stated, had associated with Kandasámi. I see no reason to discredit the evidence on this point, and plaintiff No. 1 himself does not deny it, though he states that he did not take his meals in Ladu Chetti's house. During his

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examination, plaintiff No. 4 admitted that he attended the funeral ceremony performed by Rámasámi Chetti on account of his son, Ratnavélu Chetti. There is also evidence to show that, when a person is put out of caste, those in the caste are, according to custom, bound not to associate with him either by taking meals with him or attending auspicious and inauspicious ceremonies in his house. I find that the author of the Mitákshará on ceremonial law treats such acts as association with one who is out of caste, and I cannot say that, in so far as plaintiffs Nos. 1 and 4 are concerned, they committed no caste offence according to the usage obtaining among Beri Chettis. Manu, Madava, Devála and Vignyanesvara speak of association with those put out of caste as a ground for removal from caste. As regards plaintiffs Nos. 2 and 3, the balance of evidence is to the effect that Subraya Chetti stated at the Periyagramam meeting that he saw them attend ceremonies and take meals in Rámasámi Chetti's house. But no evidence was given at the trial before me that they actually did so. The conclusion I come to in regard to them is that they were put out of caste in the *bonâ fide* belief that they committed a caste offence, but that there is no reliable legal evidence before me to show that they actually committed it.

"As to the contention founded on Act XXII of 1850, I do not consider that it is applicable to this case. The right in contest is in its nature a right to participate jointly with fellow castemen in the benefit of a caste institution, and the continued possession of status as a casteman is a condition precedent to the enjoyment of such right. It is also the understanding on which contributions to the endowment must be taken to have been made, regard being had to the usage of the particular caste to which the parties belong and of similar institutions. As to the assertion that the plaintiffs' removal from caste was not *bonâ fide* and due to personal ill-will, I do not think that it is borne out by the evidence. There was no doubt no good feeling between Rámasámi Chetti and his party on the one hand, Subraya Chetti and his friends on the other. But it must be remembered that the plaintiffs' expulsion was the act, not individually, of Subraya Chetti, but of the members of their respective divisions and the Periyagramam. It may well be that Rámasámi Chetti and his friends hated Subraya Chetti because he was hostile to the readmission of Rámasámi Chetti's son. The evidence affords no warrant for the suggestion that the plaintiffs'

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divisions and the Periyagramam voted the removal from caste from personal spite and not from a *bonâ fide* belief that there was a caste transgression. It is argued for the plaintiffs that it is not competent to me to examine into the validity of the plaintiffs' expulsion, and that, if the factum of expulsion is proved, it must be taken to be valid. In this opinion, however, I am unable to concur. It is true that matters relating to caste are within the exclusive cognizance of caste assemblies, and that, when they act *bonâ fide* in the exercise of their jurisdiction, their decision must be taken to be conclusive. To this extent, I accept the contention. Here I must observe that at first I felt some doubt whether I should not insist on strict legal proof of the commission of a caste offence, and that the judgment I come to on further consideration is that to do so would be to assume an appellate jurisdiction over caste assemblies in regard to matters of caste. But I must satisfy myself that they dealt *bonâ fide* with a caste offence. Otherwise there would be no spiritual basis for their action. As to the legal effect of the removal from caste over the right in contest, I consider that it suspends the exercise of the right until the plaintiffs obtain readmission into caste. It is alleged that the plaintiffs are allowed to enter the caste temple and worship the idol there, to make offerings to it and to perform festivals on particular occasions. It is also said that plaintiff No. 1 is the dharmakarta of the temple at Tiruvattúr. But I must say that Dharmasivácharyár matham is not a precisely similar institution. Religious instruction has to be afforded in the Matham, and according to ceremonial law no priest is competent to afford such instruction to one who is put out of caste. It may be a matter for regret that the matter in contest was not settled out of court, and that the ceremonial law of the caste does not meet the requirements of progress. But in dealing with the question here, I have no choice in the matter, and my decision should be in accordance with the usage and ceremonial law of the caste. On the ground, therefore, that the plaintiffs were removed from caste by their caste who act *bonâ fide* and in accordance with the customary procedure, I have to find the issue against the plaintiffs and dismiss the suit with costs."

Plaintiffs appealed.

Mr. *Grant* for appellants.

Mr. *Branson* and Mr. *Norton* for respondents Nos. 1–4 & 6.

Anandachárlu and *Sundaram Sastri* for respondent No. 5.

The Court (Kernan and Brandt, JJ.) delivered the following judgments:—

KERNAN, J.—[After finding that it was not proved that plaintiffs Nos. 1 and 4 had committed any caste offence or had in fact been expelled in the manner stated by the witnesses, proceeded as follows]:—

There still remains the question whether, if plaintiffs were expelled according to caste procedure or custom, their expulsion is valid. The learned Judge states the matter thus: "As to the procedure followed at these caste meetings, it is admitted that it was not judicial. It appears that no evidence was taken, no formal record was kept, that the person accused of a caste offence was not invited to the meeting, that no explanation was demanded from him, and that no previous notice of the business done at each meeting was given to the members of the caste. It is not contended that the procedure was otherwise, but it is justified on the ground that it was in accordance with custom. Seeing that the member who attended the meeting were neighbours and fellow castemen, there is ground for the contention that, according to custom, more importance was attached to their opinions than to any formal procedure. It appears, however, to be the customary procedure of the caste, and there is nothing in the evidence to lead me to a contrary conclusion."

Again, the learned Judge says: "It may be a matter for regret that the matter in contest was not settled out of Court, and that the ceremonial law of the caste does not meet the requirements of progress. But in dealing with the question here, I have no choice in the matter, and my decision should be in accordance with the usage and ceremonial law of the caste. On the ground, therefore, that the plaintiffs were removed from caste by their caste who act *bonâ fide* and in accordance with the customary procedure;" the learned Judge acted on what he found was the procedure of the caste, founded on custom or usage, viz., to charge, and condemn and expel from caste a member, in his absence, without notice either of the intention to hold a meeting to consider his conduct or of the time or place of the meeting, or of the nature of the charge, and without any explanation being called for, or an opportunity given him of explanation or of meeting the charge. The evidence shows that the custom is this, viz., a meeting of the division (to which the member to be expelled belongs) of the caste is called, but

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no notice is given to him of the meeting or of the object of it. The division decide that the member has broken a caste rule, and agree to expel him. After that, a meeting, called Periyagramam, of all the headmen of the different divisions is called in the morning for that evening, and as counsel for defendant admits, no notice is given to the member of that meeting, no evidence is taken, no explanation is demanded; that meeting merely records the expulsion recorded at the division. The proceedings of the two meetings affect to be judicial. The maxim *audi alteram partem* contains a fixed principle of justice. It prevails in all countries subject to the British rule. It is not confined to public courts of justice, but applies to all tribunals, public or private, of every kind which are vested with or assume power to decide on the conduct or rights of parties. In a very recent case decided by this court, very many of the decisions on this subject are referred to—see *Gomperts* v. *Goldingham.*(1) That was a case where a member of a club was expelled, and two of the cases referred to in that report were also cases where members of clubs were expelled. In each case it was held that the committee who expelled were 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 without having an opportunity of making his defence. Lord Justice Brett says it would be a denial of natural justice if a decision of the club was come to without his having an opportunity of being heard. There is no reason why this principle should not apply to the proceedings of caste meetings which undertake to decide on the conduct of a member of the caste, which conduct is alleged to be contrary to caste rules and usages. To be expelled from caste causes most serious prejudice to the member expelled and to his family and in their social relation. In this case it is contended that the expulsion disentitles plaintiffs from any right to investigate the accounts of the charity which has been created partly by their and their ancestors' subscription to it.

The caste institution is not above or outside the law. The usages and customs of caste exist only under and not against the law.

Whenever a custom or usage is opposed to the law, it cannot be a good custom. Colebrook B. 1, chapter 2, section 2, IX, On

(1) I.L.R., 9 Mad., 319.

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Usage—Practice which is founded on law prevails. Hence Usage inconsistent therewith must be abrogated. A custom must be reasonable. But the custom which the learned Judge has followed is not reasonable, inasmuch as, according to it, a member may be expelled although he has no opportunity of meeting the charge against him. If reasonable notice of the time and place of the intended meeting and of the substance of the charge was given to him, and if he was allowed to attend the meeting and explain or defend himself, then the law would be complied with. What would be reasonable notice the caste may determine, provided it be reasonable. The application of this rule of law does not infringe on any legal usages and arrangements of the caste, or affect any decision they may come to at their meeting of which notice was given. If after the member has received such reasonable notice, he does not choose to attend the meeting and is not prevented from doing so by any reasonable cause, then the caste may proceed to make a decision according to their usual procedure and custom. As to the alleged custom, all that appears in the evidence is that it is not usual to give notice to offenders. There is no proof of any expulsion by the caste prior to 1864; and though an expulsion is proved to have been made then and others in 1874 or 1875, yet no evidence was given that the persons expelled had not notice of the meeting.

P. Rámasámi Chetti says that in 1878 he was expelled though he got no notice, and that, for the reasons that he gives, he recognized the authority of the expulsion. But he was readmitted to caste, and it is alleged that he was expelled again, and this expulsion he disputes, and states he got no notice of the meetings.

Immemorial custom cannot prevail against the principle contained in the maxim *audi alteram partem*—see *Williams* v. *Lord Bagot.*(1)

In my judgment, therefore, the alleged expulsion of the plaintiffs is invalid on the ground that they had no notice of the meetings to expel them or of the charges made against them, and that they had no opportunity given to them of defending themselves against such charges. They were not present at any of such meetings.

Though the learned Judge acted on the custom, he does not say that he approves of it, nor does he decide that it was a good legal custom.

(1) 3 B. & C., 786.

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On the evidence I think that this very illegal practice has produced much mischief in this caste. Several expulsions since 1878 have taken place, and it is probable that, if opportunity had been given of explanation, such expulsions would not have taken place. A question was partly argued before us whether, according to Hindú law, an expulsion can take place except for some serious offence and not merely for a slight transgression of caste usage. However, this question was not open as it was not raised in the Court below.

Expulsion from caste must necessarily mean expulsion from the whole caste. If the alleged expulsions took place, it seems to me that in the evidence the expulsions were only partial. The evidence of plaintiff No. 1 and of others is that many members of the caste not belonging to the faction of defendants Nos. 1-3 do associate with plaintiff No. 1 and others and have always done so. Moreover, plaintiff No. 1 is admittedly dharmakarta of the Tiruvattúr temple to which members of the Beri Chetti caste subscribe and where many of the caste and others worship. It appears not probable that a person put out of caste by his caste would be allowed to act as dharmakarta. Defendant No. 1 in his evidence said plaintiffs are eligible for readmission into caste, and *that prohibition extends only to attending meetings for auspicious or inauspicious ceremonies, or attending when invited for taking food;* and that it does *not* extend to anything else, and that they are not entitled to be invited to caste meetings. If this is correct, it would seem that on this ground the expulsion is only partial and not complete for all purposes.

The facts of the case of plaintiff No. 4 seem to support this view. He admits he was expelled by Periyagramam, though he says he got no notice of the division meeting. He says (and he is not contradicted) that he worships at the Kandasámi pagoda (this is the special temple of the caste) and conducts there the Pradosham festival every fortnight, and that he enters the inner precincts of that temple. If he was expelled from the entire caste, it is not accounted for by the defendants why he, an outcaste, is still allowed to enter the inner precincts of the special temple of the caste, and to conduct ceremonies there, unless the reason is that the expulsion does not amount to exclusion from all caste privileges.

I do not think the defendants have proved that the expulsion is an exclusion from all caste privileges, as alleged by the defendants in paragraph 67 of their written statement. This being so, the plaintiffs are entitled to maintain this suit seeking for the relief prayed by them, even if the alleged expulsion took place.

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As regards plaintiff No. 4, the learned Judge's finding that he committed a caste offence is not very clear, although he does find that the allegation that no offence was committed cannot be supported. He refers to this plaintiff's admission that he attended a funeral ceremony of Ratnavélu at Rámasámi Chetti's house, and that he invites Rámasámi Chetti to food. This plaintiff, however, says that Rámasámi Chetti was not legally expelled. The date of the ceremony was in or shortly after September 1881. Rámasámi was, as he admitted, expelled in January 1877 and was readmitted to caste in August 1878. As a matter of fact several members of the caste signed a document of the 9th of January 1881 expelling him, but Rámasámi says he got no notice of the meeting at which, it is said, he was expelled, and that he is in caste still. In order to establish that plaintiff No. 4 committed a caste offence, the defendants should state clearly the offence they allege against him and prove it. The offence alleged being association by him with Rámasámi and attending ceremonies with him, it lies on defendants to prove that Rámasámi was then out of caste. The production of the document of the 9th of January 1881 is not sufficient for that purpose, as it has not been proved that notice of the meeting to charge was given to him or that an opportunity was given to him to defend himself. The evidence is that Rámasámi did not get such notice. I am not able therefore to see that the expulsion of plaintiff No. 4 binds him.

In my judgment, we are bound to reverse the finding and decree of the learned Judge, and to find the issue in favor of the plaintiffs, and to decree that the plaintiffs have not ceased to be members of the Beri Chetti caste, as alleged in paragraph 67 of the defendants' statement, and that they are entitled as members of the caste to file this suit. Whether they can succeed in it must depend upon facts which have not yet been tried.

We reverse the decree of the learned Judge of the 9th day of September 1885, and we find that the plaintiffs are competent to maintain this suit and they have not ceased to be members of the Beri Chetti caste, as alleged in the 67th paragraph of the written statement. This is a finding in favor of the plaintiffs, and under the order at issue the case is to be remitted to the Issue Court to

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frame issues as to the other questions in dispute. As to the costs of the trial of the preliminary issues in the court below and in appeal, we think that the defendants Nos. 1 to 4 and 6 should pay to the plaintiffs the costs of such trial and appeal, and order accordingly. We make no order as to the costs of defendant No. 5.

BRANDT, J.—I concur in the conclusions arrived at by my learned colleague, and generally in the reasons stated by him for coming to those conclusions: the voluminous evidence is so fully and clearly set out in his judgment that I am saved a great deal of labour: it may, however, be satisfactory to both parties that I should state as briefly as I can the manner in which the case presents itself to me after full consideration; in nearly all respects I take the same view of it as I did before I had the advantage of reading the judgment of Mr. Justice Kernan.

The issue, viz., are the plaintiffs competent to maintain this suit, or have they ceased to be members of the Beri Chetti caste as alleged in the 67th paragraph of the defendants' written statement, by reason that they violated the usages and customs of the caste and have thereby forfeited all the privileges of the said caste, and have been expelled from it, and by such forfeiture and expulsion have ceased to have any interest [enforceable at law?] in the property and management of the Dharmasivácharyar matham and of the Visvesvarasámi idol, and to be entitled to participate in the worship and services of the said matham, contains in fact two propositions, a finding on each of which is essential to a finding on the whole issue; and those two propositions are—

That the plaintiffs have been guilty of what may be called certain caste offences, on account of which they rendered themselves liable, according to the custom and usages of the caste to which they are bound to submit, to expulsion from the caste, and that they were in fact expelled for such misconduct.

Now on the finding of the learned Judge who tried the case there is no legal evidence to which credit can fairly be given, in proof of the fact that two of the plaintiffs, the 2nd and 3rd, were guilty of any caste offence; and that being so, these plaintiffs' alleged expulsion from caste cannot legally render them incapable of enforcing the civil rights which they possessed, even if those who profess to have expelled them did not act in bad faith and from motives of personal spite, but in the *bonâ fide* but mistaken belief that they had transgressed caste rules.

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As my learned brother puts it, it is not sufficient to say that certain things have been done in connection with the enforcement of caste rules and observances, (to which those affected must submit either by reason of their voluntary submission to the *forum* which, in accordance with the custom of the caste, deals with the breach of such rules and observances, or to which all members must submit, involuntarily it may be, for the very and only reason that they are born in such caste,) and that members of the caste have in fact been expelled for a supposed breach of such rules and observances, even if those ordering and enforcing the expulsion acted in good faith, although under a mistake as to the facts which give to those enforcing the rules jurisdiction to enforce them. It appears to me contrary to general and well-established rules of justice that such a plea or argument should be allowed.

Nor do I see anything inconsistent in so holding and in holding at the same time that within its own sphere and in the exercise of its social and religious jurisdiction the decisions of those who properly represent a caste shall be final, so far as the civil tribunals are concerned, and not open to revision or even discussion by such tribunals.

The learned Counsel for the respondents strongly and repeatedly insisted that it was sufficient to prove the *factum* of expulsion, and to show that it was not arbitrary; and that, this being shown, it matters not whether those who decided on and gave effect to the order of expulsion had or had not before them evidence of the commission of a caste offence by those expelled: a very extreme case being suggested, he did indeed go so far as to say that if the caste tribunal expelled from caste a member thereof alleging the personal appearance of such member to be displeasing to the tribunal or to the caste or some members thereof, the expulsion would be good for all purposes, religious, social and civil.

It is well that the effects of a supposed principle should be so illustrated; the illustration indicates the consequences of admitting an authority such as is postulated; and it does not in my opinion admit of doubt that the civil power has authority—not inconsistent with the fair exercise by a caste of exclusive jurisdiction in all religious, moral or social concerns connected with it—to decide that a caste-man does not *ipso facto* lose all the rights of a citizen in respect of property belonging to the caste as a body, if he be expelled by the tribunal which represents the caste or by a faction

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in it, provided that such body acts under a mistaken but *bonâ fide* belief that the accused person has committed a caste offence, when in fact he has not done so, and to secure to those aggrieved the civil rights of which it is attempted to deprive them.

The case incidentally raises many curious and some difficult questions: into several of these it is not necessary to go. I would, however, refer to some of them for the purpose of showing how very uncertain the defendants seem to have been as to the basis on which they should rest their defence. At one time in the course of argument it was suggested that there can be no half measures, and no intermediate position: that a man is either in caste or he is an outcaste. But the defendants' own evidence shows that there is (according to some) "exclusion" from caste, which is one thing, and "expulsion" from caste which is another; we heard also suggestions of "exclusion" from one of the caste divisions without expulsion from caste by the Periyagramam, the body which consists of all the other divisions, in conclave assembled; of temporary as opposed to complete exclusion or expulsion; and of exclusion or expulsion which is complete, by which the member condemned becomes spiritually dead, but can be made alive again and restored to all his rights and privileges on payment of a few annas.

Does this give an impression of systematic and well considered dealing with the case of persons who, for associating with those guilty of the "great offences" "the heinous crimes" specified by Mánu, must perform penance for the sake of expiation "since they who have not expiated their sins will again spring to birth with disgraceful marks?"—See Manu, chapter XI, sections 54 and 55; 56 to 59; 60 to 67. Are the violations of caste customs and usages alleged, akin to the offences which Manu describes in section 68 as "*jati brahmsakara* (causing a loss of class)?" or (section 69) as degrading the offender to a mixed tribe? or as cause for exclusion from social repasts, section 70? or as causing defilement, section 71?

The impression which the evidence as a whole gives me is that the division of the people of the Beri Chetti caste in Madras Town into "gramams," which collectively constitute the "Periyagramam," and the organization thereof either was in its inception or has in course of time come to resemble in no slight degree a guild or federation of guilds in many respects not dissimilar from

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those with which students of European History are familiar; and that the organization is concerned at least as much with enforcement of social observances and of conduct deemed to be for the good of the community—and possibly for regulation of its trade, though of this there is naturally not much, if any, evidence taken in this case—as with the punishment of ceremonial offences.

There certainly are more than traces, I think there is positive evidence, of the distinction between a sort of social ostracism, the subjecting of an offender to certain social penalties and disadvantages, and exclusion from caste, which distinction has been noted, commented on and recognized elsewhere (see *Sudaram Patro* v. *Soodha Ram*)(1) and it is not unimportant to consider this with a view to determining whether in the case of the plaintiffs Nos. 1 and 4 the caste as a body, or the divisions to which they belong did in fact "expel," "excommunicate," "exclude," "keep aloof," these plaintiffs or either of them for the commission of what constituted a caste offence; or whether the allegation of such "expulsion" or whatever it may be, was made subsequently to the time at which the expulsion is now alleged to have taken place, and whether it is not the result of a combination formed not for the purpose of punishing a caste offence, but with a view to bringing to bear what in the case of a Hindu is perhaps the most powerful lever which can be conceived, in order to coerce plaintiff No. 1 or these two plaintiffs to comply with the wishes of another very powerful member of the caste. My learned colleague has forcibly stated many, if not all, of the cogent reasons which appear on the record in this case for coming to the latter conclusion, and in that conclusion I entirely concur.

I do not believe that plaintiff No. 1 was excluded or put out of caste in the manner and at the time alleged by those who profess to speak to it. The *factum* of the alleged expulsion is relied on as the best proof of the commission of the caste offence or offences imputed: that evidence I do not believe, and there are other admitted and proved facts which appear to me to be irreconcileable with the alleged exclusion on account of the commission of such offences or the violation of such caste requirements and usages as are made the basis of the plea set up in the 67th paragraph of the defendants' written statement.

(1) 11 W.R., 457.

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(After dealing with the evidence on this point, the judgment proceeded as follows.)

Then there is the objection stated by my learned colleague as to no notice having been given to plaintiff No. 1 of the intention to put him out of caste.

I think it unnecessary to decide whether if it were proved to be in accordance with the custom and usage of the caste not to give an accused person an opportunity of being heard, we could hold such custom to be bad—I by no means say it would be a good or reasonable custom—but I think it unnecessary to decide the point, as I do not believe that there was an expulsion in fact.

I agree that the suit must be remanded for adjudication on such of the merits as have not yet been gone into, and I agree as to the order proposed in respect of costs.

Solicitors for the appellants—*Barclay & Morgan.*

Solicitors for the respondents 1, 4 and 6—*Branson & Branson.*

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

1887. January 19.

ANNÁJI RÁU (PLAINTIFF), APPELLANT,

and

RÁMÁ KURUP AND OTHERS (DEFENDANTS), RESPONDENTS.*

Jurisdiction—Suit to declare land liable to be sold in execution of decree—Civil Procedure Code, s. 373—Withdrawal of part of claim.

In a suit brought in a District Múnsif's Court to declare certain land liable to be sold in execution of a decree for more than Rs. 2,500, the defendants pleaded that the Court had no jurisdiction. The Múnsif allowed the plaintiff to amend the plaint by stating that he abandoned his claim to execute the decree against the land for more than Rs. 2,500.

On appeal, the District Judge held that the plaint could not be amended after the first hearing:

Held, on appeal to the High Court, that the claim was not one which could be amended so as to bring the suit within the pecuniary jurisdiction of the District Múnsif.

APPEAL from the decree of W. P. Austin, District Judge of North Malabar, reversing the decree of A. Chathu Nambiar, District Múnsif of Badagara, in suit 423 of 1884.

The plaintiff, Annáji Ráu, sued the defendants, Rámá Kurup

* Second Appeal 596 of 1886.

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and three others, for a declaration that certain land (valued at Rs. 100, being five times the revenue assessment thereon) was liable to be sold in execution of a decree obtained by plaintiff in suit 81 of 1880.

This land had been attached by plaintiff, but was released on the intervention of defendants 2 to 4 on August 13, 1883.

The suit was filed on August 11, 1884. On the 10th October 1884 the plaintiff presented a petition to the Court, stating that, although the amount of decree exceeded Rs. 2,500 (the pecuniary limit of the jurisdiction of the Court), the plaintiff relinquished the amount in excess of Rs. 2,500.

The Múnsif held that the amount to be enforced by the decree sought, was the criterion for determining the question of jurisdiction, and, as the plaintiff had relinquished his right to enforce the decree for more than Rs. 2,500, held that he had jurisdiction and decreed for plaintiff. On appeal, the District Judge held that, as it was admitted by both parties that the amount of the decree was the criterion in this case for determining the question of jurisdiction (see *Krishnamá Chárlár* v. *Srinivása Ayyangár*, I.L.R., 4 Mad., 340), the Múnsif had no jurisdiction. He held that the relinquishment could only be made at the time of presentation of the plaint and that the amount relinquished should be shown in the plaint (s. 50(*f*) of the Code of Civil Procedure). As the relinquishment had not been made until after the first hearing, when the defendants Nos. 2—4 objected to the Court's jurisdiction, the District Judge reversed the decreee of the Múnsif and directed the plaint to be returned to plaintiff.

Plaintiff appealed on the grounds—

(1) That the withdrawal of portion of the claim was not objectionable.

(2) That the plaint as amended was cognizable.

(3) That the value of the property attached ought to have been ascertained by inquiry.

Anantan Náyar for appellant.

Mr. Wedderburn for respondents.

For the plaintiff it was contended that the plaint could be properly amended under s. 373 of the Code of Civil Procedure (see also ss. 50 and 53).

For the respondents it was urged that s. 373 was not applicable to the present case, inasmuch as plaintiff did not seek to recover

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money and abandon part of his claim, but sought to declare the whole property liable to sale.

He could not be said to abandon any portion of his claim by stating that he desired to sell this property to liquidate his decree to the extent of Rs. 2,500 only. The only possible decree was that the property was or was not liable to sale.

The Court (*Brandt* and *Parker*, JJ.) delivered the following

JUDGMENT:—The claim in suit was not in respect of a sum of money, but for a declaration that certain property is liable in execution of a decree already obtained, and the appellant cannot be said to have abandoned a part of his claim when he expressed his willingness to forego proceedings against the property attached by him in excess of the sum of Rs. 2,500.

Being of opinion that it was not open to the District Múnsif to decide the suit in respect of which he had not otherwise jurisdiction, by reason of the appellant's signifying his willingness not to claim anything in excess of Rs 2,500 out of the sum which might be realized by the sale of the property in suit, we uphold the decree of the Lower Appellate Court and dismiss the appeal with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Brandt and Mr. Justice Parker.

1887. January 19.

In re VENKATÁCHALA PILLAI AND OTHERS.*

Criminal Procedure Code, s. 195—Registration Act, s. 41—Sanction of Registrar—Condition precedent to trial for forgery of will registered.

A Sub-registrar acting under s. 41 of the Registration Act, 1877, is a "Court" within the meaning of s. 195 of the Code of Criminal Procedure.

CASE referred to the High Court by J. A. Davies, Acting Sessions Judge at Tanjore.

The facts were stated as follows:—

"In this case, five persons have been committed for trial on a charge of forging a will, punishable under s. 467 of the Indian Penal Code.

"The will alleged to be a forgery was duly registered by the Sub-registrar of Máyaveram, under s. 41 of the Registration Act, after satisfying himself that it was genuine.

* Criminal Revision Case 178 of 1886.

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"Exception is taken by the prisoners' vakíl to the commitment on the ground that the Sub-registrar acting under s. 41 of the Registration Act is a 'Court,' and his sanction to the prosecution is accordingly required before this Court can take cognizance of the offence according to the terms of s. 195, clause (*c*) of the Code of Criminal Procedure, and that such sanction is wanting in the present case.

"Section 537 of the Code of Criminal Procedure declaring that no finding, sentence or order, &c., shall be reversed or altered for the want of any sanction under s. 195, refers only to proceedings in appeal or revision, or when sentences are submitted for confirmation under Chapter XXVII, and it is therefore inapplicable here. The objection that has been taken appears to have been also raised before the Committing Magistrate, but he has not noticed it. The question for determination simply is whether a Sub-registrar acting under s. 41 of the Registration Act of 1877 is or is not a 'Court' within the meaning of clause (*c*) of s. 195 of the Code of Criminal Procedure.

"There is no definition of the word 'Court' in the Code of Criminal Procedure, and it is used ambiguously. In some places it means a personal judicial authority and in others a place. It seems to have this second signification in s. 195 itself, 'proceeding *in* any Court;' and compare s. 352, 'the *place*, in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open *Court*.' The last clause of s. 4 however provides that 'all words and expressions used herein and defined in the Indian Penal Code and not hereinbefore defined shall be deemed to have the meaning respectively attributed to them by that Code.'

"But neither in the Penal Code is there any definition of 'Court' There is a definition of 'Court of Justice' in s. 20, but that term is evidently not synonymous with 'Court,' for by illustration (d) of s. 19 giving the definition of Judge which enters into the composition of the definition in s. 20, it is declared that 'A Magistrate exercising jurisdiction in respect of a charge on which he has power, only to commit for trial to another Court, is not a Judge.' If the expression 'another Court' does not sufficiently imply that such Magistrate is himself a Court, the doubt is set at rest by a reference to s. 6 of the Code of Criminal Procedure which describes all Magistrates as Courts—and it is only

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to them that power is or can be given to commit for trial under s. 206 of the same Code. Therefore though Magistrates when holding preliminary inquiries, are not 'Courts of Justice' they are 'Courts,' and so it follows that the terms are not identical.

"Looking elsewhere for a definition of 'Court' we find none in the General Clauses Act, but we do find one in the Evidence Act of 1872. 'Court' is there defined in s. 3 to include 'all Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence.' A Sub-registrar is generally so authorized under s. 63 of the Registration Act of 1877, besides a special authorization in ss. 33 and 35. The High Court of Calcutta have accordingly ruled that a Sub-registrar is a Court within the meaning of the Criminal Procedure Code. *Sardhari Lal, in re* (13 B.L.R. Appendix, 40).

"Though this ruling was passed when the Criminal Procedure Code of 1872 was in force and that Code does not contain like the present Code the reference to the Penal Code for definitions yet as the Penal Code is silent in the matter, as I have shown, there is nothing to affect the validity of the ruling.

"As the Evidence Act is an Act of general application, the definition it gives of the word 'Court' should, I think, be taken in the absence of any other definition either in the Code of Criminal Procedure, or in the Penal Code, or in the General Clauses Act, as what the Legislature intended the word should ordinarily signify, when not otherwise defined for the purposes of any particular Act.

"It might be answered that the Legislature clearly did not contemplate Sub-registrars or Registrars as 'Courts' under the Criminal Procedure Code, or they would not have declared they should be deemed as such only in certain instances (*vide* last clause of s. 84 of the Registration Act as modified or impliedly repealed by s. 483 of the Code of Criminal Procedure). But this doubt was considered in the case of Registrars by the Madras High Court in their proceedings, No. 962, dated 12th May 1881 (Weir's Criminal Rulings, pages 399-401), and it was there held that a Registrar was a 'Court' under the Criminal Procedure Code in other cases than those contemplated by the Legislature when framing s. 84 of the Registration Act.

"At any rate I am bound by the Calcutta High Court decision, there being none to the contrary by the Madras High Court, to hold that the Sub-registrar is a 'Court' under the Criminal

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Procedure Code, and as such under s. 195, clause (*e*), his sanction was required for this prosecution.

"But it is still further contended that even under the Madras High Court Ruling referred to above a Sub-registrar should be considered a Court when he acts under s. 41 of the Registration Act in respect to the registration of wills presented by third parties. It was held by the High Court in the said proceedings that a Registrar acting under ss. 73, 74 and 75 of the Registration Act was a Judge, and thereby a Court of Justice within the meaning of the Penal Code, and it is now urged that although with respect to an ordinary document, the Sub-registrar is '*functus officio*' as the High Court have said, yet that in regard to wills he has the same powers as the Registrar under ss. 40 and 41 of the Registration Act. In the case of an ordinary document when its genuineness is disputed, the Sub-registrar has no power to proceed further. He is to refuse registration. But, in the case of a will, the Registration Act confers on him extended powers. He can go into evidence and find the document to be genuine or otherwise. His powers in regard to wills do not in any way differ from those of the Registrar. So that if a Registrar is a Judge and a Court when acting under s. 41 of the Act, by analogy of the reasoning that he is a Judge and a Court when acting under ss. 73, 74, and 75, so also is the Sub-registrar. I think there is much force in this argument, and I take it as a second or additional ground for holding that the Sub-registrar when acting as he was in this case under s. 41 of the Registration Act was a 'Court' and therefore his sanction was required for the prosecution.

"I therefore refer this case to the High Court for the purpose of quashing the commitment under s. 215 of the Code of Criminal Procedure."

Bhâshyam Ayyangâr for the accused.

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

The judgment of the Court (Brandt and Parker, JJ.) was delivered by

PARKER, J.—We are of opinion that the term "Court" in s. 195 of the Criminal Procedure Code is not restricted to a "Court of Justice" as defined in the Indian Penal Code. Section 6 of the Code of Criminal Procedure clearly contemplates the existence of Courts constituted under other laws, and the Legislature

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has seen fit to use the general expression "Court" in preference to the more restricted description "Court of Justice." A Sub-registrar is legally authorized to take evidence under Part VIII of the Indian Registration Act for the purpose of satisfying himself upon certain points, and he is, therefore, when acting under s. 41, Act III of 1877, a "Court" within the meaning of the Indian Evidence Act. As the document has been given in evidence before him in a proceeding in which the Sub-Registrar had to determine whether the document should, or should not, be registered, it appears to us that his sanction is necessary under s. 195 of the Code of Criminal Procedure before a Court can take cognizance of an offence alleged to have been committed by a party to that proceeding.

The Judge having reported that all the accused were parties to the proceedings the commitment is quashed.

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.

1887. nuary 18.

REFERENCE UNDER STAMP ACT, s. 49.*

Stamp Act, s. 3, clause 4 (b)—Bond.

A executed a document, by which he promised to pay on demand Rs. 16 to B. The writer of the document signed the document as writer, for the purpose of attesting A's signature:

Held that the document was liable to stamp duty as a bond.

CASE referred under s. 49 of the Indian Stamp Act, 1879, by J. D. Goldingham, District Judge of Bellary.

The case was stated by K. Lakshmana Ráu, District Múnsif of Narain Doverkeri, as follows:—

"In small cause No. 57 of 1886, the plaintiff sues upon an instrument which secures the repayment of Rs. 16. It bears date 21st September 1883 and is payable to the payee. It does not contain the words 'payable to bearer or order.' It bears the signature of its executant, as well as the signature of its

* Referred Case 4 of 1886.

REFERENCE UNDER STAMP ACT, s. 49.

writer, and stands engrossed on paper to which one anna adhesive stamp is affixed.

"The plaintiff treated the instrument as a promissory note, because, as he stated, it was not attested by witnesses.

"An instrument of a similar nature, put in evidence in another case, was treated by me as a bond. I levied the proper stamp duty and penalty on it, and, under s. 35 of the Stamp Act, sent a copy of the instrument to the Acting Head Assistant Collector. That officer was of opinion that it was not an attested document, and that it should therefore be treated as a promissory note. This being the case, I feel a doubt as to the amount of duty to be paid in respect of the instrument under consideration in this case.

"Any instrument attested by a witness and not payable to order or bearer is a bond as defined by clause 4(*b*) of s. 3 of the Stamp Act No. 1 of 1879. In the present case, if it was not intended that the writer should be a witness to the signature of the executant, there was, apparently, no necessity for the former signing the instrument. Therefore, it appears to me that the signature of the writer is the attestation of a witness within the meaning of the above clause, and that the instrument under consideration is a bond and not a promissory note. A bond for Rs. 16 is required to be engrossed on an impressed stamp of four annas. The instrument in question, however, bears an adhesive stamp of one anna.

"The questions submitted for the decision of the High Court are:—

"1*st*.—Whether an instrument containing an unconditional promise to pay on demand and bearing the signature of its writer, a third party, is a bond or promissory note.

"2*nd*.—Whether an instrument containing an unconditional promise to pay on demand becomes a bond if it is not made payable to bearer or order."

Counsel were not instructed.

The District Judge having reported that the document was attested, the Full Bench (Collins, C.J., Kernan, Muttusámi Ayyar Brandt, and Parker, JJ.) delivered the following

JUDGMENT:—We are of opinion that the document in question is a bond, not being payable to bearer or order, and the signature of the obligor being attested by a witness.

APPELLATE CIVIL.

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

1887. Jan. 11.

VENKATA SHETTI AND OTHERS (DEFENDANTS), APPELLANTS,

and

RANGA NÁYAK (PLAINTIFF), RESPONDENT.*

Merger of securities—Civil Procedure Code, ss. 43, 373

On the 5th September 1874 R., a Hindú, and his sons borrowed Rs. 5,000 from V. and mortgaged to him certain land, items 1, 2 and 3. On the 7th September 1874, V. borrowed Rs. 5,000 from R. N. and mortgaged his rights in items 1 and 2 and land of his own to R. N. In 1877 R. N. bought at a sale in execution of a decree against R. the share of R. in the said items 1 and 2 subject to the mortgage created by R., on 5th September 1874, and to another mortgage created by R., dated 11th January 1875. In 1880, R. N. sued V. and the sons of R., for arrears of interest due under his mortgage bond.

This suit was withdrawn with liberty to bring a fresh suit for the principal and interest due under the bond.

In 1885, R. N. sued V. and the sons of R., to recover principal and interest due under his mortgage bond.

V. pleaded that, as R. N. had bought R.'s share in items 1 and 2, subject to the mortgages created by him, R. N.'s rights as mortgagee were merged in his rights as purchaser.

R.'s sons pleaded, *inter alia*, that the suit was barred by the provisions of ss. 43 and 373 of the Code of Civil Procedure:

Held that the claim of R. N. was neither merged nor barred.

APPEAL from the decree of C. Venkobácharyár, Subordinate Judge of South Canara, in suit 3 of 1885.

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

Bháshyam Ayyangár and *Náráyana Ráu* for appellants.

Rámachandra Ráu Saheb and *Gopala Ráu* for respondent.

JUDGMENT:—This is an appeal preferred on behalf of defendants Nos. 1, 2 and 4, in original suit 3 of 1885, on the file of the Subordinate Court of South Canara. The interests of the defendants Nos. 1 and 2 are not identical with those of defendants

* Appeal 142 of 1885.

Nos. 3 and 4; the interests of the two latter are identical, but defendant No. 4 alone is before us as an appellant.

On the 5th September 1874 defendant No. 3, Krishna Shetti, appellant No. 3, Narasayya Shetti and Náráyana Shetti (deceased), brothers, and their father Rámá Shetti borrowed of the appellant No. 1, Venkata Shetti, a divided brother of the said Rámá Shetti, Rs. 5,000 and executed in favor of the lender an instrument hypothecating landed property, items 1 and 2 in this suit, and another parcel not included in this suit, Exhibit B. On the 7th of the same month appellant No. 1, Venkata Shetti, and his son, appellant No. 2, Devappa Shetti, borrowed of the respondent, Ranga Náyak, Rs. 5,000 (the bond states the consideration as Rs. 6,000, but it is admitted that only Rs. 5,000 were advanced) and gave their mortgagee a bond hypothecating the land constituting items 1 and 2 in this suit and another parcel of land, the jenm title to which the mortgagors hold in their own right, Exhibit A.

The suit was brought for the recovery of the principal and interest due under Exhibit A.

In the year 1850 Malappa Shetti, a brother of Rámá Shetti, obtained a personal decree against Rámá Shetti in a partition suit, and in 1876 Malappa's son Ganapathi took out execution of that decree, and in 1877 the respondent in this suit purchased Rámá Shetti's share in items 1 and 2 now in suit, subject to the incumbrances created by Rámá Shetti under Exhibit A, and under another instrument, dated the 11th January 1875, whereby as security for a further loan of Rs. 8,500 borrowed of appellant No. 1, Venkata Shetti, Rámá Shetti hypothecated his share in items 1 and 2 now in suit, and also three other parcels of land. The share which the auction-purchaser the respondent was eventually held to have purchased consists of $\frac{1}{4}$th of plaint item No. 1 and $\frac{1}{8}$th of plaint item No. 2.

The respondent filed a suit 164 of 1880 against his mortgagors, appellants Nos. 1 and 2 and against defendant No. 3, and appellant No. 3 for arrears of interest only, then accrued due under Exhibit A: that suit was by permission withdrawn with leave to institute a fresh suit for recovery of the principal (then due) and interest. Defendant No. 5, Venkatesa Mala, was made a party to the suit by the respondent, on the ground that the purchase of Rámá Shetti's share in execution of the suit of 1850

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was in fact made by Defendant No. 5, but the finding is that the respondent is the real purchaser, and no appeal has been preferred against this finding and nothing turns upon it in appeal.

Appellants Nos. 1 and 2 pleaded that by the purchase of Rámá Shetti's share in items 1 and 2 in suit subject to the incumbrances created by Exhibit A and by the mortgage of 1875, the respondent's mortgage rights under Exhibit A were lost, by merger of the latter in the right acquired by him under his purchase.

Defendant No. 3 and appellant No. 3 pleaded that in no circumstances can they be held liable in respect of either principal or interest due under A; they further raised the objection taken by the appellants Nos. 1 and 2 on the ground of merger of the securities in the hands of the respondent, and appellants Nos. 1, 2 and 3, and defendant No. 3 all contended that, notwithstanding the permission given to the respondent to withdraw his suit No. 164 of 1880 with leave to institute a fresh suit as above stated, the present suit is barred by the provisions of sections 43 and 373 of the Code of Civil Procedure.

The Subordinate Judge framed issues intended to meet the contention of the said defendants as to the character and effect of the respondent's purchase in execution of Rámá Shetti's share in items 1 and 2, and held that what was purchased was the equity of redemption subject to his own incumbrance under the mortgage instrument A, and to the charge in favor of appellant No. 1 under the mortgage of 1875, but that "he did not purchase his mortgagor's right of redemption nor the right of the mortgagors of appellant No. 1, but only the interest of one of them," and that the plea as to merger was therefore untenable: he held that appellants Nos. 1 and 2 are primarily (and personally) liable, and that the respondent is entitled to recover the principal and interest due under A "by sale of the properties mortgaged" under A; the decree is thus worded "that the plaintiff do recover" the amount decreed and costs "from 1st and 2nd defendants and from the mortgaged properties described below, unless the said sums be paid within six months" from date of the decree; and the several properties are then specified in a schedule appended to the decree.

The Subordinate Judge disallowed the objection that by reason of the provisions of ss. 43 and 373 of the Code of Civil

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Procedure, the suit is not maintainable, on the ground that the permission to withdraw from the suit of 1880 was given by the District Múnsif in the exercise of his discretion and that that discretion was not improperly exercised.

The first ground of appeal argued at the hearing was that the respondent should have sued appellants Nos. 1 and 2 alone, and for sale of their mortgage right in items 1 and 2 and of their jenm right in item No. 3, and that they had no cause of action against the original mortgagors, defendant No. 3 and appellant No. 3, but it was subsequently conceded that to a suit for realization of respondent's security under A, the original mortgagors, as having an interest in the property items 1 and 2, were not improperly made parties, and the contention was confined to the terms of the decree; it was then admitted on behalf of the respondent that so far as items 1 and 2 are concerned the interest which the appellants Nos. 1 and 2 have therein under Exhibit B, and nothing more, can be sold in satisfaction of the respondent's claim under Exhibit A. The decree of the lower Court will accordingly be amended by substituting for the words "by sale of items 1 and 2" the words by sale of the mortgage rights of the 1st and 2nd defendants in items 1 and 2:" the order for the sale of "the mortgaged property" as regards item 3 is correct. It was contended for the respondent that the allowing of the appeal to this extent is a matter of form only; but this is not so; and by consent, for the purpose of assessing costs in this appeal only, the value in respect of which the appellants must be taken to have succeeded is assessed at Rs. 1,500.

But, in respect of the second ground of appeal that there was merger of the securities, by reason of which the respondent is barred from enforcing his mortgage lien, we must hold that the appellants fail. The doctrine of merger applies in cases in which a higher security is given between the same parties; but this alone is not sufficient; the remedy given by the higher must be co-extensive with that given by the original lower security; the rights which unite must be in respect of the same property; but here the property mortgaged and the property sold are not identical; all that was sold was Rámá Shetti's interest in, that is, the right of one of several sharers to redeem part of the property mortgaged. The respondent's purchase then has not the effect of

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depriving him of his right to put up to sale the mortgage rights of appellants Nos. 1 and 2 in plaint items 1 and 2.

As to the third and only remaining argument in appeal that the statutory bar to a second suit brought in respect of a portion of a claim, a portion of which a party has omitted to sue in respect of in a former suit, subsists, notwithstanding that such former suit has been withdrawn by permission of the Court with leave to institute a fresh suit founded on the same cause of action; if this construction be put upon the two sections it is not possible for them to stand together, but the sections must be reasonably construed together so that they may if possible both stand, and we are of opinion that it is not necessary to hold that s. 43 applies in the case of a suit withdrawn by permission under s. 373, but that the effect of such an order is to leave matters in the position in which they would have stood had no such suit been instituted. The obvious intention of the Court which made the order was to allow the respondent to sue for principal and interest, instead of compelling him to proceed with his claim for interest alone, in which case any second suit for the principal would have been met by the plea that the suit is barred by s. 43 of the Code; and if the contention now raised were to prevail, the anomaly would be presented of an order made by a competent Court as to a matter within its discretion to which order no legal effect could be given.

Section 373 was presumably intended to allow of mistakes or omissions being corrected, within the discretion of the courts concerned, and we do not think it necessary to hold that section 43 is a bar to the entertainment of the present suit.

The result is that the appellants fail in respect of the main grounds of appeal argued before us, but succeed in so far as the decree is amended in the manner hereinabove provided.

The appellants will then pay the proportionate costs of the respondent in respect of the amount in regard to which they fail, and the respondent will pay the appellants' proportionate costs in respect of the amount in which the latter succeed, and these amounts are, for the purpose of estimating such costs only, by consent taken as Rs. 7,500 and Rs. 1,500 respectively.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Brandt and Mr. Justice Parker.

QUEEN-EMPRESS

against

VENKATÉSAGÁDU AND OTHERS.*

1887. Jan. 18.

Criminal Procedure Code, s. 33—Penal Code, s. 65—Imprisonment in default of payment of fine.

Section 33 of the Code of Criminal Procedure, 1882, does not authorise a magistrate to pass a sentence in default of payment of fine in excess of the term prescribed by s. 65 of the Indian Penal Code. *Reg.* v. *Muhammad Saib*, I.L.R., 1 Mad., 277, was overruled in 1881.

CASE referred for the orders of the High Court under s. 438 of the Code of Criminal Procedure by J. Thompson, Acting District Magistrate of Kistna.

Venkatésagádu and four others were convicted by the Second-class Magistrate of Mangalagiri, under s. 510 of the Indian Penal Code, of being drunk and causing annoyance in a public place. Three of the accused were sentenced to twelve hours' simple imprisonment and a fine of Rs. 5 each, and in default to 2 days' simple imprisonment, and the other two to a fine of Rs. 3 each and in default to 2 days' simple imprisonment. The fines were levied.

The District Magistrate referred this case on the ground that the maximum punishment for the offence being twenty four hours' simple imprisonment, the alternative imprisonment awarded in excess of six hours was illegal under s. 65 of the Penal Code and s. 33 of the Code of Criminal Procedure.

The case was referred to a Full Bench by Muttusámi Ayyar and Brandt, JJ.

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

The Full Bench (Collins, C.J., Kernan, Muttusámi Ayyar, Brandt and Parker, JJ.) delivered the following

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* Criminal Revision Case 629 of 1886.

QUEEN-EMPRESS v. VENKATESA-GADU.

JUDGMENT:—The case, *Reg.* v. *Muhammad Saib* (1), has been overruled by an unreported case of a Full Bench in 1881, published in Weir's Criminal Digest, p. 335.(*a*)

(*a*) *High Court Proceedings*, 18*th May* 1881, *No.* 994.

The defendant in this case was sentenced by the Second-class Magistrate to pay a fine of Rs. 10, or in default to suffer one month's simple imprisonment for an offence under s. 510 of the Indian Penal Code.

The Joint Magistrate submits, through the District Magistrate, that the term of imprisonment awarded in default of fine was in excess of the period allowed by law, and that inasmuch as the period of imprisonment provided as a substantive penalty for the offence is limited to 24 hours, the Second-class Magistrate was not competent to sentence the accused in default of payment of the fine to a period of imprisonment in excess of 6 hours.

INNES, J.—The sentence as it stands is of course illegal and the proceedings upon which it professes to be founded do not warrant it.

The portion of these proceedings applicable to the case runs as follows:—

"But if the sentence is fine only, the imprisonment in default of payment may be the whole period of imprisonment which the Magistrate is competent to inflict for the offence."

The Magistrate, therefore, when imposing fine only and imprisonment in default, is limited as to the term of imprisonment in default in two ways—

First.—He cannot go beyond the substantive term of imprisonment fixed for the offence, because that is the outside measure of the imprisonment that it is competent to inflict *for the offence*.

Second.—He has to see whether that term of imprisonment is beyond his own powers as a Magistrate. If it is not, he may impose the whole of it in default of payment of fine. If it is beyond his powers, he can only impose such a term of imprisonment as is within his powers. In the present case, the Magistrate simply considered what were his general powers; he altogether neglected to consider what he was competent to inflict *for the offence*. The limit of his competency in this respect was 24 hours. As the fine was paid, the High Court could only interfere setting aside the sentence of one month's imprisonment.

The Magistrate referring the case would read the words "or as is allowed by law" in the last clause of s. 309 as meaning "as limited by s. 65 of the Indian Penal Code," which would admit of only one-fourth of the term of substantive imprisonment as the outside measure of the imprisonment impossible in default of payment of fine when fine alone is inflicted. In either view, however, the Sub-magistrate was clearly acting illegally in the sentence he imposed.

HUTCHINS, J.—On either view of the question, the sentence referred is wrong, because a sentence of imprisonment for one month for an offence under s. 510 is not one "allowed by law" however those words are to be construed. The more important question remains, whether those words in the third clause of s. 309 of the Procedure Code mean "allowed by law as the full substantive penalty for the offence" as held by this Court, or allowed by the particular section applicable to the offence and s. 65 of the Penal Code "taken together," as held by the High Court of Allahabad (*Empress* v. *Darba*, I.L.R., 1 All., 461).

It will hardly be denied that when such a general expression as "allowed by law" is used, its most natural meaning is "allowed by all the provisions of the law taken together." If the Legislature had intended that nothing but the particular section applicable to the offence was to be looked at, surely there would have been no difficulty in finding apt words to express that meaning. "As is provided by law for the particular offence" would have answered their purpose well enough.

(1) I.L.R., 1 Mad., 277.

QUEEN-EMPRESS v. VENKATESA-GADU.

We follow the latter ruling—see also *Empress of India* v. *Darba* (1).

Let the case be remitted to the Division Bench for disposal.

I think therefore that the construction adopted by the Allahabad Court is the natural construction of the third clause of s. 309, even if it stood alone.

Mr. Knox, who makes this reference, has pointed out other reasons for coming to this conclusion. The section purports to deal exclusively with cases punishable with imprisonment in addition to fine, and its first provision is that in all such cases, whether the sentence be a fine alone or a fine with imprisonment, and whether the Court be one of limited jurisdiction or competent to inflict the full penalty provided for the particular offence, the period of imprisonment is to be regulated by ss. 64 and 65 of the Indian Penal Code. In other words, it starts with one general principle, viz., that no Criminal Court shall award alternatively a longer term of imprisonment than one-fourth of that which the law provides as the maximum substantive punishment where it provides imprisonment at all as a substantive punishment.

Then comes in the proviso, which is applicable only to Magistrates whose powers to imprison have been further limited by the preceding sections. If they choose to imprison as well as to fine, then their power to add a further term of imprisonment for non-payment of the fine is further restricted. Not only shall they not impose more than a fourth of the maximum term provided for the particular offence, but they shall not exceed a fourth of the term to which the previous sections had restricted their general powers.

The clause in question comes next. It also is applicable to magistrates only, but it deals with cases in which they might have passed a substantive period of imprisonment, but have chosen to fine only. In such a case, the additional restriction which had been imposed by the preceding clause is removed, and the Magistrate may go up to the full term which he has been generally empowered to inflict, provided that the sentence is one otherwise allowed by law. I do not think that a sentence of alternative imprisonment exceeding one-fourth of the maximum substantive term provided for the offence (when such a term has been provided) is in any case "allowed by law." I would therefore rescind the ruling of this Court. I may add that it is clearly recognized by this very section (309) that the penalty to which a man is subject is to be determined by reference to the Penal Code. The Procedure Code does not in any case alter penalties and is only concerned with the officers by whom they are to be inflicted and the limits within which the various classes of courts may inflict them.

TURNER, C.J.—the ruling of this court reported in the Indian Law Reports, 1 Madras, 277, cannot in my judgment be supported.

The 309th section of the Criminal Procedure Code declares that Criminal Courts without exception shall in every case punishable under any law in force for the time being with imprisonment as well as fine govern themselves by the provisions of ss. 64 and 65, Indian Penal Code, in awarding the period of imprisonment in default of payment of fine.

This provision would ordinarily have found its proper place in the Indian Penal Code, which declares penalties rather than in the Procedure Code which declares the powers of Courts, but the provisions of the Indian Penal Code were confined to offences made punishable by that Act, and although the 5th section of the General Clauses Act extended the provisions of the Penal Code to all fines imposed under any Act thereafter to be passed unless such Act contained an express provision to the contrary, it was convenient in an Act declaring the powers of Criminal Courts

(1) I.L.R., 1 All., 461.

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to extend the provisions of the 64th and 65th sections of the Penal Code to every case punishable with fine under any law in force for the time being.

Such I understand was the purpose of the principal clause of s. 309. But inasmuch as the Code of Criminal Procedure had, in declaring the powers of Criminal Courts of different grades, restricted the powers conferred on Magistrates to award imprisonment as a substantive part of the sentence, it was necessary to place some restriction also on the powers conferred on Magistrates to award imprisonment in default of payment of fine. With this object, the second and third clauses of s. 309 were enacted. The second clause deals with cases in which the Magistrate awards imprisonment and fine and declares that, in such cases, the further imprisonment to be awarded in default of the payment of fine shall not exceed one-fourth of the whole period the Magistrate would be empowered to inflict as a substantive part of the sentence. The third deals with cases in which the Magistrate imposes a sentence of fine only and declares the Magistrate may in such cases impose such term of imprisonment in default of payment of fine as is allowed by law, provided it is not in excess of his powers under the Act.

The "term of imprisonment in default of payment of fine allowed by law" is the term which in the particular case is prescribed by ss. 64 and 65 of the Indian Penal Code. The construction adopted by this Court involves the anomaly that a Magistrate could in the case of certain offences impose a more severe penalty in default of payment of fine than could be imposed by a Court of Session, and requires the transposition of the terms of the provision and the introduction of the words "for the offence" after the words "allowed by law."

MUTTUSÁMI AYYAR, J.—Section 65 of the Indian Penal Code presupposes an offence punishable with imprisonment as well as fine and fixes the maximum alternative sentence at one-fourth of the term of imprisonment sanctioned by the Code as a substantive sentence. Offences may be punishable with imprisonment or fine under a special or local law, and the first paragraph of s. 309 extends s. 65 to those offences. The second paragraph refers to a case decided by a Magistrate where imprisonment is actually awarded as a penalty and directs that in that case the alternative sentence shall not also exceed one-fourth of the maximum term of imprisonment which it is competent to the Magistrate to award. The last paragraph refers to a case in which there is a sentence of fine only and provides that the additional restriction mentioned in paragraph 2 shall not apply. Reading them together, I think the restriction in the first paragraph, viz., that the alternative imprisonment shall not exceed one-fourth of the substantive imprisonment sanctioned by law, is applicable to all offences punishable with imprisonment or fine, whether the sentence actually passed is one of imprisonment or fine, and that neither of the restrictions mentioned in the first and second paragraph is applicable to an offence punishable with fine only. The ruling in I.L.R., 1 Mad., 277, gives no effect to the words in the first paragraph of s. 309, "whether with or without imprisonment," and the words in the third paragraph "allowed by law" do not necessarily imply that s. 65 is not applicable, and that ss. 65 and 66 are not the provisions of law referred to as regulating the amount of alternative imprisonment. In either view, the sentence under reference is clearly illegal and must be set aside.

INNES, J.—Having had the advantage of seeing the opinions of the Chief Justice and the other Judges who have taken part in the consideration of this question, I am of opinion that our ruling was erroneous and should be overruled.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

SÁMI AYYAR (PLAINTIFF), APPELLANT,

and

KRISHNASÁMI AND 9 OTHERS (DEFENDANTS), RESPONDENTS.*

1886. Sept. 29. Dec. 16.

Civil Procedure Code, ss. 268, 274—Sale of interest of obligee in a hypothecation bond.

The interest of the obligee in a bond hypothecating certain land as security for a debt having been attached under s. 274 of the Code of Civil Procedure and sold, a suit was brought by the purchaser upon the said bond; it was objected that the suit was not maintainable because the bond had not been also attached as a debt under s. 268:

Held that the fact of the bond not having been attached as a debt under s. 268, did not affect the right of the purchaser to realize the amount due under it.

APPEAL from the decree of T. Ganapathi Ayyar, Subordinate Judge of Tanjore, at Kumbakónam, in suit No. 8 of 1884.

Bháshyam Ayyangár and *Désikácháryar* for appellant.

Subramanya Ayyar for respondents Nos. 1, 9 and 10.

Báláji Ráu and *V. Rámachandra Ráu* for respondents Nos. 2, 3, 4, 5, 6 and 7.

Respondent No. 8 did not appear.

The facts necessary for the purpose of this report are set out in the judgments of the Court (Kernan and Brandt, JJ.):—

KERNAN, J.—The appellant, Sámi Ayyar, is the plaintiff in original suit No. 8 of 1884, on the file of the Subordinate Court of Kumbakónam. The Subordinate Judge dismissed the suit with costs.

The facts are not in dispute, and the questions in this appeal are questions of law. The plaintiff seeks to recover, out of the lands particularized in the plaint, the amount due on a hypothecation deed, dated the 12th of March 1869, executed by Muttu Ayyan, the father of defendant No. 1, for Rs. 5,000 to Kuppusámi Ayyan payable on the 11th of March 1872.

* Appeal 145 of 1885.

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The defendants claim the lands specified in the hypothecation deed, under different titles and in different shares.

The first question is whether the plaintiff has acquired the right and interest of Kuppusámi, the grantee in the hypothecation deed of 12th March 1869, to the debt thereby secured and whether he is entitled to enforce that security against the lands.

The plaintiff's claim is founded on a purchase of the right of Kuppusámi in execution of a decree. The respondents contend that the proper proceedings were not adopted to attach the debt due on the hypothecation bond and that therefore plaintiff is not entitled to maintain this suit.

There are various other defences afterwards referred to, but the main question is whether plaintiff has title to maintain the suit. The facts on this question are as follows, viz.,—The plaintiff obtained a decree in suit No. 15 of 1875 in the Court of the Subordinate Judge of Kumbakónam against Venkatarám Ayyan and others, sons of the same Kuppusámi, for money; and attached the deed of hypothecation under s. 269 of the Code of 1877, which is in terms the same as s. 269 in the present Code; and became the purchaser thereof for Rs. 1,200; and obtained a certificate of the purchase, and possession of the deed of hypothecation. The plaintiff afterwards filed suit No. 63 of 1877 against several of the respondents to this appeal founded on the purchase so made, but that suit was dismissed upon the ground that the plaintiff had not in suit No. 15 of 1875 attached the debt secured by the hypothecation deed in the manner prescribed for attachment of debts by s. 268, *i.e.*, by obtaining an order under that section. After such dismissal, the plaintiff attached in suit No. 15 of 1875 under s. 274 the estate and interest of the defendants in that suit in the deed of the 12th March 1869 and in the lands thereby pledged as security for the debt. Plaintiff became the purchaser at the auction-sale held on the 15th of June 1880, and on the 21st of September 1880 received a certificate of sale in these terms, viz.,—" It is hereby certified that, in the auction-sale held on 15th June 1880 in execution of the decree passed in this suit, the aforesaid plaintiff, K. Sámi Ayyan, has been declared to have purchased for Rs. 1,200 the hypothecation bond along with the said defendants' interest therein, executed on 12th March 1869 by Muttu Ayyan in favor of the defendants' father, Kuppusámi Ayyan, for Rs. 5,000, hypothecating the two houses bearing Municipal Door Nos. 4 and 61 in Pachayappa Mudaliyar Agraháram in Kasba Kumbakónam, attached to the Sub-registration District of Kumbakónam, in Tanjore District, veli 1 and gulis 93$\frac{3}{8}$ of nanja, púnja and other lands in Pulukappu Kattalai village, in Kumbakónam Taluk, in the aforesaid District; 1 má and 43$\frac{1}{10}$ gulis of nanja land in Somanadhan Kattalai, in the aforesaid taluk; and 5 velis, 13 más and 90$\frac{5}{16}$ gulis of nanja, púnja and other lands in Puttúr village, Melayúr Máganam, attached to Mathyarjanam Sub-registration district, in the aforesaid district—total for the three villages being 6 velis, 16 más and 26$\frac{3}{4}$ gulis—in order that the amounts thereof may be fully recovered on the liability of the hypothecated properties, and that the said sale has been duly confirmed by the Court."

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Upon these facts the question of law is whether, by reason of the debt not having been attached in the mode pointed out by s. 268, viz., by a restraining order, the title of the plaintiff to sue for the recovery of it under the deed of hypothecation is defective. If the debt only was intended to be sold or if it was intended to be sold jointly with immovable property in order to recover it by personal remedy, it should have been attached under s. 268. Section 284 only authorizes the sale of attached property. But it has been held by this Court, in *Appasámi* v. *Scott*,(1) that the interest of a defendant secured by hypothecation of land is an interest in land and should be attached under s. 274. Under that section an order duly proclaimed prohibits the defendant from transferring or charging the property in any way, and prohibits all persons from receiving the same by purchase, gift, or otherwise. The interest of the mortgagee in the hypothecated property was the right to realize thereout the amount due under the hypothecation deed. The mortgagee had no interest in the property hypothecated except as security for the debt for payment of which it was hypothecated. The attachment and sale were not of the interest of defendant No. 1 in the land alone, but of the right of defendant No. 1 to recover the amount of the bond secured on the land.

As the Court had power to sell the interest of defendant No. 1 in the property to realize the debt, I am unable to see how an attachment of the debt alone was necessary to enable the Court to sell the interest attached under s. 274. In the case of decrees

(1) I.L.R., 9 Mad., 5.

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to raise the amount of mortgages or charges on land which have been attached, it has been held that the attachment should be made under s. 274, *Hari G. Joshi* v. *Rámchandra*,(1) *Musammat Bhawani Kuar* v. *Gulab Rai*.(2) No doubt in cases of such decrees the debt passed into a decree, but no distinction was made on that ground. In *Musammat Bhawani Kuar* v. *Gulab Rai* the Court say:—"The decree is for money recoverable by sale of property hypothecated for its payment. The right and interest which it creates is a right in a judgment-debt recoverable by sale of immovable property charged with its payment. The decree gave to the decree-holder a subsisting interest in the nature of a charge on hypothecated property, and the sale of their rights under the decree must be held to be a sale of an interest in immovable property."

It is not necessary to decide whether a sale of the interest of the mortgagee after attachment under s. 274 would carry the right to the purchaser to recover the debt by personal remedy against the debtor, as the plaintiff admits such remedy is barred by limitation.

For the above reasons I think the plaintiff's title to realize the debt from the hypothecated property is not defective by reason of the absence of attachment of the debt under s. 268.

I may add that the mortgagee has not assigned the debt, but he produced the hypothecation deed in Court before the sale, and the plaintiff has had the possession of it since the sale.

The next question is whether the share (½) of defendant No. 1 in the plaint ancestral property is liable to pay the amount due on the hypothecation deed of the 12th of March 1869.

The Subordinate Judge found that the debt secured by that deed was not, nor was any part of it, to use his language, "contracted for the purpose of the family of defendent No. 1 and that his share is not liable." The Subordinate Judge does not explain what he means by the expression "contracted for the purpose of the family of defendant No. 1."

The facts appear to be these: Muttu Ayyan, the father of defendant No. 1, was in possession of ancestral property mentioned in Exhibit A, the hypothecation deed; and after the birth of defendant No. 1, Muttu Ayyan borrowed from Kuppusámi Ayyan

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

Rs. 4,000 and executed therefor two bonds, one for Rs. 3,000 and one for Rs 1,000 on the 25th January 1869; Mutta Ayyan lent money to a son of Kuppusámi named Sabhápati, who on the same day executed a bond to Muttu Ayyan for Rs. 5,000. On the 12th of March 1869 Muttu Ayyan again, in order to relieve himself from a pressing decree, borrowed from Kuppusámi Rs. 936, and therewith paid off the decree. For the amount of these 3 bonds Muttu Ayyan executed the hypothecation deed, 12th March 1869, to Kuppusámi Ayyan as security charging the ancestral property. The two bonds for Rs. 3,000 and Rs. 1,000, interest thereon, and the amount of the decree for Rs. 936 were the debts due by Muttu Ayyan antecedent to the execution of the hypothecation deed, and Muttu Ayyan was entitled as against his son, defendant No. 1, to give security therefor on the ancestral property, even though those debts were incurred not for family benefit or necessity, and for which debt the family never received any benefit, *Girdharee Lall* v. *Kantoo Lall*.(1) The plaintiff did not allege that the debts secured by the deed of 12th March 1869 were incurred for any family benefit or necessity.

The evidence before us is sufficient to enable us to say that the deed of 12th March 1869 was given by Muttu Ayyan to pay or secure antecedent debts to the extent of Rs. 5,000 due by him.

The Judge has erroneously referred to Exhibits XI, XXVI and XXVII as leading him to the conclusion that the full Rs. 5,000 was not advanced, and further leading him to the conclusion that Muttu Ayyan and Sabhápati had been leading immoral lives. In his judgment he admits that these documents are not, as he says, "strictly speaking evidence against the plaintiff." If so, he should not have relied on them.

As the plaintiff proved that the deed of 12th March 1869, was executed as security by Muttu Ayyan to pay antecedent debts due by him, the onus lay on defendant No. 1 to prove, if he could, that such antecedent debts were incurred for illegal or immoral purposes, and this he has not done; nor has the Subordinate Judge found that the debts were incurred for such purposes.

It was contended rightly by defendant No. 1 that Muttu Ayyan could not have given a security to affect his share for the

(1) I.L.R., 1 I.A., 321.

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bonds for Rs. 3,000, and Rs. 1,000 when they were executed, and it was contended that it would be illusory to allow Muttu Ayyan to charge the share of defendant No. 1 by giving a renewal, as it was called, for those two bonds. If the giving of the deed of March was merely a device resorted to by Muttu Ayyan and Kuppusámi to enable Muttu Ayyan to give a security binding on defendant No. 1 such device could not be allowed to succeed, and the plaintiff's, case should so far fail. But we see no reason to believe there was any such device resorted to. Muttu Ayyan was on the 12th of March 1869 liable to pay a decree for Rs. 936, and when applying to Kuppusámi for a loan to pay the latter sum, it is not improbable that Kuppusámi required security for the two prior debts. There is not any evidence to lead us to the belief that the full sum, Rs. 5,000 was not due by Muttu Ayyan to Kuppusámi when the deed of hypothecation was executed. No evidence has been referred to as showing that Kuppusámi was aware at the time when he lent it that the money was borrowed in order to lend it to his son Sabhápati. Such knowledge cannot be inferred from the fact that Exhibit A recites that the loan of Rs. 3,000 was taken to lend to Sabhápati. Nor is there satisfactory legal evidence that the money was spent by Sabhápati for illegal or immoral purposes.

The Subordinate Judge has held that the plaintiff is not entitled to redeem mortgages affecting the plaint property vested in respondents Nos. 2, 3, 4, respectively, granted by Muttu Ayyan prior to the 12th of March 1869, upon the ground that the mortgagees obtained decrees on such mortgages and for sale of the property and that defendants, 2, 3 and 4 have purchased the lands they hold under such decrees.

This view of the Subordinate Judge is wrong, inasmuch as neither the plaintiff nor Kuppusámi nor defendant No. 1 was made a party to any of the suits brought on foot of such mortgages, and they are not bound by the sales in such suits. The plaintiff is clearly entitled to redeem the mortgages prior to the deed of the 12th March 1869, provided he do so within 6 months from the date of the decree in this appeal. He will have to pay the sums due respectively on foot of such prior mortgages and interest and costs, and in default of such payment this suit should be dismissed as regards those defendants with costs.

The plaintiff alleges that some of the defendants, Nos. 1, 2, 3, have sold lands not mortgaged to them.

The defendants Nos. 5, 6, 7 claim different portions of the property comprised in the deed of the 12th March 1869 by purchase or mortgage from defendants Nos. 2, 3, 4, and the Subordinate Judge held that their lands are not subject to plaintiff's claim. The rights of these defendants Nos. 5, 6, 7 as between them and the plaintiff are the same as the rights of their grantors or mortgagors, defendants Nos. 2, 3, 4, and if the plaintiff redeems the mortgage vested in defendants Nos. 2, 3, 4, he will be entitled to sell the lands held by defendants Nos. 5, 6, 7. But of these latter defendants such of them as hold mortgages will be entitled to deduct the mortgage debt from the fund paid to redeem the prior mortgages to their mortgagors. As to the purchasers from defendants Nos. 2, 3, 4, such purchasers may then have an equity to be paid the value of their interests out of the sums paid to discharge the prior mortgages vested in defendants Nos. 2, 3, 4. But except by agreement between the parties, the application of this equity, if upon the facts it exists, must be determined by suit between these parties.

Under the hypothecation deed, Exhibit A, interest was payable half-yearly, and suit No. 1 of 1870 was brought in the Kumbakónam District Múnsif's Court against defendant No. 1, and a decree was obtained by the plaintiff. This decree was assigned by the plaintiff to defendant No. 8, and he by execution thereof sold the estate and interest of defendant No. 1 in part of the lands comprised in the hypothecation deed A and became purchaser thereof. After such purchase defendant No. 8 sold to the defendants Nos. 9 and 10 portions of the land so purchased in suit No. 1 of 1870. The defendants Nos. 8, 9, 10 contend, amongst other defences, that, as the interest due on the bond was charged on the land under the hypothecation bond, Exhibit A, and as the land was sold in suit No. 1 of 1870 to pay that interest, the land cannot now be resold to pay the principal sum.

They rely on *Srinath Dutt* v. *Gopal Chundra Mittra* (1), in which, and in other cases, decided by the different High Courts, it was held that if a mortgagee obtains a money decree on the *footing of the mortgage debt and sells the mortgaged property in*

(1) I.L.R., 9 Cal., 511.

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execution for payment of principal and interest, such sale passes the interest of the mortgagee to the purchaser free from the mortgage. I do not think that principle applies to this case, inasmuch as the decree, though for the amount due for interest, was only a money decree, and was assigned to defendant No. 8 who sold in execution and who was not entitled to any lien on the land. Defendant No. 8 in selling in execution did not stand therefore in the position of a mortgagee who sells to realize the principal amount in respect of which he has a lien, and also an execution for the debt and who cannot in the sale separate his lien from the interest he sells under the execution.

Moreover, the defendant No. 1 had an equity of redemption in the lands, and this was the right and interest which defendant No. 8 bought in the lands. The interest under the hypothecation deed in all the lands vested in defendants Nos. 8, 9, 10 may be sold. But they are entitled to redeem from the plaintiff if they so desire.

There is no question of limitation.

The decree of the Subordinate Judge will be reversed and a decree given for the plaintiff for the amount due and subsequent interest at 6 per cent. till date of payment, to be recovered from the hypothecated lands; that the plaintiff do pay to the prior mortgagees and assigns, parties to the suit, the amount due to them respectively and their costs of this suit within six months from the date of this decree, and in default of such payment this suit shall stand dismissed against the said prior mortgagees with costs.

In case the plaintiff shall redeem the said prior mortgagees as above directed, then the lands comprised in Exhibit A are to be sold by auction, and out of the proceeds the plaintiff is to be paid the amount paid by him to the prior mortgagees for principal and interest and also the amount due to the plaintiff upon Exhibit A.

It is represented by the vakils on either side that there is not sufficient information as to what lands are comprised in the plaint hypothecation bond given to plaintiff, and we think this is so and frame the following issues:—

I. Whether any and if so what items of land mentioned in the plaint bond A are comprised in the prior hypothecation bonds D. E. F.

II. What is the amount, inclusive of kist, payable under D. E. F. on the dates on which the lands therein specified were sold in execution.

III. Whether the items of lands in possession of defendants Nos. 1, 5 and 7 which were comprised in the prior hypothecation bonds D. E. F. have been exonerated from the first prior mortgage by reason of the razinámа in suits 207 of 1885 and 272 of 1881.

IV. Whether any and which of the lands in possession of defendant No. 1 were comprised in the plaint bond A.

The Subordinate Judge is requested to try the above issues on the existing evidence and upon such further evidence as the parties may offer, and to submit his finding thereon in two months from the date of the receipt of this order, when 10 days will be allowed for objections.

BRANDT, J.—I only wish to add a few observations regarding the first question, viz., whether or not this suit is maintainable by reason of the plaintiff having failed to attach in execution the mortgage instrument on which he sues, both as a debt, under s. 268 of the Code of Civil Procedure and also under s. 274 as immovable property or an interest in immovable property.

It is not alleged that what was sold was not duly attached and brought to sale *quâ* immovable property under the execution proceedings taken by the appellant in 1880.

In execution of the decree in original suit No. 15 of 1875, obtained by the Plaintiff against the sons of Kuppusámi Ayyan, the interest of the latter under the mortgage instrument A was attached and sold as movable property.

A suit brought by the plaintiff on the strength of his purchase at such sale was dismissed on the ground that under the attachment no interest in the immovable property passed under the sale: and this is not questioned. The decision is in accordance with authority, *Appasámi* v. *Scott.*(1) In support of his decision that unless the interest of the mortgagee be attached under s. 268, as well as under s. 274, the plaintiff took no title under his purchase, the Subordinate Judge refers to *Mahadeo Dubey* v. *Bhola Nath Dichit*;(2) *Fida Husain* v. *Kutub Husain*;(3) *and Srinath Dutt* v. *Gopal Chundra Mittra.*(4)

(1) I.L.R., 9 Mad., 5.
(2) I.L.R., 5 All., 86.
(3) I.L.R., 7 All., 38.
(4) I.L.R., 9 Cal., 511.

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The question for consideration in the first case cited was whether a sale in execution of a simple money decree is *de facto* void where there has been no attachment, and the question was answered as might be expected in the affirmative.

The case is not apposite here, for here there was an attachment, and there is nothing to show that it was not "a regularly perfected" attachment: the question is whether the appellant must fail because there were not (as it is said) two attachments, one as of a debt, and the other as of immovable property. The second case cited has no bearing whatever on the point before us: it appears to have been cited in the Court below simply because the case of *Mahadeo Dubey* is mentioned in it.

In *Srinath Dutt* v. *Gopal Chundra Mittra* the learned Judges do no doubt throw out a suggestion that in the case of sale in execution of a debt secured by a mortgage there should be an attachment under both sections, viz., 274 and 268, but the only point really determined was that the sale of such a debt as a debt alone, under the provisions of the Code applicable to movable property, was a material irregularity producing substantial injury to the judgment-debtor: and that may well be; but in the case before us the interest of the mortgagor in the immovable property was attached and sold, and it is difficult to see what injury there could be to the mortgagor by reason of its not having been attached and sold as a debt also.

The particular question before us has not, so far as I know, been decided, and the objection appears then to me to be purely technical: it remains to consider whether it must prevail.

The facts of this case are in some respects singular. It was conceded that the personal remedy of the mortgagee against the mortgagor is barred by time, and that fact was relied on as showing that there was no debt to attach; and it was argued that there can be no "debt" unless there is personal liability. The argument would have been stronger, if for "no debt" there had been substituted the words "no such debt as is contemplated under s. 268 of the Code of Civil Procedure:" but even then the necessity for an attachment under that section might be put on the ground that, before the execution creditor should sell, the mortgagor might otherwise pay the amount secured to a third party and the land could not then be sold as the security.

The attachment of the debt, *quâ* debt, was necessary not so much, if at all, in the interest of the judgment debtor as of the judgment creditor; and as a matter of fact no payment of the money due was made to a third party. And it was not contended that it would be necessary where attachments have been made both under s. 258 and under s. 274 that whatever is attached should be sold both as a debt or movable property and also as immovable property; and a sale of the interest put up to sale as immovable property might, and in the present case at all events did, in my opinion, convey all that was capable of being sold; and that, as my learned colleague has put it, was the interest of the mortgagee in the hypothecated property,—that interest consisting of the right to realize the amount due under the hypothecation deed; and the right of the appellant was to have that property sold in satisfaction of the amount due under Exhibit A.

I also am therefore of opinion that the sale of such interest as defendant No. 1 had in the property mortgaged was, in the circumstances of this case, a valid sale.

I have nothing to add in other respects to the judgment of my learned colleague, in which I entirely concur as regards the other questions arising and disposed of by him.

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. August 16. December 23.

VENKATASÁMI (PLAINTIFF), APPELLANT,

and

STRÍDAVAMMA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Receiver, appointment of—Appealable order—Civil Procedure Code, ss. 503, 505, 588.

An order rejecting an application to appoint a Receiver is an order passed under s. 503, and is therefore appealable under s. 588, cl. 24, of the Code of Civil Procedure.—*Subramanya* v. *Appasami*, I.L.R., 6 Mad., 355, overruled.

IN suit No. 12 of 1884 in the District Court of Kistna the plain-

* Appeal against Order 66 of 1886.

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tiff, Makarla Venkatasámi Nayudu, applied for the appointment of a Receiver under s. 503 of the Code of Civil Procedure.

The application was dismissed with costs.

Against this order plaintiff appealed to the High Court.

Mr. *Grant* for appellant.

Bháshyam Ayyangár and *Ánandácharlu* for respondents.

The case was heard on the 16th August 1886, and on the 23rd August the Court (Collins, C.J., and Parker, J.) delivered the following

ORDER:—The petitioner appeals against an order of the District Court of Kistna, refusing to appoint a Receiver under s. 503 of the Code of Civil Procedure. The petitioner has by litigation established his status as an adopted son, and the suit is for recovery of movable property valued at over a lakh of rupees. Defendant No. 1 has given a list of movables to the value of Rs. 2,560 only and the petitioner prays that a Receiver be appointed to take charge of the property in suit pending the taking of an account.

It is objected that an order refusing to appoint a Receiver is not appealable under s. 503 of the Code of Civil Procedure—*Subramanya* v. *Appasámi*.(1)

We have ascertained that one of the learned Judges who decided that case (Muttusámi Ayyar, J.) has subsequently entertained doubts of the correctness of the ruling, and we find that the High Court of Calcutta has ruled that an order refusing to appoint a Receiver is appealable.—*Gossain Dulmir Puri* v. *Tekait Hetnarain*.(2)

It has been held both by this Court in Appeal against Order 115 of 1885,(3) and by the Calcutta Court in *Birajan Kooer* v.

(1) I.L.R., 6 Mad., 355. (2) 6 Cal. L.R., 467.

(3) APPEAL AGAINST ORDER 115 OF 1885.

PARKER, J. (Muttusámi Ayyar, J., concurring).—The Subordinate Judge in Original Suit No. 17 of 1885 nominated under s. 505 of the Code of Civil Procedure a certain person to be appointed as a Receiver. The District Judge expressed an opinion that the suit would not lie in its present form and refused to sanction the appointment of any Receiver. This appeal is presented against the order of the District Judge, and it is objected that the order of the District Judge is passed under s. 505 of the Code of Civil Procedure, from which s. 588 of the Code of Civil Procedure provides no appeal.

Against this it is urged by the learned Advocate-General that as the power conferred by chapter XXXVI can only be exercised by High Courts and District

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Ram Churn Lall Mahata,(1) that no appeal lies from an order passed under s. 505, and in the latter case it was held that a District Court ought to decide on the necessity for the appointment of a Receiver on a reference from a Subordinate Court, before authorizing the Subordinate Judge to appoint a Receiver.

By analogy when the appellate authority is the High Court it

Courts, the order of the District Judge must be regarded as an order passed by the District Court under s. 503, and is therefore subject to appeal.

It has already been held by this Court in *Subramanya* v. *Appasámi* (I.L.R., 6 Mad., 355), that an order refusing to appoint a Receiver under s. 503 is not appealable, but it does not appear that the same question is raised in the present case. There a Subordinate Judge refused to make an order under s. 503, which in any case he could not do unless authorized by the District Court under s. 505. But here the order of the District Court is clearly passed under the last clause of s. 505. It has been held in *Birajan Kooer* v. *Ram Churn Lall Mahata* (I.L.R., 7 Cal., 719) that the concluding words "or pass such other order as it thinks fit," authorize the District Court not only to decide the fitness of the person nominated, but also the necessity for the appointment of a Receiver at all.

In the present case no order has been passed under s. 503, either by the Subordinate Court or by the District Court. The Subordinate Judge proposed to pass an order under that section and solicited sanction, but the sanction was refused.

The question therefore does not arise whether if the District Judge had approved the nominee and accorded sanction to the Subordinate Judge to make an order under s. 503, that order would be the order of the Subordinate Court or of the District Court.

I understand the argument of the learned Advocate-General to be that the order would be that of the District Court which would be exercising its powers by delegating them.

I find from the notes to Mr. Justice O'Kinealy's Code of Civil Procedure (pages 386, 387) that this subject was considered in the cases *Gossain Dulmir* v. *Tekait Hetnarain* (6 C.L.R., 467) and *Birajan Kooer* v. *Ram Churn Lall Mahata* (I.L.R., 7 Cal., 719). In the former of those cases it was laid down that an order made by a Subordinate Judge dismissing an application for the appointment of a Receiver *after obtaining sanction from the District Judge* is an order under s. 503, and not under s. 505, and therefore appealable. This would favor the view that after sanction given, it is the Subordinate Court which makes the order under s. 503 and not the District Court, the Subordinate Court having been authorized thereto under s. 505. In the latter case it was held that the first step taken by the Subordinate Judge was to nominate and that from this proceeding there is no appeal. The Judge then approves and under s. 505 authorizes the appointment, and from this also there is no appeal. Then the Subordinate Judge *appoints* the Receiver previously nominated, and from this order there is an appeal. Thus this ruling also corroborates the view that the action of the District Court is not taken under s. 503 but under s. 505, and that the appeal is from the order of the Subordinate Court under s. 503. Applying these principles to the present case it would follow that no order refusing to appoint a Receiver under s. 503 has been made either by the Subordinate Court or by the District Court, and therefore no question arises as to the correctness of the ruling in I.L.R., 6 Mad., 355. The Subordinate Judge has in fact passed no order at all. He solicited sanction to pass an order under s. 503. The District Judge under s. 505 refused to accord that sanction (or refused to delegate his power). From that refusal there is no appeal.

I would dismiss this appeal with costs.

(1) I.L.R., 7 Cal., 719.

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may be argued that a similar power exists, and that an application made under s. 503 can only be disposed of by an order passed under that section, which is appealable under s. 588, cl. (24).

Against this it may be urged that when orders are passed refusing applications under certain sections they have been elsewhere made expressly appealable—see s. 588, cls. (7), (8), (9), (16), (20), (27).

As our learned colleague has doubts of the correctness of the Madras decision, and the Calcutta Court has taken a different view, we refer for the decision of the Full Bench the question—

"Is an order refusing to appoint a Receiver under s. 503 of the Code of Civil Procedure appealable under s. 588, cl. (24)?"

On the 13th October the case was heard by the Full Bench (Collins, C.J., Kernan, Muttusámi Ayyar, Brandt and Parker, JJ.).

Mr. *Grant* and *Sadagópachárlyar* for appellant.

Bhâshyam Ayyangár and *Ánandácharlu* for respondents.

PARKER, J. (the Chief Justice, Kernan and Muttusámi Ayyar, JJ., concurring).—The question referred is whether an order refusing to appoint a Receiver under s. 503 of the Code of Civil Procedure is appealable under s. 588, cl. (24).

In support of an affirmative answer we are referred to *Beasut Hossein* v. *Hadjee Abdoollah*,(1) in which it was said by the Privy Council in a question raised under the 76th section of the Registration Act that the words "no appeal lies from any order under this section" must be taken to exclude not only an appeal when the Judge directs the Registrar to register a deed, but also one when the application for registration is rejected. Their Lordships observed that there would be great difficulty in saying that an order of rejection did not fall within the term "an order made under this section."

Similarly the High Court of Calcutta in *Nubbi Buksh* v. *Chasni*(2) held that an order refusing an application to be made an insolvent must be considered to be one made under s. 351 of the Code of Civil Procedure, and appealable under s. 588, cl. (17). It was observed that s. 351 (like s. 503) did not expressly authorize the Court to refuse the application, but from the language of the section it was obviously within the Court's power to refuse it, and therefore that an order of refusal must be taken to be made under

(1) L.R., 3 I.A., 221. (2) I.L.R., 6 Cal., 168.

the section. Exactly the same reasoning would apply to the application for the appointment of a Receiver under s. 503.

We find also that the same High Court has ruled that an order refusing to appoint a Receiver is appealable—*Gossain Dulmir Puri* v. *Tekait Hetnarain*.(1) This decision is not however reported in the authorized Indian Law Reports.

Against this it is urged that it is the policy of the law to give an appeal only when extraordinary powers are exercised and not when the exercise is refused, and we are referred to cls. (7), (8), (9), (16), (20), (27) of s. 588 in proof of the theory that where the Legislature intended an appeal to be given against a refusal it was careful to give that appeal by express enactment.

If the contention that the Legislature did not intend to make the refusal to exercise a power appealable were to be allowed, it would follow that there could be no appeal in the case of a refusal to remove a person under s. 503(*b*) when such person had misappropriated property committed to his custody. We are bound to place a reasonable construction upon an Act, and the Legislature certainly could not have intended to enact this. But if an appeal would lie from a refusal to exercise a power under s. 503(*b*), I can see no sufficient reason why there should not be an appeal from a refusal to exercise a power under s. 503(*a*). The consequences of an improper refusal might be no less disastrous.

I am not insensible to the difficulty suggested by the other clauses of s. 588, but I would point out with respect to most of them, *e.g.*, cls. (8), (9), (20), (27), that when an order is granted it becomes appealable in the further progress of the suit, and hence it was necessary for the Legislature to make the order of refusal specially appealable, since the effect of the order was to stop the further progress of the suit.

The absence of an appeal from an order under s. 505 is no argument for the absence of an appeal from a refusal to act under s. 503, since in the former case the District Court merely authorizes a Subordinate Court to act, and when it has acted there is an appeal from the order passed—see *Birajan Kooer* v. *Ram Churn Lall Mahata*.(2)

I would answer to the Division Bench that an order of refusal

(1) 6 Cal. L.R., 467. (2) I.L.R., 7 Cal., 719.

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to appoint a Receiver is an order under s. 503 of the Code of Civil Procedure, and is appealable under s. 588, cl. (24). I would therefore overrule *Subramanya* v. *Appasámi*.(1) I am fortified in this opinion by the fact that one of the learned Judges who decided the case (Muttusámi Ayyar, J.) is himself not now satisfied with the correctness of that decision.

BRANDT, J.—I concur. An order or proceeding recording a refusal to appoint a Receiver is certainly "an order under s. 503 of the Code of Civil Procedure;" and orders "under" that and other sections are appealable under the provisions of s. 588, cl. (24).

The principle adverted to in *Beasut Hossein* v. *Hadjee Abdoollah*(2) appears to me to be applicable in the case before us, not the less so because the order or orders under consideration in that case related to direction for registration of, and refusal to register deeds. The power to make an affirmative order implies (in the words of the learned Judges who decided the case reported on) the power to make an order refusing to exercise powers.

There is no doubt considerable force in the arguments advanced by the learned pleader on the other side. It was pointed out that under the Civil Procedure Code of 1859 no appeal lay against an order refusing to appoint a Receiver, while an appeal allowed against an order making such an appointment; and that under s. 94 of that Code an appeal against orders made under the two preceding sections was open to the defendant only; and it was suggested that the intention was to allow an appeal only when the extraordinary powers given were exercised, and not when a Court refused to exercise them; and that the same intention is to be inferred from the manner in which the present Code is expressed, as it now stands, after amendments.

If regard be had to principles and to expediency it is obviously most important that a valuable property should not run the risk of being ruined because a Court has declined to exercise a power which, if the discretion given were properly used, it should have exercised.

Reference was also made to the fact that an appeal is expressly allowed from an order refusing to issue an injunction; to the wording of ss. 351, 492, 493, 496, 497, 502 and 505, and to

(1) I.L.R., 6 Mad., 355. (2) L.R., 3 I.A., 225.

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cls. (9), (11), (16) and (20) of s. 588, as showing that generally when the Act allows an appeal against proceedings recording refusal to make an order it does so in express terms.

Mr. Justice Parker has noticed the inferences which may be drawn from the provisions of ss. 503, 505, and from cls. (8), (9), (20) and (27) of s. 588, and it would be quite possible to meet many of the objections taken on behalf of the respondent, though possibly not all of them. It appears to me however unnecessary to go into details; there may be some slight inconsistencies in the Code of Civil Procedure discoverable by acute minds; but I see no reason to think that the Legislature intended not to allow an appeal against an order under s. 503 refusing to appoint a Receiver, and I think it is more consonant with the general principles of the Code, and with the rules of construction, as well as with the wording of cl. (24) of s. 588, to hold that an appeal does lie in the case before us, than to hold that it does not.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

RÁMAYYANGÁR AND ANOTHER (PLAINTIFFS), APPELLANTS,

and

KRISHNAYYANGÁR AND ANOTHER (DEFENDANTS), RESPONDENTS. *

1886. August 18.

Civil Procedure Code, s. 539—Sanction granted to two persons separately to institute suit in respect of breach of charitable trust.

R. instituted a suit with the Collector's sanction to compel the performance of a charitable trust; D. was subsequently joined as plaintiff, having also obtained the Collector's sanction to institute the suit:

Held that the sanction obtained by D. related back to the institution of the suit.

APPEAL from the decree of J. C. Hughesdon, District Judge of Tinnevelly, in suit No. 7 of 1885, dismissing the suit on the ground that the plaint, as filed, had not been sanctioned by the Collector as required by s. 539 of the Code of Civil Procedure.

Párthasáradhi Ayyangár for appellants.

Respondents did not appear.

* Appeal 70 of 1886.

RÁMAYYANGÁR v. KRISHNAYYANGÁR.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Court (Kernan and Brandt, JJ.).

JUDGMENT.—The suit was instituted by appellant No. 1, Rámayyangár, after he had obtained the sanction of the Collector.

Subsequently, Ramayyangár's son, Dorasámí, was added as plaintiff No. 2, and he also obtained the Collector's sanction to "institute" the suit, as it is termed in the Collector's order. Subsequently issues were framed. The Judge holds that the Collector's sanction in the case of Dorasámi is not sufficient with reference to s. 539 of the Code of Civil Procedure, as at the time when the suit was instituted, the Collector's sanction had not been obtained by him. Referring to the decision of the Privy Council in *Mahammad Azmat Ali Khan* v. *Lalli Begum*,(1) which appears to be an analogous case, decided with reference to the Pensions Act; we are of opinion that the sanction obtained by Dorasámi relates back to the institution of the suit.

We think the order dismissing the suit was wrong; and as the Judge dismissed the suit on a preliminary ground which excluded evidence, we set aside the order and direct the Judge to restore the case to his file and to dispose of it on the merits.

The costs of this appeal to be costs in the cause.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

1887. March 1.

QUEEN-EMPRESS

against

PONNURANGAM.*

Penal Code, ss. 24, 378—Theft of joint property by co-parcener.

Theft of joint property may be committed by a co-parcener if he takes it from joint possession and converts such possession into separate possession.

THIS was a case referred for the orders of the High Court under s. 438 of the Code of Criminal Procedure by W. H. Glenny, District Magistrate of North Arcot.

(1) I.L.R., 8 Cal., 422.

* Criminal Revision Case 765 of 1886.

QUEEN-EMPRESS v. PONNURANGAM.

The case was stated as follows:—

"Ponnurangam, the accused, a boy of 18, took a cart from his father's mandi, or shop, without his father's knowledge, and sold it, and appropriated the proceeds. He admitted all this, but pleaded, first, that he was undivided from his father and was a joint owner of the cart; and, secondly, that the reason he took the cart was that his father, who was married a second time, does not support either him (accused) or his mother. He kept, he said, part of the proceeds for his own support and sent the rest to his mother.

"The Second-class Magistrate took the accused person's word for all these allegations and found 'he seems to have acted under *bonâ fide* claim of right,' and discharged him."

Counsel were not instructed.

The Court (Kernan and Muttusámi Ayyar, JJ.) delivered the following

JUDGMENT:—The Second-class Magistrate's judgment and order are wrong. Theft of joint property of a family may be committed by one of the family though a co-parcener, if he takes it from joint possession and converts such possession into separate possession—See Weir's Criminal Rulings, p. 154, on s. 379, Indian Penal Code.

The acquittal is set aside and the Magistrate is directed to re-try the case and to have regard to the definition of theft in s. 378, Indian Penal Code, and of the word "dishonestly" in s. 24.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

1887. March 2.

VENKAPPA AND OTHERS (DEFENDANTS), APPELLANTS,

and

NARASIMHA (PLAINTIFF), RESPONDENT.*

Stamp—Court Fees Act—VII of 1870, s. 6, schedule II, art. 17.

In a suit on a mortgage bond a decree was passed for payment of principal and interest, and in default for sale of the mortgaged property. Some of the defendants filed a memorandum of appeal against so much of the decree as declared the liability of the property, affixing a stamp of Rs. 10 only:

* Referred Case No. 1 of 1887.

VENKAPPA v. NARASIMHA.

Held that the proper stamp to be paid was not Rs. 10 as in the case of a declaratory decree, but on the value of the debt not exceeding the value of the property.

THIS was a case referred to the High Court by J. W. Best, District Judge of South Canara, under s. 617 of the Code of Civil Procedure.

The facts were stated as follows :—

"The object of the original suit was to recover from the Alyasantana family of the defendants, on the responsibility of the mortgaged lands, Rs. 2,169-15-10 due under a mortgage bond; and the court fee paid on the plaint was on this amount, namely Rs. 135.

"Defendants Nos. 3, 4 and 5 denied the plaint mortgage and disputed the chargeability of the debt on the family estate.

"The District Múnsif who tried the suit, finding that the debt was properly chargeable on the family property, decreed the plaint amount with further interest (Rs. 137-8-0) and costs to be paid by defendant No. 1, and, on his default to do so, to be recovered by sale of the mortgaged lands after a specified time.

"Against this decree, defendants Nos. 3, 4 and 5 have presented the appeal in question in order *to exonerate the lands from liability* for the amount decreed.

"The appellants have stamped the appeal with a court-fee of Rs. 10, on the ground that the relief sought in appeal is a mere declaration that the debt is not chargeable on the family property.

"I am of opinion, however, that as what they seek is not a mere declaration to be made use of on some future occasion, but a declaration *with consequential relief* so that the lands may not be sold in execution of the original decree, the appeal should be valued according to the amount of money concerned (as in the Lower Court), and that the court-fee to be paid is the *ad valorem* fee on Rs. 2,169-15-10, namely, Rs. 135 (Chief Justice's ruling—November 1872, quoted in the foot-notes at page 240 of Weir's Digest of Rules, &c., 1883)."

Counsel were not instructed.

The Court (Kernan and Muttusámi Ayyar, JJ.) delivered the following

JUDGMENT :—We agree with the referring officer. There was a decree directing the payment of the amount and in default that the lands of the defendants should be sold and the produce applied to payment of the debt. The defendants appealed against

so much of the decree as declared the liability of their property, and to be released from the decree. The relief they sought was, therefore, not a mere declaratory decree but to be released from the decree. The proper stamp to be paid, therefore, is not Rs. 10 as in a declaratory decree, but on the value of the debt, not exceeding, however, the value of the property.

The case of *Vithal Krishna* v. *Bálkrishna Janárdan* (1) is not in conflict with this, as there the relief sought was only to obtain a declaration of the right claimed.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

THOPARA MUSSAD (PLAINTIFF), APPELLANT,

and

THE COLLECTOR OF MALABAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

1886. December 21.

Malabar law—Rights under a kanam—Denial of jenm right by kanamdár—Adverse possession—Limitation—Declaration of escheat.

A. demised certain lands on kanam to B. in 1853. B. afterwards committed an offence under the Mapilla Act and the lands were handed over for the benefit of his representatives to C. Government subsequently, without making A. a party to their proceedings, declared the lands to have escheated, and in 1863 sold them to C. A.'s representatives now sued to recover the lands from C.'s representatives who set up an adverse title and alleged that the suit was time-barred :

Held that C. was, at the time of the escheat, in the position of a manager for mortgagees; that the escheat proceedings of which the mortgagor had no notice did not affect his rights; that denial by the mortgagee in possession of the mortgagor's right to redeem is not sufficient to convert such possession into adverse possession.

APPEAL from the decree of V. P. de Rozario, Subordinate Judge of South Malabar at Palghat, reversing the decree of B. Kamaran Náyar, District Múnsif of Betutnád, in suit No. 359 of 1884.

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

Mr. *Wedderburn* and *Sankara Menon* for appellant.

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(1) I.L.R., 10 Bom., 610.

* Second Appeal 196 of 1886.

MUSSAD v. THE COLLECTOR OF MALABAR.

The Government Pleader (Mr. *Powell*) for the Collector of Malabar.

Sankara Náyar for defendant No. 3.

JUDGMENT.—The plaintiff sued to recover two items of land demised on kanam by his brother to one Mahmad Kutti Muppan in 1853. Mahmad Kutti Muppan was the husband of the second and the father-in-law of the third defendant.

The facts found are that the kanam sued on was granted in amicable settlement of a suit based upon a prior deed of 1816; that three years after it was granted (*i.e.*, in 1856) the lands were attached by Government on account of an offence committed by Mahmad Kutti under the Mapilla Act, and a fine of Rs. 15,000 levied therefrom; that after realization of that fine, the lands were handed over to Ali Muppan in 1857 with the consent of Mahmad Kutti's heirs and for their benefit; that subsequently, Government came to the conclusion that the plaint property had belonged to the Betutnád Rájá and had escheated to Government on his death without heirs; that Government then sold the lands to Ali Muppan who paid for them by instalments, the sale being completed in 1863; and that Ali Muppan, and after him defendant No. 3, had since remained in possession.

The District Múnsif found that Ali Muppan was in possession as kanamdár, and that the suit being to redeem a mortgage of 1853, the limitation was sixty years. He therefore decreed in plaintiff's favor.

On appeal, the Subordinate Judge reversed this decision, holding that Ali Muppan was neither the mortgagee nor the assignee or representative of the mortgagee, and that even if he had been, his tenancy determined, and his possession became adverse when the Government declared the property to be an escheat and sold it to him; and hence that the suit was barred. The decision in *Ammu* v. *Ramakishna Sástri* (1) was relied on in support of this decision.

Both the Courts below have treated the kanam deed as a mortgage, and we think that they were right in so doing. The kanam was granted for the amount due under a decree and for a further advance; and in such case, the law of limitation applicable to mortgages must be applied: *Nellaya Variyath Silapani*

(1) I.L.R., 2 Mad. 226.

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v. *V. M. Ashtamurti Nambúdri.*(1) We cannot, however, agree with the Subordinate Judge that Ali Muppan was not at the time when the Government purported to deal with the property as an escheat, in the position of representative of or manager for the mortgagees. Exhibit E appears to us clearly to show that the property was entrusted to him, with the consent of the heirs of Mahmad Kutti, for the purpose of being managed by him on their behalf.

But we do not think that the action of Government in declaring the lands to be an escheat and in selling them to Ali Muppan can affect the plaintiff's title, unless it be shown that he was aware of the proceedings, and that by the action of Government the relation of mortgagor and mortgagee ceased to exist between the plaintiff and the heirs of Mahmad Kutti, on whose behalf Ali Muppan had been entrusted with the land. In *Ammu* v. *Ramakishna Sástri* (2) the Deputy Collector appears to have held a regular inquiry and to have declared formally that the land was a Government escheat in a proceeding to which the plaintiff in that suit was a party. In the case before us, there is nothing to show what was the procedure adopted, or whether the plaintiff was a party to the proceeding. The Subordinate Judge observes that "Náráyana Musad became aware of the sale by Government and sued (1859) to redeem the plaint property." It is not, however, altogether clear that the property then sued for was the same. That suit apparently referred to property which had been sold by Government in 1859 for Rs. 532, and it is not clear what that property was. Assuming the property or part of it to have been the same, Ali Muppan, no doubt, set up a title adverse to the plaintiff, but the District Múnsif dismissed the suit on the ground that the Government was not a party.

We are not prepared to hold that the mere denial by the mortgagee in possession, or by the representative of the mortgagee in possession, of the mortgagor's right to the equity of redemption is of itself sufficient to convert such possession into adverse possession: *Ali Muhammad* v. *Lalta Bakhsh.*(3)

The Subordinate Judge has failed to observe the plaintiff's contention that land item No. 1 was not included in the land sold to Ali Muppan in 1863. If this be so, Ali Muppan's purchase

(1) I.L.R., 3 Mad., 382. (2) I.L.R., 2 Mad., 226. (3) I.L.R., 1 All., 655.

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from Government cannot possibly give rise to an adverse title with respect to this item.

With these observations we set aside the decree of the Subordinate Judge and remit the appeal for re-hearing. The costs to be costs in the cause.

APPELLATE CIVIL.

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

1887. January 27.

AHMED KUTTI (DEFENDANT), APPELLANT,

and

KUNHAMED (PLAINTIFF), RESPONDENT.*

Malabar law—Kanam—Construction of redemption clause—Time for redemption.

The primary intention that a kanam is to be redeemed only after 12 years, can be negatived either expressly or by implication by a special clause. *Prathenpurayil Kuridipravan Kanara Kurup* v. *Prathenpurayil Kuridipravan Govindan* (I.L.R., 5 Mad., 311) distinguished.

APPEAL from the decree of W. P. Austin, District Judge of North Malabar, affirming the decree of A. Annasámi Ayyar, District Múnsif of Pynad, in suit No. 601 of 1885.

This was a suit brought in 1885 to redeem a certain paramba demised to the defendant under a kanam deed, dated 11th October 1880. The marupat (Exhibit A) contained the following clause:—

"When the paramba is demanded, I shall restore the same by receiving the kuikanam and kanam amount . . . . . according to the custom of the country."

The defendant objected that he was entitled to hold the land for 12 years, but this objection was overruled by both the Lower Courts.

The defendant appealed to the High Court.

Anantan Náyar for appellant.

Sankara Menon for respondent.

The Court (Muttusámi Ayyar and Parker, JJ.) delivered the following

* Second Appeal 509 of 1886.

AHMED KUTTI v. KUNHAMED.

JUDGMENT:—We are of opinion that the construction placed by the Judge on Exhibit A is correct. The words, "when the paramba is demanded, I shall restore," are inconsistent with the intention that the terms should continue for 12 years certain. It is no doubt true that when a kanam is granted, the primary intention is that it should be redeemed after the expiration of 12 years. But when that intention is negatived, either expressly or by necessary implication by a special clause, we do not consider that we are at liberty to introduce into the document words which we do not find in it, so to render the special provision operative only on the expiration of 12 years. The language of the document referred to in *Puthenpurayil Kuridipravan Kanara Kurup* v. *Puthenpurayil Kuridipravan Govindan* (1) is not the same as in Exhibit A, nor have we that document before us. We consider that the second appeal cannot be supported, and we dismiss it with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

1887. February 25.

BURGESS AND OTHERS (PLAINTIFFS),

and

SIDDEN AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, ss. 404, 406—Application for permission to sue as paupers presented by several paupers jointly.

The mere fact that several persons jointly present an application for permission to sue as paupers does not authorize the Court to entertain it on behalf of applicants who do not appear in person.

THIS was a case referred for the orders of the High Court under s. 617 of the Code of Civil Procedure by W. E. T. Clarke, Subordinate Judge, Nílgiris.

The case was stated as follows:—

"A pauper petition for recovery from the executors under the will of the late Thomas Sidden of the sum of Rs. 3,888 (being 12 years' maintenance) and of Rs. 3,600, the corpus of a trust fund deposited with the said Thomas Sidden and further interest, &c., was presented to me on the 29th September 1886.

(1) I.L.R., 5 Mad., 311.

* Referred Case 8 of 1886.

BURGESS v. SIDDEN.

"The parties to this petition are five in number, all resident beyond the jurisdiction of this Court.

"The petition was presented to me by fifth petitioner only in person; the said fifth petitioner produced no authority authorising him to appear and act for the other petitioners, but vakaluts were put in with the petition by which 1, 2, 3 and 5 petitioners empowered Messrs. Cowdell and Co., Solicitors at Ootacamund, to appear for them, together with a power of attorney by which petitioner No. 4 apparently authorized petitioner No. 1 to act for her in recovering the moneys alleged to be due to petitioners by the representatives of the late Mr. Sidden."

Counsel were not instructed.

The Court (Kernan and Brandt, JJ.) delivered the following

JUDGMENT:—An application to sue as a pauper must be made to the Court by the applicant in person, unless he is exempted under s. 640 or 641 from appearing in Court (which is not the case here), and it is only in the case of persons so exempted that the application may be presented by a duly authorized agent.

The mere fact that several pauper applicants jointly present an application cannot authorize the Court to entertain it on behalf of applicants who do not appear in person.

The application in this case was not presented on behalf of the petitioners who did not appear by an agent duly authorized to appear under s. 404, and therefore the provisions of s. 406 do not apply.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

1887. February 25.

SÍRIAH AND OTHERS (PLAINTIFFS),

and

MÚCKANÁCHÁRY AND OTHERS (DEFENDANTS).*

Civil Procedure Code, ss. 268, 284, 287 (e), 301—Attachment of a debt due to a Judgment-debtor—Sale of debt—Payment into Court—Prohibitory order.

A decree-holder by a prohibitory order made under s. 268 (a) of the Civil Procedure Code attached a debt due to his judgment-debtor. The debt was not paid into Court:

* Referred Case 11 of 1868.

SÍRIAH v. MÚCKANÁCHÁRY.

Held, that the Court cannot, under s. 268, of the Code of Civil Procedure, call on a person subject to a prohibitory order to pay or show cause why he should not pay his debt into Court. The Court is bound to satisfy itself that a debt is due, the debt must then be sold and delivery made under ss. 284 and 301 of the Code of Civil Procedure.

THIS was a case referred for the orders of the High Court under s. 617 of the Code of Civil Procedure by W. E. T. Clarke, Subordinate Judge, Nílgiris.

The facts were stated as follows:—

"In the execution proceedings connected with original suit No. 79 of 1885 on the file of the High Court of Judicature at Madras, the decree in which was referred to this Court for execution, the judgment-creditor under s. 268, cl. (*a*) of the Code of Civil Procedure attached certain debts said to be due by various persons to his judgment-debtor; this Court issued notice to the several alleged debtors, calling on them to show cause (if any) why their debts should not be paid into Court. In answer to such notices, the alleged debtors appeared before this Court; some of them admitted their debts to be due, others said they had owed debts but had paid their amounts, and one said it depended on a settlement of accounts between the judgment-debtor and himself whether he owed anything to the said judgment-debtor or not."

Sundaram Sastryar for plaintiffs.

Mr. Rámasámi Ráju for defendants.

The Court (Kernan and Brandt, JJ.) delivered the following

JUDGMENT:—The first question referred for our decision is—"Whether a Court is not justified under s. 268 in issuing a notice to a garnishee, as he is styled by the Subordinate Judge, to show cause why he should not pay his debt into Court, seeing that it has power to make further orders under that section?"

The Court has not power under s. 268 of the Code of Civil Procedure to call upon a person warned by the Court not to make payment to his creditor to show cause why he should not pay his debts into Court: under the section above quoted it is optional with the debtor to pay the amount of his debt into Court. But under s. 287 (*e*) the Court executing the decree has power to summon any person whom it thinks necessary, in order to ascertain, among other things, the nature and value of the property; and we concur with the Bombay High Court—*Harilál Amthabhai*

SÍRIAH v. MÚCKANÁCHÁRY.

v. *Abhesang Meru* (1)—in considering that if there is notice or reasonable cause to suppose that there is no debt due, the Court not only can, but ought to satisfy itself on the point.

The second question is: "Whether if as the result of an inquiry held under s. 287 a Court finds either that a garnishee admits a debt or that it is proved to be due by him to the judgment-debtor, a Court is imperatively bound to put such debt up for sale, or whether it may order the same to be paid into Court by the garnishee instead of proceeding to sell it?"

If the Court is satisfied that there is a subsisting debt, the debt must be sold (s. 284); and delivery is to be made under s. 301. Under s. 268 the debtor may pay the amount of his debt into Court, but the code does not empower the Court to compel the debtor to pay the money into Court, while it does expressly provide for the mode in which sale and delivery of the debt attached is to be made. A power to compel the debtor to pay the amount of his debt into Court cannot be imported by reason of greater convenience of the course suggested by the Subordinate Judge, nor from the fact that such a course is not expressly forbidden by the code.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. November 16. 1887. January 26.

CHEKKONEKUTTI AND ANOTHER (PLAINTIFFS), APPELLANTS,

and

AHMED AND OTHERS (DEFENDANTS), RESPONDENTS.*

Mapillas—Muhammadan Law—Gift to take effect at an indefinite future time.

Gifts to take effect at an indefinite future time are void under Muhammadan law.

THIS was a suit for a declaration of the plaintiffs' title to certain property under a deed of gift. By that deed Ahmed Haji, a Mapilla, conveyed the land in question to his wife, Mama, for life, and after her death to his daughter, Pathuma, and children born to her. Pathuma had no issue at the date of the deed, but subsequently had two children, the plaintiffs in this suit. She

(1) I.L.R., 4 Bom., 323.

* Second Appeal 454 of 1886.

CHEKKONE KUTTI v. AHMED.

predeceased her mother, on whose death the defendants took possession of the property as her heirs.

The suit was dismissed by K. Kunjan Menon, Subordinate Judge of North Malabar, and his decree was affirmed on appeal by W. P. Austin, District Judge of North Malabar.

Plaintiffs appealed.

Mr. *Shephard* and *Sankara Menon* for appellants.

Mr. *Wedderburn* and *Anantan Náyar* for respondents.

The facts and arguments appear sufficiently for the purposes of this report from the judgment of the Court (Collins, C.J., and Parker, J.).

JUDGMENT.—The property which forms the subject of the present suit was given by one Ahmed Haji to his wife Mama by Exhibit A. The deed, after setting forth the particulars of the property, goes on: "I have agreed that the said properties should be perpetually enjoyed by you, as long as you are alive, and after your death by Pathuma who is born to me in you, and children born to her."

At the date of the deed, Pathuma had no children, and she died before her mother Mama, but left two children (the plaintiffs) surviving her. The plaintiffs now claim the property under the deed A, on the death of Mama.

The parties are Mapillas of North Malabar and are governed by Muhammadan Law. The sole question argued in the appeal is, whether the gift to an unborn person is valid. It is admitted that the question does not arise in the present suit as it is framed, whether Pathuma took a vested interest and whether plaintiffs could claim as heirs to Pathuma.

The District Múnsif held that the gift was void under Muhammadan Law by reason of its indefiniteness; and the District Judge that it was void as regards Pathuma, because it was never rendered complete by seisin on her part, and was void *ab initio* in the case of her unborn children, since no one could make seisin for such a class.

Cases have been quoted at the bar to show that such a gift over to unborn children would be invalid according to Hindu Law, but no ruling under Muhammadan Law has been cited. Such a gift would not contravene the provisions of s. 12 of the Transfer of Property Act. But s. 129 of that Act directs that nothing in that Chapter, viz., VII, relating to gifts, shall be deemed to affect

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any rule of Muhammadan Law. We have therefore to consider whether such a gift is prohibited by the special law by which the parties are governed.

Referring to the principles of Muhammadan Law collected in the standard work of Mr. Macnaghten, we find prohibitions against a gift being made to depend on a contingency, or being referred to take effect at a future definite period (Rule 3, page 50), also in the case of a gift made to two or more donees, the interest of each must be defined, either at the time of making the gift or on delivery (Rule 7). In the present case, the gift to Pathuma and to any children that might be born to her was contingent upon their surviving Mama; and assuming such a gift to be valid subject to Mama's previous life interest, there is the condition that the interest of each donee must be defined at any rate on delivery.

Had the deed declared that on the death of Mama the property should be divided in certain definite shares between Pathuma and such of the children born to her as might be living at that date, the gift then would be defined; but as the words stand, they would include as sharers any children that might be born to Pathuma after the death of Mama. At the date of the gift, the interest of Mama alone was defined, but that of Pathuma was incapable of definition, since it would depend on the number of children that might be born to her. Even granting that the seisin required by Muhammadan Law could be postponed by Pathuma and her children till the death of Mama, no one could make seisin for an indefinite number of future children.

It may be urged that the result of English decisions in dealing with a gift to a class is to ascertain first, at what period the class is to be ascertained, and that the gift takes effect in favor of such of the class as are then capable of taking, after-born members of the class being simply excluded; but in India, in cases arising under Hindu Law, the course of decisions has been to establish that a gift whether vested or contingent which includes or might include persons unborn at the date of the gift is wholly void, that no one can take under a gift who is not in existence and thus capable of taking at the date from which the gift speaks: *Ram Lal Sett* v. *Kanai Lal Sett.*(1) The view however which the learned Judge took in that case implied some doubt as to whether the

(1) I.L.R., 12 Cal., 663.

previous decisions had not been carried too far; and the gift was allowed to stand with respect to persons alive and capable of taking at the date of the gift, but was set aside with regard to persons unborn at the date of the gift.

The principles of Muhammadan Law which prohibit indefinite gifts and gifts *in futuro* appear to us equally to exclude the validity of such gifts to take effect at an indefinite future time. The rules referred to would seem to indicate that Muhammadan Law tends to correspond more closely with Hindu than with English Law in its principles. We dismiss this Second Appeal but without costs, as in the Court below, the point being a novel one, and by no means free from difficulty.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

LAKSHMAYYA (PLAINTIFF), APPELLANT,

and

JAGANNATHAM AND OTHERS (DEFENDANTS), RESPONDENTS.*

1887. February 18. March 9.

Limitation Act—Act XV of 1877, *Sch. II, Art.* 85—*Mutual current accounts—Reciprocal demands.*

A employed B as his agent. B alone kept written debit and credit accounts. A sued B for a balance due on the account between them:

Held, that the debit and credit account showed reciprocal demands between plaintiff and defendants, and that the account was a mutual open and current account within the meaning of Limitation Act, 1877, Schedule II, Art. 85.

THIS was an appeal against the decree of H. LeFanu, District Judge of Kistna, in appeal suit No. 199 of 1884, modifying the decree of Subba Rao, District Múnsif of Masulipatam, in original suit No. 631 of 1883.

Defendant No. 1 (the other defendants being undivided members of his family) worked certain harbour boats belonging

* S.A. 472 of 1886.

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to the plaintiff on commission, and was authorized to pay money on the plaintiff's account for the expenses of working the boats, &c. Debit and credit accounts were rendered to the plaintiff on 31st December 1879, which showed a balance in the defendants' favour of Rs. 17-1-3. This item was brought into account rendered on 30th March 1880 and formed part of a balance in the defendants' favour of Rs. 45-3-6, which was again brought into accounts rendered on the 7th July 1880, showing a balance in defendants' favour of Rs. 179-11-4. The defendants left off working the plaintiff's boats in April 1880. On the 14th March 1881, defendant No. 1 sent signed copies of the accounts of 30th March 1880 and 7th July 1880 (Exhibit A) to the plaintiff together with a letter demanding payment of the balance (Exhibit B).

The plaintiff sued to recover a balance alleged to be due to him on the boat accounts. The plaint was filed on the 6th July 1883, and (as amended) stated that the cause of action arose on the 14th March 1881, the date of Exhibit B which was relied on as an acknowledgment within the meaning of s. 19 of the Limitation Act.

The lower Courts held that the plaintiff's claim was barred by limitation.

The arguments employed in this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Kernan and Brandt, JJ).

Rámá Ráu for appellant.

Anandacharlu for respondent No. 1.

JUDGMENT.—The plaintiff, under a kararnamah, dated the 10th of January 1879, entrusted the defendant with the working of his boats, and authorised the defendant to receive the moneys payable by people using the boats, and to pay on his account money for expenses incurred in and for the working of the boats. The defendant was entitled to receive commission for his work. The defendant worked the plaintiff's boats from about the 10th January 1879 to April 1880. The defendant kept the accounts of receipts and payments in respect of the boats and in respect of moneys paid to the plaintiff, and of moneys paid at his request to other parties and in respect of moneys due on other accounts settled between the plaintiff and the defendant and for commission due to the defendant. An account was furnished to the plaintiff by the

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defendant up to 31st December 1879, which showed a balance of Rs. 17-1-3 due by the plaintiff to the defendant. That item is brought into another account furnished by the defendant to the plaintiff up to the end of March 1880; and the latter account showed a balance due by the defendant to the plaintiff of Rs. 45-3-6, which sum is the first item in the last account furnished by the defendant to the plaintiff down to and including a debit to the plaintiff on the 7th July 1880. This last account after crediting the plaintiff with all receipts by the defendant therein specified, and debiting the plaintiff with various payments as above mentioned, and with a charge for Rs. 200 for discontinuing the defendant in the business, showed an alleged balance of Rs. 179-11-4 due to the defendant.

The plaint was filed on the 6th July 1883. The cause of action was originally stated in the plaint to have arisen on the 7th July 1880, but the plaint was amended stating that the cause of action arose on the 14th of March 1881, the date of Exhibit B. The defendant pleaded that plaintiff's claim was barred by limitation. At the trial it appeared that the plaintiff, in April 1880, ceased to allow the defendant to work the boats, and that in Exhibit B, a letter of the defendant to the plaintiff, dated 14th March 1881, the defendant says he sent in April 1880, when the plaintiff took the boats, an account to the end of March 1880 and an account to the 7th of July 1880, and that he sent two duplicate accounts signed by the defendant, and he says, "with regard to them you owe us Rs. 179-11-4." The defendant then calls on the plaintiff to pay that sum and interest within one week, and threatens that otherwise the defendant will sue the plaintiff in a Civil Court. The duplicate accounts referred to in that letter are mutual open current accounts within s. 85 of the Limitation Act of 1877, and the Courts below were in error in holding the plaintiff's suit barred by limitation.

The accounts are not accounts containing only one side of the account, but they contain items of debit and credit to both parties on mutual credit, and the account between them was open and current. The case of *Catling* v. *Skoulding*(1) is probably the first reported case in which the case of mutual accounts, not being merchant's accounts was discussed. In that case another case of

(1) 6 Term. Reports, 189.

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Cotes v. *Harris* was referred to in which the account was all on one side; and Lord Kenyon says, in such case "the last item within the limitation in the account would not draw after it those of longer standing, but it was not doubted that if there had been mutual demands the plaintiff might have recovered." Other cases on the subject of mutual accounts are collected in the notes to *Webber* v. *Tivill*.(1)

There were here reciprocal demands between the plaintiff and the defendant apparent on the accounts, viz., the money received by the defendant for the earnings of the boat formed to that extent the plaintiff's demand, and the payment by the defendant at the plaintiff's request to other parties and the payment to the plaintiff and payments for the expenses of working the boats and the commission due to him to that extent formed the defendant's demand against the plaintiff. In order that an account shall be deemed to be a mutual account, it is not necessary that parties shall have each kept accounts in writing. It is enough if the dealing amounted to mutual debits and credits on both sides, and if the account is kept in writing, it is enough if one of the parties keeps it so. In *Khushalo* v. *Behari Lal*,(2) art. 85, schedule II of the Limitation Act, was held to apply to an account of debits and credits kept by a banker. In *Nárrandás Hemráj* v. *Vissandas Hemráj*(3) it was held that when the course of business has been of such a nature as to give rise to reciprocal demands between the parties art. 85 would apply: *Watson* v. *Aga Mehedee Sherasee*.(4)

It is not necessary to consider the question raised, whether the defendant's letter of the 14th of March 1881 was an acknowledgment within s. 19 of the Limitation Act, or whether it could be received in evidence without being stamped.

The suit must for the above reasons be remanded for retrial on the merits. Costs of the appeal to be provided for in the revised decree.

(1) 2 Saunders, 127. (2) I.L.R., 3 All., 523.
(3) I.L.R., 6 Bom., 134. (4) L.R., 1 I.A., 346.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

APPA RÁU (PLAINTIFF), APPELLANT,

and

SURYANÁRÁYANA (DEFENDANT), RESPONDENT.*

1887. January 26.

Contract Act, s. 74—Penalty—Enhanced rate of interest and compound interest.

A mortgagor agreed that if any instalment of interest accruing due on the mortgage was not paid, he should pay compound interest and discharge the principal in one year, and further that if the principal was not so discharged he should pay interest at an enhanced rate:

Held that the mortgagee could enforce the agreement.

THIS was a suit brought by a mortgagee to recover a balance of interest due on a mortgage bond in which the mortgagor agreed as follows:—

"Should I so fail to pay the amount of interest, I shall pay the interest at 2 per cent. per month, as stated above, on the amount of the interest also from the expiry of the instalment. I shall pay the principal, the amount of interest due, and the amount of interest thereon, within one year in Vizagapatam. Should I fail to clear a year hence the whole amount due to you, I shall pay you the whole of the amount due, together with interest on it from that date at the rate of 3 per cent. per month."

Default was made in payment of an instalment of interest, and the principal was not discharged within the following year.

The District Múnsif of Vizagapatam held that the agreement set out above was penal in character and not enforceable by the mortgagee, and that he was only entitled to interest at the original rate of 2 per cent. per month and decreed accordingly.

On appeal the District Judge of Vizagapatam confirmed the decree of the District Múnsif.

The plaintiff appealed.

Mr. *K. Brown* for appellant cited (*inter alia*) Contract Act, s. 74—*Adanki Rámachandra Row* v. *Indukúri Appalaráju Gáru* (2 M.H.C.R., 451); *Mackintosh* v. *Crow* (I.L.R., 9 Cal., 689);

* Second Appeal 333 of 1886.

APPA RÁU v. SURYANÁRÁYANA.

Behary Loll Doss v. *Tej Narain* (I.L.R., 10 Cal., 764); *Sungut Lal* v. *Baijnath Roy* (I.L.R., 13 Cal., 164).

The Advocate-General (Honorable *P. O'Sullivan*) for respondent referred to Madras Regulation XXXIV of 1802 and cited *Dip Narain Rai* v. *Dipan Rai* (I.L.R., 8 All., 185).

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT:—It has frequently been held that an agreement to add interest to principal and so to pay compound interest is not a penalty. The only question is whether an agreement to pay an increased rate of interest as well as compound interest amounts to a penalty.

The old laws as to usury referred to by the learned Advocate-General have now been repealed, and the only case of authority relied upon is *Dip Narain Rai* v. *Dipan Rai*.(1) It was therein held that if a lender stipulated for both kinds of damages, viz., compound interest and also interest at an increased rate, the two stipulations together could not be regarded as a fair agreement with reference to the loss sustained by the lender but would amount to a penalty. The learned Judges did not, however, refer to any authorities in support of the proposition thus laid down.

With all deference, we cannot assent to so general a rule, and are of opinion that the question must largely depend upon the circumstances of each particular case. It might easily happen that for special reasons a sum of money might be at first lent on unusually favorable terms and that, if unpaid at the time stipulated, compound together with increased interest, would not amount to more than a fair indemnity against loss.

We think the true principal of decision is that a Court should not interfere to protect persons who, with their eyes open, choose knowingly to enter into even somewhat extortionate bargains, but that it is only when a person has entered into such a bargain in ignorance of the unfair nature of the transaction, advantage having been taken of youth, ignorance or credulity, that a Court of Equity is justified in interfering, *Mackintosh* v. *Wingrove*.(2) No such plea was raised in the case now before us.

The appeal is allowed, and, in modification of the decrees in the Courts below, we award the plaintiff the sum sued for together with his costs throughout.

(1) I.L.R., 8 All., 185. (2) I.L.R., 4 Cal., 137.

PRIVY COUNCIL.*

THAYAMMÁL AND ANOTHER (DEFENDANTS)

and

VENKATARÁMÁ (PLAINTIFF).

P. C. 1887. Feb. 12.

[*On appeal from the High Court at Madras.*]

Adoption—Widow adopting to her deceased husband, with consent of sapindas—Effect of estate having already vested in the widow of a son.

A son's widow having obtained her widow's estate in the property inherited by her deceased husband from his father, the widow of that father cannot adopt a son to the latter, whether she acts under authority from her husband or as widow with the assent of sapindas.

That the power of the father's widow to adopt a son to him is brought to an end upon the vesting of the estate in the son's widow was decided in *Musumat Bhoobum Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (1) and *Padmakumari Debi* v. *The Court of Wards*.(2)

APPEAL from a decree (21st March 1884) of the High Court affirming a decree (18th January 1882) of the District Judge of Trichinopoly.

In the suit, out of which this appeal arose, a son, adopted by the widow of a son of one of two brothers deceased, claimed a declaration that an adoption by the widow of the other brother, sapindas assenting, was invalid; and he had obtained a decree to that effect on the ground that, before the adoption now disputed, the estate had already vested in the widow of a son.

Of two brothers, Dorasámi, deceased in 1858, and Subha Aiyan, also deceased, the former left a son, Kuttisámi, who died in 1866, and a widow, Thayammál, the first defendant in this suit. The latter brother left a son named Rangasámi, who died in 1861. Kuttisámi, son of Dorasámi, left a widow, Thangammál.

The plaintiff, claiming as adopted son of Rangasámi, alleged that an adoption purporting to be made in 1877 by Thayammál, widow of Dorasámi, whereby she attempted to adopt Chitambara

* *Present*: Lord WATSON, Lord FITZGERALD, Lord HOBHOUSE, Sir BARNES PEACOCK, and Sir R. COUCH.

(1) 10 M.I.A., 279. (2) 1 L.R., 8 Cal., 302; L.R., 8 I.A., 229.

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Aiyan, the second defendant, was invalid by law. One of the reasons alleged for the invalidity of the adoption was the existence of Thangammál, the widow of Kuttisámi, who had (it was alleged as another reason) adopted a son to her deceased husband, thereby, although this son had since died, preventing any further adoption in the line of succession to Dorasámi. Another objection was that Chitambara Aiyan was too old for the adoption to be valid; also that his upanayana had already been performed before 1877. On this last ground the Court of First Instance decreed the claim, deciding, also in favour of the plaintiff, a question of fact raised by the defence, viz., whether the plaintiff had himself been adopted, as he alleged, to Rangasámi.

A Divisional Bench of the High Court (Sir C. Turner, C.J., and Muthusámi Aiyar, J.) dismissed an appeal from that decree. They affirmed the finding of the plaintiff's adoption, pointing out that it was supported by what appeared in *Ramasámi Aiyan* v. *Venkataramaiyah*,(1) a suit in which the present plaintiff was also plaintiff as heir of Rangasámi in virtue of this same adoption, suing to set aside some dispositions of property made by the widow.

As to the other part of the case, the High Court put the decision on a different ground from the first Court. The Judges held the adoption to be invalid for the reason that an adoption cannot be made by a widow after the estate has vested in the widow of the son. They referred to *Padmakumari Debi* v. *The Court of Wards*.(2) The judgment is reported in *Thayammál* v. *Venkatarámá*.(3)

On this appeal, Mr. *J. D. Mayne* and Mr. *H. H. Shephard* appeared for the appellants.

The respondent did not appear.

For the appellant it was argued that the High Court had misunderstood the application of the judgment in *Padmakumari Debi* v. *The Court of Wards*,(2) the decision in that case not having been, as it had been held to be, entirely applicable to the facts now presented; nor had it been kept in view that the adoption of the second appellant, having been intended to operate for the benefit

(1) I.L.R., 2 Mad., 91. (2) I.L.R., 8 Cal., 302; L.R., 8 I.A., 229. (3) I.L.R., 7 Mad., 401.

of the widow's deceased husband, accorded with principle. It was clear that if an infant son, left by the husband, had died, the widow, with the assent of the sapindas, could have adopted a son to him—See *Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya*.(1)

It did not appear why this power should be taken away by reason of the son having grown up, married, and then died, leaving a widow; although it must be admitted that this widow, having inherited, would not be liable to be deprived of her widow's estate. Notwithstanding, however, that the adoption would be so far inoperative, as regards the latter purpose, it did not follow that it would be invalid altogether; and it was consistent with law that the adopted son should take on the death of the widow, and not before.

As to the prior adoption of Krishnásámi since deceased by Thangammál, in order to make that adoption a valid ground of objection to the adoption now in dispute, it must be shown to have taken place before the latter adoption which occurred in May 1877; and due authority for it must be shown, or else, that the appellants were estopped from disputing it.

[*Sir Barnes Peacock* inquired whether, in regard to the ground of the High Court's decision, the appellant's counsel would dispute that, when once the estate had vested in the son's widow, the rights of the heirs, coming in after the widow, could not be altered. He also asked whether it was not clear that an adoption must be valid at the time when it was made, if it was to be valid at all.]

It was submitted that there might be a suspension of the rights following upon the adoption. The power and duty of adopting was continued, as for three generations male offspring, or its admitted substitute was required. It was true that an adoption must be either valid or invalid at the time when it took place; but it did not follow that this adoption was invalid for that reason, as it might be that the right of the adopted son to take possession did not accrue till after the death of the widow—an argument which none of the decisions appeared altogether to negative.

(1) I.L.R., 1 Mad., 174; L.R., 4 I.A., 1.

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Reference was made to—

Digest of the Hindú Law, by West and Bühler, Vol. II, Book II, Section III, 3rd Ed., p. 995.

Mayne's Hindú Law and Usage, paras. 163, 178.

Tagore Law Lectures, 1882.

Judgment of Jackson, J., in *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee*.(1)

Mussumat Bhoobum Moyee Debia v. *Ram Kishore Acharj Chowdhry*.(2)

The Collector of Madura v. *Muttu Ramalinga Sethupati* (*Ramnad Case*).(3)

Sri Raghunadha v. *Sri Brozo Kishoro*.(4)

Vellanki Venkata Krishna Row v. *Venkata Rama Lakshmi Narsayya*.(5)

Ram Soonder Singh v. *Surbanee Dossee*.(6)

On a subsequent day, 26th February, their Lordships' judgment was delivered by

Sir BARNES PEACOCK.—This is an appeal from a judgment of the High Court at Madras in a suit instituted by the respondent to have it declared that an alleged adoption of the second defendant by the first defendant was invalid. It appears that Dorasámi, who was entitled to certain property, died many years ago, leaving Thayammál, the first defendant, his widow, and also an only son, Kuttisámi, his heir-at-law, surviving him.

Kuttisámi, the son, married Thangammál, and subsequently died without issue, leaving Thangammál, his widow, who, upon the death of her husband, succeeded as heir to the property.

It is alleged that, after the death of Kuttisámi, the son, and during the life of Thangammál, his widow, Thayammál, with permission of sapindas, adopted the second defendant as a son of her deceased husband. Several objections have been taken to that adoption, and, among others, that the son's widow having lawfully adopted a son to him, the father's widow had no power to adopt. The adoption by the son's widow was disputed, but it was objected on behalf of the respondent that it was immaterial whether she had adopted or not, for that, even in the absence of such adoption,

(1) I.L.R., 5 Cal., 615.
(2) 10 M.I.A., 279.
(3) 2 M.H.C.R., 206; 12 M.I.A., 397.
(4) L.R., 3 I.A., 154.
(5) I.L.R., 1 Mad., 174; L.R., 4 I.A., 1.
(6) 22 W.R., 121.

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the survival of the son's widow and the vesting of the estate in her put an end to the right of Thayammál, his mother, to adopt a son to his father.

Their Lordships are of opinion that the objection is fatal to the adoption of the second defendant. It is therefore unnecessary to express an opinion as to other objections to that adoption, or to consider whether there was or was not a valid adoption by the son's widow.

Their Lordships are of opinion that the High Court was correct in considering that the case is governed by the decision of this Committee in the case of *Padmakumari Debi* v. *The Court of Wards* (1) which was founded upon the case of *Mussumat Bhoobum Moyee Debia* v. *Ram Kishore Acharj Chowdhry*.

It was contended by the learned counsel for the appellant that all that was decided by the Judicial Committee in *Bhoobum Moyee's case* was that the son adopted by the mother could not recover the estate from the widow of the son. This appears to have been the view taken by the Lower Courts in *Padmakumari's case*. But this Committee, upon appeal, held that the case went much further. Nothing can be clearer or more explicit than the language used by the Committee in that case. They said: "The substitution of a new heir for the widow was, no doubt, the question to be decided, and such substitution might have been disallowed, the adoption being held valid for all other purposes, which is the view which the Lower Courts have taken of the judgment; but their Lordships do not think that that was intended. They consider the decision to be that, upon the vesting of the estate in the widow of Bhowani (*i.e.*, the son), the power of adoption was at an end and incapable of execution, and if the question had come before them without any previous decision upon it, they would have been of that opinion." Their Lordships entirely concur in that view, and they are of opinion that the adoption, with the permission of sapindas in the present case, could have no greater effect as regards the right to property than the adoption under the deed of permission in the cases to which reference has been made.

For the above reasons they will humbly advise Her Majesty that the judgment of the High Court ought to be affirmed. The

(1) I.L.R., 8 Cal., 302; L.R., 8 I.A., 229.

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respondent not having appeared, there will be no costs of the appeal.

Appeal dismissed.

Solicitors for appellants: Messrs. *Burton, Yeates, Hart* and *Burton*.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1887. January 21. March 4.

REFERENCE UNDER S. 39 OF ACT V OF 1882.*

Madras Forest Act,—Act V of 1882, *ss.* 14, 39—*Indian Limitation Act,—Act XV of* 1877, *ss.* 5, 6—*Period of limitation—Power to excuse delay.*

Delay in preferring an appeal under the Madras Forest Act beyond the period prescribed by s. 14 of that Act, may be excused under s. 5 of the Indian Limitation Act, 1877.

THIS case was referred by the Collector of Salem, under Madras Act V of 1882—the Madras Forest Act, s. 39.

The question referred and the circumstances under which it arose appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Parker, J).

Counsel were not instructed.

JUDGMENT.—The appeal as to which this reference is made is preferred under s. 14 of the Madras Forest Act V of 1882, which prescribes the term of 60 days as the period within which the appeal must be preferred.

The appeal was preferred two days out of time.

The question referred by the Collector is whether he has power to excuse the delay under paragraph 2, s. 5 of the Limitation Act of 1877, regard being had to the provisions of s. 6 of the same Act that, when a period of limitation is specially prescribed by any special or local law, nothing in that Act (*i.e.*, the general Limitation Act) shall affect or alter the period so prescribed.

The Collector has recorded his opinion that the general provisions of the Limitation Act cannot apply to a case in which the period of limitation is fixed by a special or local law, and the decision in *Thir Sing* v. *Venkatarámier*(1) would at first sight

* Referred Case 2 of 1886. (1) I.L.R., 3 Mad., 92.

REFERENCE UNDER FOREST ACT V OF 1882.

appear to support that view. But it must be noted that the decision in that case was governed by the Limitation Act of 1871, s. 6, of which differs in its wording from the corresponding section (also s. 6) of the present Act.

In the Act of 1871, the concluding words of s. 6 were "nothing herein contained *shall affect such law*," but in the present Act the words are "nothing herein contained *shall affect or alter the period so prescribed*."

It was held in *Behari Loll Mookerjee* v. *Mungolanath Mookerjee*(1) and *Golap Chand Nowluckha* v. *Krishto Chunder Dass Biswas*(2) that the object of the alteration was to give persons suing the benefit of the rules contained in the present Act for computing the period within which the suit must be brought, and in *Nijabutoolla* v. *Wazir Ali*,(3) the Judges went further and held that the provisions of s. 5 were generally applicable to all suits and appeals notwithstanding anything contained in s. 6.

We think that the Collector is at liberty to excuse the delay under the second paragraph of s. 5. To do so does not alter the period prescribed by any special law, but is merely the exercise of a discretion which is not expressly prohibited and which is generally applicable.

APPELLATE CIVIL.

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

1887. Feb. 11, 28.

MUTTIRULANDI AND OTHERS (DEFENDANTS), APPELLANTS,

and

KOTTAYAN (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 57—Plaint presented in a wrong Court.

In all cases where no option as to the selection of the Court is allowed by law to the plaintiff, a plaint presented in a wrong Court must be returned for presentation in the proper Court.

APPEAL from the decree of A. J. Mangalam Pillai, Subordinate Judge of Madura (West), affirming the decree of P. S. Guru-

(1) I.L.R., 5 Cal., 110. (2) I.L.R., 5 Cal., 314.
(3) I.L.R., 8 Cal., 910. * Second Appeal 743 of 1886.

MUTTI-RULANDI v. KOTTAYAN.

múrthi Ayyar, District Múnsif of Tirumangalam, in suit No. 673 of 1884.

This suit was brought to recover a certain mányam, situated within the limits of a zamindárí village. Both the lower Courts decreed for the plaintiff.

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

1. Regulation VI of 1831 precludes Courts of Civil Judicature from taking cognizance of suits for this nature.
2. The Subordinate Judge is wrong in holding that Regulation VI of 1831 does not apply to a zamindárí village, but only to áyan villages.

Bháshyam Ayyangár for appellant.

Subramanya Ayyar for respondents.

The arguments employed in this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Muttusámi Ayyar and Parker, JJ.)

JUDGMENT.—It is admitted in second appeal that the Courts below had no jurisdiction, and that the suit should have been brought under Regulation VI of 1831. The only point argued was whether the plaint having been presented in a Court of Civil Jurisdiction can be returned under s. 57 of the Code of Civil Procedure for presentation in a Revenue Court.

We are of opinion that the wording of the section is imperative, and that in all cases where, as here, no option as to the selection of the Court is allowed by law, the plaint must be returned for presentation in the proper Court; *Prabhákarbhat* v. *Vishwámbhár Pandit*(1) and *Bhadeshwar Chowdhry* v. *Gaurikant Nath*.(2)

The decrees of the lower Courts must be reversed and the plaint returned to the plaintiff. The plaintiff must bear defendants' costs throughout.

(1) I.L.R., 8 Bom., 313. (2) I.L.R., 8 Cal., 834.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

PACHAMUTHU (DEFENDANT No. 5), APPELLANT,

and

CHINNAPPAN (PLAINTIFF), RESPONDENT.*

1887. Feb. 22, March 9.

Indian Limitation Act—Act XV of 1877, Sch. II, arts. 91, 120—Suit for declaration of title—Incidental relief—Setting aside instrument.

The period of limitation for suits to declare title is six years from the date when the right accrued, under Indian Limitation Act, 1877, Sch. II, art. 120; and this period is not affected by art. 91, though the effect of the declaration is to set aside an instrument as against the plaintiff.

APPEAL from the decree of S. Gópaláchárу, Acting Subordinate Judge of Madura (East), in appeal suit No. 239 of 1885, reversing the decree of T. Venkata Rámayya, District Múnsif of Paramagudi, in original suit No. 523 of 1884.

This was a suit for a declaration that the plaintiff was owner of certain land.

In October 1880 the plaintiff brought an action against the defendants, Nos. 1–4, and in November 1880, the plaint land was attached before judgment. In the interval, defendant No. 1, the father of defendants Nos. 2–4, mortgaged the plaint land to defendant No. 5 under Exhibit J. The same land was subsequently sold in execution of a decree obtained by another creditor against defendant No. 1, and in December 1882, the plaintiff became the purchaser and entered into possession under a certificate dated 26th June 1883. The plaintiff now sued for a declaration as above, alleging that the mortage to defendant No. 5 was fraudulent and without consideration.

Defendants Nos. 1–4 did not appear.

The District Múnsif dismissed the suit on the ground that it was barred under Indian Limitation Act, 1877, Sch. II, art. 91.

The Subordinate Judge reversed his decree and granted the declaration prayed for.

Defendant No. 5 appealed.

* Second Appeal 287 of 1886.

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Subramanya Ayyar and *Rangachâryâr* for appellant argued that art. 91 was applicable since the plaintiff in fact sought to have the appellant's mortgage (Exhibit J) set aside.

Mr. K. Brown for respondent relied on *(inter alia)*, *Uma Shankar* v. *Kalka Prasad* (I.L.R. 6, All., 75) and *Ikram Singh* v. *Intizam Ali* (I.L.R. 6, All., 260) and referred to *Raj Bahadoor Singh* v. *Achumbit Lal* (L.R. 6, I.A., 110).

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Kernan and Parker, JJ.)

JUDGMENT.—The appellant's principal ground of appeal is that the respondent's cause of action was, at the time of filing of this suit, the 18th of March 1884, barred by limitation.

The plaintiff prays for a declaration "that the 5th defendant has no right whatever to the plaint lands valued at Rs. 300, and that the plaintiff is the owner thereof by right of auction purchase." The appellant contends that art. 91 of the Limitation Act applies. The plaintiff contends that art. 120 applies, but that if art. 91 applied still the suit is not barred.

The facts necessary to refer to and found by the Subordinate Judge are as follows :—

The plaintiff filed a suit No. 632 of 1880 on the 8th of October 1880 against defendant No. 1, and his sons defendants Nos. 2, 3, and 4, on two hypothecation bonds for Rs. 1,040 to recover the amount due, and on the 19th October 1880 served the defendants with notice for an attachment before judgment, and on the 21st November 1880 attached the plaint lands. In the meantime defendant No. 1 executed a mortgage to the defendant No. 5 with possession for 20 years for Rs. 1,000, dated 16th October 1880, which was duly registered (Exhibit J). Suit No. 147 of 1881 was brought against defendant No. 1. by another creditor of his, and judgment having been obtained, the plaint lands were attached in that suit, and the plaintiff became the purchaser thereof on the 6th December 1882 and got a certificate dated 26th June 1883 (Exhibit E). The plaintiff obtained possession from the Court under s. 318 of the Code of Civil Procedure in August 1883 and has since been in possession. After the execution by defendant No. 1 of the mortgage to defendant No. 5 (Exhibit J), the plaintiff's son on behalf of the plaintiff and with his knowledge

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presented a petition to the Registration officer not to register that mortgage, alleging that it was executed with fraudulent intent as suit No. 632 of 1880 was pending.

The Subordinate Judge differing from the Múnsif has found that the 5th defendant's mortgage (Exhibit J) was not executed for valuable consideration and was executed to defeat and delay execution by his creditors.

It is true, as argued by the plaintiff's Vakil, that fraud must be proved not presumed. But the evidence in this case being believed by the Subordinate Judge, we cannot say that, on the facts, he was wrong in holding that fraud was proved. It has not been made ground of appeal that, if the fraud was correctly found, still the action would not lie, nor was this question raised in the Lower Courts.

It is not clear when the facts that entitled the plaintiff to sue became known to him, within the meaning of Indian Limitation Act, Sch. II, art. 91, and if we were of opinion that the case came within that section we should direct further inquiry. But we think that art. 91 does not apply as the plaintiff does not and did not seek to cancel or set aside the mortgage of the 16th of October 1880. No doubt a declaration that defendant No. 5 has no title to the plaint land would be to that extent equivalent to setting aside that mortgage. But such declaration would still leave the deed to operate as between the parties thereto, and therefore would not amount to cancelling or setting aside that deed. Moreover the plaintiff has no title or interest to set aside the deed as between the parties thereto. Assuming that the plaintiff had a right to file a suit for the declaration prayed, is that right barred under any other provision of the Limitation Act? The only article, which it appears to us, affects plaintiff's right is art. 120 which prescribes the period of six years from the date when the right accrued. The plaintiff purchased in December 1882, and he relies on his right as a purchaser to have the declaration. No doubt the plaintiff had information before his purchase, and probably in November 1880, that the deed to the defendant No. 5 was executed without consideration and was fraudulent, and he purchased the interest of the defendant at auction, but we do not think these matters should be now considered as the plaintiff's right to maintain this suit, subject to the questions of limitation, is not

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made a ground of appeal, and as the deed of mortgage to the defendant No. 5 is found to be fraudulent.

This second appeal is dismissed with costs.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1887. Feb. 18, March 22.

QUEEN-EMPRESS

against

BAODUR BHAI AND OTHERS.*

Madras District Municipalities Act—Act IV of 1884, *ss.* 191, 192, 193, 198—*Butchers' licenses—Private market, meaning of.*

A Municipal Council, under the Madras District Municipalities Act, refused to give licenses to certain persons keeping butchers' shops not used as slaughter-houses, except on the condition that they should remove to a fixed market:

Held, that butchers' shops are not "private markets" within the meaning of the Act, and that the action of the Municipal Council was *ultra vires*.

THIS was a petition under ss. 435 and 439 of the Code of Criminal Procedure praying the High Court to revise an order of the District Magistrate of Bellary dismissing the complaint in case No. 43 of 1886 on the file.

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

The accused were not represented.

The facts and arguments sufficiently appear for the purpose of this report from the Judgment of the Court (Collins C.J., and Parker, J).

JUDGMENT.—The Prosecuting Inspector to the Municipal Council of Bellary laid a complaint before the District Magistrate against four persons for failing to take out licenses for their shops, under s. 191, cl. 2 of the District Municipalities Act. The accused are keepers of butchers' shops in Cowle Bazaar, and have never hitherto been called on to take out licenses for their shops. They are willing to take out licenses, but the Municipal Councillors require them to remove their shops to the municipal market in

* Criminal Revision Case 456 of 1886.

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order that the District Surgeon and his assistant may be able to see daily whether they are selling good meat, such supervision being difficult if butchers' shops are scattered all over the town.

The District Magistrate held that the action of the council in declining to give licenses to existing shopkeepers, except on the condition that they should remove to a fixed market, was *ultra vires*, and dismissed the complaint. This criminal revision petition is presented by the Public Prosecutor.

The first point for determination is whether the defendants are bound to take out licenses for their shops. By s. 198, cl. 1, it is provided that the owner of every *private market* for the sale or exposure for sale of animals or articles of food shall obtain from the Municipal Council a license to keep open such market, and by cl. 2, the Municipal Council is empowered to refuse such license, if, in their opinion, the market is by position, construction, or arrangement unfit for the purpose of a market and calculated to be a nuisance to the neighbourhood.

Are then these butchers' shops, private markets, for the sale of articles of food within the meaning of the Act?

The term "market" is defined in s. 3, cl. 25 of the Act as "any place ordinarily used for the sale of meat, &c., which is, at the passing of this Act, a licensed market, or which may hereafter be declared by the Municipal Council to be a market."

These shops were not licensed markets at the passing of the Act, nor have they since been declared by the Municipal Council to be markets.

It is contended, however, that in s. 191, cl. 2, it is enacted that *no place in any Municipality* shall be used as a slaughter-house or for the slaughtering of any animal intended for food *or for selling or storing the flesh thereof*, unless a license for such use thereof has been previously obtained from the Chairman.

This section, however, is one of those relating to "slaughter-houses," and the intention of the legislature in ss. 191–193 was clearly to provide for the maintenance of public or licensed slaughter-houses in places under Municipal control, in which slaughter-houses animals intended for food might be slaughtered, or the flesh thereof sold or stored for sale. It is necessary that cls. 2 and 3 of s. 191 should be read together, and a reasonable construction put upon them. Clause 2 is wide enough in its terms to be construed into a prohibition against killing a chicken intended

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for food in any house within the Municipality, but that such cannot have been the intention of the legislature may be inferred from cl. 3, which expressly prohibits the slaughter of any cattle, sheep, goats, or pigs within the Municipality except in a public or licensed slaughter-house.

Having regard to the subject matter of legislation (slaughter-houses), the preceding clause and the context, we think that the expression "the flesh thereof" in cl. 2 can only be taken to mean the flesh of the animal intended for food and slaughtered in the same place, otherwise there was no necessity for cl. 3 which prohibits the slaughtering of cattle, sheep, or pigs otherwise than in a public or licensed slaughter-house.

If the butchers used the premises on which their shops are situated as slaughter-houses, their action would be punishable under s. 192. This, however, is not alleged in the complaint. If they merely sold in their shops a supply of meat obtained elsewhere, which is all that is apparently alleged, they have committed no offence.

The view we have taken appears to be similar to that taken by the High Court of Bombay in *Rája Paba Khoji, in re* (1), and *Queen-Empress* v. *Magan Harjivan* (2).

On these grounds, the order dismissing the complaint was right, and we must dismiss this petition.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

MILLARD AND ANOTHER, *in re*.*

1887. March 22. April 1.

Penal Code, ss. 103 *and* 494—*Native Christian—Marriage by relapsed convert.*

A was baptised in infancy into the Roman Catholic Church, but subsequently relapsed, with the rest of her family, into Hindúism and was married to a Hindú. Her Hindú husband since discarded her, and alleged that he would not have married her if he had known that she had been baptised. A was subsequently re-admitted into the Roman Catholic Church and married by B, a priest, to a Roman Catholic during the lifetime of her Hindú husband

(1) I.L.R., 9 Bom., 272. (2) I.L.R., 11 Bom., 106.

* Criminal Revision Case No. 55 of 1887.

Held, that A's marriage with the Hindú was subsisting and valid at the time of her Christian marriage; that she was guilty of the offence of bigamy; and that B was guilty of abetting that offence. *Lopes* v. *Lopes* (I.L.R., 12 Cal., 706) discussed.

PETITION under ss. 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of J. Hope, the Sessions Judge of South Arcot in calendar case No. 2 of 1887, convicting the first and second accused, respectively, of the offences of marrying during the lifetime of a husband, and of abetting that offence under ss. 494 and 109 of the Indian Penal Code.

The facts of this case, which were not in dispute, were stated by the Sessions Judge as follows:—

"During the famine that prevailed ten years ago the first accused Irisi, then a little girl, was taken by her parents away from their village Polakunam in the Tiruvannamalai taluk to Alladi in the Tindivanam taluk. There they, along with other people, were baptized by the Roman Catholic priest of the place. Almost immediately after, they returned to their own village and Irisi's father died. This was about 1877. In 1885 Irisi was married to the first witness Subban in accordance with the custom of the pariah caste (to which the parties belong) and with religious rites which were non-Christian. She cohabited with her husband for about a month, during which she conformed to his religion. The immediate cause of their separation does not appear. Possibly it was Subban's discovery that she had once been baptized. At any rate he now alleges he was deceived and would not have married her had he known the fact. And when the Roman Catholic priest, Mr. Millard, who is the second accused in Court, tried subsequently to effect a reconciliation between them, Subban refused to take her back on the ground of her being a Christian, and even consented to pay Rs. 20 to meet the expenses of her second marriage.

"In September 1886, Irisi was married by the Reverend Mr. Millard under her Christian name of Therèse to a Christian named Zachary. If her marriage to Subban was a valid marriage she must be found guilty of bigamy and the priest must be found guilty of abetting her in the commission of the offence."

Grant and *Laing* for petitioners cited (*inter alia*) ex parte

In re MELLARD.

Karaka Náchiár,(1) *Gopal Singh* v. *Dhungasee*,(2) *The Government of Bombay* v. *Ganga*,(3) and *Weir's Criminal Rulings*, Ed. II, page 216.

The *Government Pleader* (Mr. *Powell*) in support of the conviction cited also *Regina* v. *Sambhu Rágho*.(4)

The arguments further adduced on this petition appear sufficiently, for the purpose of this report, from the judgment of the Court (Collins, C.J., and Parker, J.).

JUDGMENT.—The first accused Irisi has been convicted under s. 494 of the Penal Code for marrying again during the lifetime of her husband Subban, and the second accused, a Roman Catholic priest, has been convicted for abetting her in the commission of that offence.

The facts found are that in 1877 Irisi, when a little girl, was, with her parents, baptized into the Roman Catholic Church, but that, after her father's death, the family relapsed into Hindúism; that Irisi was married in 1885, in accordance with the custom of the pariah caste, to one Subban; that, after some cohabitation, Subban made the fact of her former baptism a reason for discarding her; that she has since been re-admitted to the Roman Catholic Church by the second accused and was married by him to one Zachary, a Roman Catholic Christian, in 1886.

The Sessions Judge held that the marriage between Irisi and Subban, not having been dissolved under the Native Converts' Marriage Dissolution Act XXI of 1866, was a valid subsisting marriage at the date of Irisi going through the form of a Christian marriage with Zachary, hence that both the accused were liable to conviction, but he imposed a merely nominal punishment, on the ground that they had acted under a mistaken view of the law.

The grounds on which we are asked to set aside this conviction on revision are—

(1) That the pariah marriage between Irisi and Subban was legally void.

(2) That even if valid, it was dissoluble by the Canon law of the Roman Catholic Church, and that it should be presumed it was legally dissolved.

(1) 3 M.H.C.R., 254. (2) 3 W.R., 206.
(3) I.L.R., 4 Bom., 330. (4) I.L.R., 1 Bom., 347.

In re MELLARD.

On the first ground it is contended that Irisi never reverted to Hindúism at all, and hence that her marriage with Subban was void under the Indian Christian Marriage Act (Act XV of 1872), s. 4. But there was ample evidence on which the Judge was entitled to find that the family had relapsed into Hindúism after their return to their own village, and we must, therefore, hold that the marriage of Irisi and Subban was a valid marriage.

The second question is, whether that marriage had been legally dissolved at the date of the alleged Christian marriage. Mr. Laing contends that it is dissoluble by Canon law, and that, though there is no evidence on record that it was so dissolved, there is a legal presumption—the marriage having been performed—that all the necessary preliminaries were properly observed.

We are clearly of opinion that in this case there is no such presumption. The rule we are asked to apply to the facts before us is, that when once a marriage in fact has been proved, there arises a presumption, in the absence of evidence to the contrary, that there has also been a marriage in law. There can be no such presumption as to a form of marriage gone through, when a former valid subsisting marriage has been proved. In such case, the *onus* is entirely upon the defence to show that the earlier subsisting marriage has been validly dissolved.

We are then asked to admit evidence to prove (1) that the marriage between Subban and Irisi could be dissolved by Canon law, and (2) that it was in fact so dissolved; and we are referred to the case of *Lopez* v. *Lopez*(1) in support of the contention that a dispensation, according to the rule of the Church of Rome, can give validity to a marriage between persons within prohibited degrees when such parties are not governed by English statute law, but by the customary law of the class to which they belong.

The rule there laid down can have no application to such a case as the present, where one of the contracting parties, viz., Subban, has never been governed by the customary law of the Roman Catholic Church. It would be irrelevant, therefore, to take evidence upon this subject, since no rules of Canon law could operate to deprive Subban of his wife.

It is then urged that the Native Converts Marriage Dissolution Act (Act XXI of 1866) does not apply to Roman Catholics and, in

(1) I.L.R., 12 Cal., 706

In re MILLARD.

fact, that Roman Catholics have always been exempted from the operation of the Marriage Acts passed by the Governor-General in Council. In support of this contention we are referred to s. 34 of that Act and the Indian Christian Marriage Act (Act XV of 1872), s. 65.

The object of Act XXI of 1866 was to legalize, under certain circumstances and with a certain procedure, the dissolution of marriages of native converts to Christianity who were deserted or repudiated on religious grounds by their wives or husbands, and s. 34 of the Act declared that nothing in that Act should be taken to declare invalid any marriage of a native convert to Roman Catholicism if celebrated in accordance with the rules, rites, ceremonies and customs of the Roman Catholic Church. The section does not exempt Roman Catholic converts from the procedure laid down by the Act, but merely declares that nothing in that Act shall render a Roman Catholic marriage invalid. This would certainly not render it lawful for a Roman Catholic priest to marry a woman to another man, her own husband being still living.

All that is enacted by s. 65, Act XV of 1872, is a prohibition against the solemnization of a marriage between Roman Catholic Christians under Part VI of that Act, *i.e.*, by a certificate granted by a person licensed under the Act. The effect of the change of the law was merely that Roman Catholics could only have their marriages solemnized by their own clergy according to the rites of their church, nothing being said about prohibited degrees—see *Lopez* v. *Lopez* (1)—but it certainly will not authorize a Roman Catholic clergyman to solemnize a marriage between a man and a woman who, by the law of the land, is still the wife of another man.

We entertain no doubt that the conviction was right and must, therefore, dismiss this petition.

(1) I.L.R., 12 Cal., 706.

APPELLATE CIVIL.

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

SUBRAMANYAN AND OTHERS (DEFENDANTS), APPELLANTS,

and

GOPALA AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1886. October 18. 1887. April 14.

Malabar law—Karnavan—decree against,—Female not incapable of managing the affairs of a tarwad—Res judicata.

The senior female member of a Malabar tarwad, who managed its affairs, instituted a suit on behalf of the tarwad and in the capacity of karnavan:

Held, (1) that a female is not precluded from managing the affairs of her tarwad when there is no male member in her family capable of performing the duties of a karnavan; and

(2) that the junior members of the tarwad were, in the absence of fraud shown, constructively parties to the suit, and were accordingly bound by the decree passed in it.

APPEAL against the decree of V. P. deRozario, Subordinate Judge of South Malabar, in appeal No. 149 of 1885, affirming the decree of N. Sarvóthama Ráu, District Múnsif of Palghat, in original suit No. 1038 of 1883.

This was a suit brought by the plaintiffs, who together with their mother, defendant No. 9 constitute a Malabar tarwad, to redeem a certain piece of land. The land in question was alleged to have been demised in 1838 by the then karnavan of the plaintiff's tarwad on kanam to one Annamalai, who assigned his interest to a devasom belonging to defendants Nos. 1 to 4 but under the management of defendant No. 5. Defendants Nos. 1 to 4, and defendants Nos. 6 and 7 who were tenants of the land in question, did not appear. Defendant No. 8 claimed the jenm right in the land. Defendant No. 9 had brought original suit No. 210 of 1881, against defendant No. 8, to redeem the alleged demise of 1838 made by her tarwad; but it was dismissed, it being found that the jenm right was in defendant No. 8 and not in the tarwad of defendant No. 9. Defendant No. 8 and

* Second Appeal No. 940 of 1885.

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defendant No. 5 (who claimed through him) accordingly now pleaded that the matter was *res judicata*. The plaintiffs in reply alleged that defendant No. 9, being a female, was not legally competent to represent or sue on behalf of the tarwad, and that they were not affected by the decree in the former suit. Both the lower Courts decreed for the plaintiffs. Defendants Nos. 5 and 8 appealed, defendant No. 9 being joined as respondent No. 4.

This second appeal coming on for hearing on the 18th October 1886, the Court made an order directing the Subordinate Judge to try the following issues, viz.—

(1) Whether the respondents' tarwad was sufficiently represented in the former suit by respondent No. 4.

(2) Whether the decree in that suit against respondent No. 4 was passed against her as representing the tarwad and is binding as against the other respondents.

The Subordinate Judge returned the following finding, and decided both issues in the affirmative :—

"Fourth respondent (ninth defendant) Emuri Amma is the senior lady in her tarwad. First plaintiff is her grandson and second and third plaintiffs are her daughters. At the date of the former suit (No. 210 of 1881) brought by ninth defendant, first plaintiff, the only male member in the family, was a minor. Ninth defendant, therefore, was quite competent to sue on behalf of the tarwad. The proceedings show that she sued not on her own behalf but on account of the tarwad. The land was described in the plaint as tarwad land, and she sued to recover as the representative of her deceased karnavan. The final decree in favour of fifth and eighth defendants passed in that suit is therefore binding on the plaintiffs. It is not pretended that the decree was obtained by fraud or collusion. The record shows clearly that the former suit was prosecuted by ninth defendant with due diligence on behalf of her tarwad. Exhibits S and T and X and Y now produced by plaintiffs show that ninth defendant joined her late karnavan in demising tarwad lands and in suing for their recovery. These exhibits tend to show that ninth defendant took part in the management in the lifetime of her karnavan and was not unqualified to manage on the death of the karnavan. Exhibit VIII shows that, after the death of her karnavan, she solely demised tarwad property. In Exhibits V and W, two simple bonds executed by ninth defendant in 1051 and 1053, plaintiffs also appear as

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executants; but they were admittedly minors at the time, and it cannot be contended that they joined in the bonds, because they were joint managers with ninth defendant and not because the obligees required their junction.

"I find both the issues in favour of the appellants."

Bháshyam Ayyangár for appellants.

Mr. *Wedderburn* and *Sankara Náyar* for respondents.

The arguments adduced in this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Muttusámi Ayyar and Brandt, JJ.).

JUDGMENT.—It is found by the Subordinate Judge that respondent No. 4 sufficiently represented her tarwad in the former suit, and that she instituted and conducted it in her capacity as karnavan and on behalf of her tarwad. Assuming that these findings can be accepted, there can be no doubt that appellants must succeed and the suit must fail. But it is urged that, as a female, the respondent No. 4 was not lawfully entitled to the karnavanship of her family when she had a minor son. We are unable to assent to this contention. We are aware of no usage of Malabar which precludes a female from managing the affairs of her tarwad when there is no male member in her family capable of performing the duties of a karnavan.

It is next contended, with reference to the decision in *Sri Devi* v. *Kelu Eradi*,(1) that it is open to the respondents to challenge the decision passed against their karnavan in original suit No. 210 of 1881. It must be observed that in that case, the plaintiffs in the second suit were some of the junior members of a Malabar tarwad, whilst the previous suit was instituted not by the karnavan but by a stranger claiming from the karnavan and the senior anandravan a portion of the tarwad property. Our decision therein was in accordance with the ruling of the Full Bench of this Court reported in *Ittiachan* v. *Velappan*;(2) but in the case before us, the former suit was instituted by the representative of the estate and on behalf of the tarwad: and, unless fraud is shown, we must take it that respondents Nos. 1 to 3 were constructively parties to that suit.

We reverse the decrees of the Courts below and direct that the suit be dismissed with costs throughout.

(1) I.L.R., 10 Mad., 79. (2) I.L.R., 8 Mad., 484.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

1887. February 22. April 19.

CHANDRAMMÁ (DEFENDANT No. 1), APPELLANT,

and

VENKATRÁJU (PLAINTIFF), RESPONDENT.*

Regulation XXIX of 1802, *s.* 7—*Office of karnam in a zamíndárí village—Succession to —Female claimant—Incapacity of next heir.*

The karnam of a zamíndárí village having died, leaving a widow his heir, the zamíndár appointed her to the office of karnam. The nearest male sapinda of the deceased karnam (from whom he was divided) sued to establish his right to the office of karnam:

Held, (1) that a woman cannot hold the office of karnam;

(2) that when the immediate heir is incapacitated, the nearest male sapinda of the deceased karnam is entitled to succeed to the office.

APPEAL from the decree of T. Rámasámí Ayyangár, Subordinate Judge at Cocanada, in appeal suit No. 38 of 1885, reversing the decree of T. R. Malhari Ráu, District Múnsif of Peddapuram, in original suit No. 128 of 1884.

The plaintiff sued for a declaration of his right to the office of karnam in a zamíndárí village and to have the appointment of defendant No. 1 set aside.

On the death of the karnam of the zamíndárí village of Kandregula, the zamíndár, defendant No. 2, appointed defendant No. 1 to succeed him. Defendant No. 1 was the widow and heir of the deceased karnam, and was a minor at the time of her appointment. The plaintiff was the nearest male sapinda of the deceased karnam, from whom, however, he had been divided: he claimed the office on the ground that defendant No. 1, being a female, was incapacitated to fill the office.

The District Múnsif dismissed the suit on the ground that the plaintiff, being divided from the late karnam, had no title to maintain it.

His decree was reversed by the Subordinate Judge, against whose decree defendant No. 1 preferred this second appeal.

* Second Appeal No. 336 of 1886.

Subba Ráu for appellant.

Bháshyam Ayyangár for respondent.

The arguments adduced in this second appeal appear sufficiently, for the purpose of this report, from the judgments of the Court (Kernan and Parker, JJ.).

KERNAN, J.—It has been found that the plaintiff was divided from the late karnam of Kandregula village, the husband of the appellant (defendant No. 1), who is the heir of her husband, after whose death she was appointed karnam by defendant No. 2. The plaintiff is karnam of another village called Kanapur and seeks, in this suit, to cancel the appointment by defendant No. 2, and to have a decree declaring him karnam, and to gain possession of mirasi lands attached to the office. The plaintiff is a sapinda of the late karnam and puts forward his claim on the ground that defendant No. 1, being a female, is incapacitated to fill the office.

Regulation XXIX of 1802, s. 7, directs that in filling vacancies in the office of karnam the heir of the preceding karnam shall be chosen by the landholders concerned, except in cases of incapacity, on proof of which the landholders shall be free to exercise their discretion in the nomination of persons to fill vacancies. The plaintiff contends that, by reason of her sex, defendant No. 1 is incapacitated to fill the office. No doubt it has been so decided in this Court (see the cases collected in *Venkata* v. *Rámá*.(1) In those cases, the plaintiff, a female, sued the zamíndár to be declared karnam as heir of the deceased karnam. The zamíndár, it was held, was entitled to resist the claim. In this case the female is not plaintiff and the zamíndár has appointed her. However, looking to the duties to be performed by karnam as specified in the regulation, many of which are for public purposes, I am not able to see that the special facts of this case justify the zamíndár in making the appointment, or relieve the appellant, defendant No. 1, from the incapacity arising from her sex.

But the question now is whether the plaintiff, respondent, had title to maintain this suit. He is not the heir of the deceased karnam, and though the heir may be incapacitated, and though the plaintiff is a sapinda of the deceased karnam, is he entitled to the office against the will of the zamíndár? Section 7 of the regulation provides that in filling vacancies in the office of karnam, the

(1) I.L.R., 8 Mad., 257.

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heirs of the preceding karnam shall be chosen by the landholder, except, in case of incapacity, the landholder shall be free to exercise his discretion in the nomination of the person to fill the vacancy.

The zamíndár has not nominated the plaintiff to the office. Therefore, he has no title to maintain this suit, unless the true construction of the regulation is that when the immediate heir is incapacitated, a sapinda of the deceased karnam, who is not his heir, is entitled to succeed to the office. There is no such provision in the regulation. This case is an illustration of the inconveniences of such construction; as here the plaintiff is divided from the family of the deceased karnam and is already a karnam in another village. I am not aware that the exact point has yet been raised and decided. But many cases appear to have been decided adopting such construction—see *Venkayya* v. *Subbarâyudu*.(1) I think, therefore, the appeal must be dismissed with costs.

PARKER, J.—The karnam of Kandregula having died, the zamíndár, defendant No. 2, appointed his widow, defendant No. 1, to the office. She was no doubt the nearest heir to the deceased, but was incapacitated, by her sex, from holding the office of karnam—*Venkataratnamma* v. *Rámánujasámi*.(2)

The plaintiff, the present claimant, is found to be the nearest male sapinda of the deceased, and the question is whether he has a right to sue, though not the nearest heir.

The tendency of the decisions has been that under Regulation XXIX of 1802, s. 7, the zamíndár is bound to appoint from among the heirs of the deceased karnam, in order that the office may remain hereditary in the family, but passing over the nearest heir in case of personal incapacity—*Venkatanárâyana* v. *Subbarâyudu* (3) and *Venkayya* v. *Subbarâyudu*.(1) If the incapacity arise from minority, and another member of the family be appointed, he cannot be displaced on the nearer heir attaining majority—*Venkatanárâyana* v. *Subbarâyudu*.

We were referred to the judgment of this Court in second appeal No. 735 of 1882 (unreported). That was a case in which a minor had been appointed karnam and sued for the emoluments of the office, and all that the Court held was that he was entitled to the emoluments until the appointment was regularly set aside.

(1) I.L.R., 9 Mad., 283. (2) I.L.R., 2 Mad., 312.
(3) I.L.R., 9 Mad., 214.

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That case has, therefore, no bearing upon the present, which is a suit to set aside an appointment.

Under the circumstances the decree passed by the Subordinate Judge was right and the second appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

RÁMACHANDRA (PLAINTIFF), APPELLANT,

and

NARÁYANASÁMI (DEFENDANT), RESPONDENT.*

1886. November 16. 1887. March 30.

Rent Recovery Act (Madras Act VIII of 1865), s. 13—who entitled to proceed under—Attachment held good as to part.

A granted two villages in perpetuity to B under a deed, reserving a certain rent to himself which was to be recovered "according to the Act" if it fell into arrear. The rent remained unpaid for two years, and A obtained an attachment for the whole arrear under the Madras Rent Recovery Act:

Held, (1) that A was entitled to proceed as landlord under the Madras Rent Recovery Act;

(2) that the attachment held good for such amount of rent as was recoverable under that Act—*Rámasámi* v. *The Collector of Madura*(1) discussed.

APPEAL against the decree of H. T. Knox, Acting District Judge of North Arcot, reversing the decree of G. W. Fawcet, Acting Sub-Collector of North Arcot.

This was a summary suit brought under Act VIII of 1865 against the manager of the Kangundi Zamíndárí under the Court of Wards to procure the release of property alleged to have been illegally distrained and to recover damages.

The plaintiff held under a deed of grant from the Kangundi Zamíndár, (exhibit A) dated 22nd October 1875, therein described as a "permanent pattá" of certain villages, reserving a rent of Rs. 350 "payable according to the kist bunds of each year," with regard to which it contained the following term:—

* Second Appeal No. 963 of 1885. (1) I.L.R., 2 Mad., 67.

RÁMACHANDRA v. NARÁYANA-SÁMI.

"If it is allowed to fall into arrears without being paid in the said manner, the same will be recovered according to the Act with interest and batta for establishment."

The rent having fallen into arrear for two faslies, the defendant distrained for the whole arrear under Act VIII of 1865. The Sub-Collector held that the plaintiff was not a tenant of the defendant within the meaning of Act VIII of 1865, and that in itself the distraint was illegal "inasmuch as it purported to be on account of arrears due for more than a year," and passed a decree for the release of the property and for damages. The District Judge reversed this decree, and, with reference to an objection as to stamp duty (alluded to in the judgment of the High Court), observed in paragraph 5 of his judgment:—

"The appellant did not pay the stamp duty necessary to cover a claim to recover the property released from attachment, and, as the property is in the hands of the plaintiff, and he will in any case have to proceed against him in a regular suit, does not press his claim."

The plaintiff appealed.

Rámachandra Ráu Saheb for appellant.

Ananda Chárlu for respondent.

Besides the authorities discussed in the judgment *Zinulabdin Rowten* v. *Vijien Virapatren*(1) was cited for the appellant.

The arguments further adduced in this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins C.J., and Parker, J.).

JUDGMENT.—The plaintiff holds two villages under a permanent lease and the defendant has attached certain properties under the Rent Recovery Act for arrears said to be due for faslies 1292 and 1293. The suit is to set aside the attachment and for damages for illegal distraint.

The Sub-Collector decreed for the plaintiff and awarded Rs. 35 as damages, but the District Judge reversed the decision on appeal and dismissed the suit with costs.

Three points were argued on second appeal:—

(1) That the distraint was illegal, as the defendant had no right to proceed under the Rent Recovery Act.

(1) I.L.R., 1 Mad., 49.

RÁMACHANDRA v. NARÁYANA-SÁMI.

(2) That (granting the defendant had such right) the distraint was illegal, as process must be taken within one year and defendant had distrained for kists of fasli 1292 more than one year due.

(3) That the Court had given a relief not asked for, inasmuch as the property had been returned to plaintiff.

With regard to this last point, there was no necessity for the defendant to pay stamp duty for the recovery of the property which had been restored to plaintiff's possession. The effect of this reversal of the Sub-Collector's decision was to restore the attachment, and the fifth paragraph of the District Judge's decision is based on a misapprehension.

With regard to the second objection there is no reason why the attachment should not hold good for the amount of such kists as may be recoverable under the Act.

The first ground of appeal is the most important, viz., whether defendant is entitled to proceed under the Act at all. The wording of exhibit A shows that the parties regarded the Act as applicable to them, but they would not be competent to legislate for themselves, and could not by mutual agreement give the Revenue Courts Jurisdiction.

It is admitted that under the decisions in *Appásámi* v. *Rámá Subba* (1) and *Subbaraya* v. *Srinivasa* (2) the plaintiff would be a "tenant" within the meaning of the Rent Recovery Act, but it is contended that in passing these decisions the learned Judges overlooked the decision of the Privy Council in *Rámasámi* v. *The Collector of Madura*,(3) in which it was held that the interchange of pattás and muchalkás contemplated by the Act and the remedies provided in ss. 8 and 9 would only be available between landlords and tenants engaged in actual cultivation of the lands. This decision has been followed in *Rámá* v. *Venkatáchalam*.(4)

We are not able to see that there is any irreconcilable conflict in the decisions. It may be that the defendant and plaintiff, though not landlord and cultivating tenant between whom pattás and muchalkás must be interchanged, or who must have agreed to dispense with pattás and muchalkás, are yet landlord and tenant authorized under s. 13 of the Act to have recourse to the

(1) I.L.R., 7 Mad., 262. (2) I.L.R., 7 Mad., 580.
(3) I.L.R., 2 Mad., 67. (4) I.L.R., 8 Mad., 676.

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remedies provided therein. Exhibit A shows that such agreement in writing existed, and that it was understood by the parties that they stood to each other in a relation to which the provisions of the Act would apply. This view is consistent with that taken by Morgan, C.J., in *Gopalasawmy Mudelly* v. *Mukkee Gopalier*.(1)

The decision of the District Judge appears to us to be correct, and we dismiss the second appeal with costs.

APPELLATE CRIMINAL—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. October 13. 1887. April 29.

QUEEN-EMPRESS

against

SHEIK BEARI AND OTHERS.*

Criminal Procedure Code, s. 195—Sanction to prosecute—Notice to accused.

A conviction for preferring a false complaint is not illegal only by reason of the prosecution having been sanctioned without notice previously given to the accused.

Sanctioning a prosecution for an offence is a judicial act, and the party to whose prejudice it is done must be previously heard and a judgment formed upon legal evidence. In cases in which the Magistrate dismisses the original complaint upon a report from the police, there is no legal evidence before him on which to form his judgment. In cases, however, in which the Magistrate examines the complainant and hears the evidence and acquits or discharges the accused, and then, without notice to the complainant, sanctions his prosecution for preferring a false charge, sanction cannot be said to be improperly given.

CRIMINAL Revision Cases Nos. 226 and 234 of 1886 were cases taken up by the High Court in the exercise of its powers of revision under ss. 435 and 439 of the Code of Criminal Procedure.

In criminal revision case No. 226 of 1886 the District Magistrate of South Canara had dismissed the charge of preferring a false charge in calendar case No. 12 of 1886, on the ground that the prosecution of the accused had been sanctioned by the Deputy Magistrate of South Canara on the report of the police without an opportunity of proving his case having been given to the accused.

(1) 7 M.H.C.R., 312.

* Criminal Revision Cases Nos. 226, 234 and 242 of 1886.

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In criminal revision case No. 234 of 1886 J. D. Goldingham, Sessions Judge of Bellary, had acquitted the accused charged with preferring a false charge, on the ground that the prosecution had not been legally sanctioned. The circumstances were stated as follows:—

"Prisoner is charged with preferring a false charge before the Village Magistrate of Harikbavi and before the Second-class Magistrate of Kudlighi, charging one Madhava Ráu and others with having broken open her house and stolen certain property therefrom. On the 24th September the accused preferred the charge in question before her Village Magistrate. He sent it on to the Taluk Magistrate and the Taluk Magistrate referred it to the police. On the 18th October the police sent to the Magistrate a referred charge sheet stating the case was false and asking for sanction to prosecute the complainant. After waiting until another and a different case was disposed of, in which Madhava Ráu charged complainant and her son and brother with assault, the Magistrate took a statement from the accused on the 5th November, and on 8th November recorded a proceeding under s. 195 of the Code of Criminal Procedure, giving his sanction to prosecute her for preferring a false charge under s. 211 of the Indian Penal Code."

The Sessions Judge cited and discussed in his judgment *Government* v. *Karimdad*,(1) *Empress* v. *Salik Roy*,(2) *Empress* v. *Bhawani Prasad*,(3) *Rámásámi* v. *Queen-Empress*,(4) and *Queen-Empress* v. *Ganga Ram*.(5)

Criminal revision case No. 242 of 1886 was referred for the orders of the High Court under s. 438 of the Code of Criminal Procedure by J. B. Pennington, District Magistrate of Tanjore.

The case was stated as follows:—

"One Venkatachala Tevan, of Unjaviduthi, in Patukóta taluk, charged Viran, of Kaliranviduthi, and six others on the 15th January 1885 before the station-house officer of Tiruvónam with having committed the offences of house-breaking and theft under ss. 457 and 380 of the Indian Penal Code. The station-house officer, after inquiry, referred the case, on the 3rd February 1885, to the Second-class Magistrate of Patukóta taluk as false, and

(1) I.L.R., 6 Cal., 496. (2) I.L.R., 6 Cal., 582.
(3) I.L.R., 4 All., 182. (4) I.L.R., 7 Mad., 292.
(5) I.L.R., 8 All., 66.

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prayed for sanction for prosecuting the complainant for having preferred a false charge. The Magistrate, after examining the complainant on the 21st February 1885, distrusted the truth of the complaint and dismissed it on the same date under s. 203 of the Code of Criminal Procedure without passing any orders on the request for sanction to prosecute the complainant. On the 17th February 1885, Viran, one of the accused in the case before the Taluk Magistrate, preferred a complaint before the Sub-Divisional Magistrate of Patukóta division charging Venkatachala Tevan and some others with the offences of wrongful confinement and making a false charge before the station-house officer of Tiruvónam, against Venkatachala Tevan, and some others. The Sub-Divisional Magistrate inquired into the complaint, heard the evidence of witnesses, framed a charge of wrongful confinement and of preferring a false complaint under ss. 342 and 211 of the Indian Penal Code, and proceeded to enter upon the defence. He then reverted to another appointment, and Mr. Shipley, Assistant Magistrate, who took his place, threw out the case on the 15th October 1885, on the ground that previous sanction had not been obtained under s. 195 of the Code of Criminal Procedure. I then obtained the record of the case and passed proceedings on the 14th November 1885, ordering further inquiry into the case for the reasons stated therein. These proceedings were passed, of course, before I had seen the ruling in *Queen-Empress* v. *Ganga Ram*.(1) On the 3rd December 1885 the Second-class Magistrate of Patukóta taluk refused to sanction the prosecution, on the ground that the original complainant had not been given an opportunity of establishing the charge he had preferred. On the 29th January 1886, the Assistant Magistrate reported to me that the Second-class Magistrate had refused sanction, and, referring to the ruling in *Queen-Empress* v. *Ganga Ram*, requested to be informed whether the Sub-Magistrate should apply to the District Magistrate to have the original case re-opened, or whether the defendant in the original case might be told to make the application. I thought that the case having been formally dismissed, I should not be justified in ordering a further inquiry, unless it appeared that there were some valid grounds for proceeding with the case, and called for the entire records of the case and all connected cases on the 6th February 1886. The Assistant Magistrate, perhaps

(1) I.L.R., 8 All., 38.

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before the receipt of this call for the records, dismissed the case for want of sanction on the 10th February 1886, referring to the above ruling of the Allahabad High Court; and having already (on the 2nd and 9th February 1886) made an inquiry into the original complaint and examined the complainants' witnesses (though without an order from the District Magistrate under s. 437 of the Code of the Criminal Procedure) sanctioned the prosecution of the original complainant and certain others."

The *Government Pleader* (Mr. *Shephard*) for the Crown cited (besides the cases referred to in the followinng judgments) *Gour Mohun Singh* re, (1) *Ashroff Ali* re, (2) *Chakradar Potti* re, (3) *Abul Hasan* re, (4) *Empress* v. *Bhawani Prasad*.(5)

MUTTUSÁMI AYYAR, J.—The question referred to us for decision in these cases is whether a Magistrate is at liberty to sanction prosecution for an offence mentioned in s. 195 of the Code of Criminal Procedure without previous notice to the accused. There can be no doubt that sanctioning a prosecution for an offence is a judicial act and the proceeding held in connection with it is a judicial proceeding. It is declared that any sanction given or refused under s. 195 may be revoked or granted by any authority to which the authority giving or refusing it is subordinate. An appeal is, therefore, allowed from the order of the Magistrate, and it pre-supposes the existence of judicial evidence on which an opinion can be judicially formed. Again, no act can be said to be judicial unless the party, to whose prejudice it is done, is previously heard and a judgment is formed upon legal evidence. As observed in *Gyan Chunder Roy* v. *Protap Chunder Dass*,(6) and *Giridhari Mondul*, in re,(7) the intention of the Legislature in requiring that prosecution by a private party must be sanctioned is to enable the Magistrate to see whether there is good ground for the application made to him, or whether it is made solely for the purpose of harassing the accused or preventing any further legal proceedings which he may be entitled to take, and effect cannot satisfactorily be given to that intention unless the party concerned is previously heard. It seems to me, from the very nature of the case, that an opinion must be formed as to whether sanction should be given or refused upon legal evidence and after the party concerned has had

(1) 16 W.R., 44.
(2) I.L.R., 5 Cal., 281.
(3) I.L.R., 8 Cal., 282.
(4) I.L.R., 1 All., 497.
(5) I.L.R., 4 All., 182.
(6) I.L.R., 7 Cal., 206.
(7) I.L.R., 8 Cal., 435.

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an opportunity of being heard. In cases in which the Magistrate examines the complainant and hears the evidence and either acquits or discharges the accused, there is ground for the contention that the conditions mentioned above are substantially complied with, and though no previous notice is issued after sanction is applied for, sanction cannot be said to be improperly given; even in that case, it would not be inappropriate to give notice to the opposite party to show cause why sanction should not be given as applied for, and to decide after hearing any argument which may be urged on his behalf whether sanction should be given or refused.

But in cases in which the Magistrate dismisses the original complaint upon a report from the police, there is no legal evidence before him upon which he is in a position to frame his opinion. It is irregular to substitute the opinion of the police officer who made the report for that of the Magistrate, and notice must be issued to the party concerned to show cause why his prosecution should not be sanctioned, and the Magistrate should hear evidence, if necessary, in support of the cause shown. The omission to do so would invalidate the sanction, unless the superior Court is in a position to say, with reference to the provisions of s. 537, that it has occasioned no failure of justice. It is said that no previous notice is expressly required to be given by s. 195, but it must be remembered that the proceeding held under that section is a judicial proceeding, in which it may be presumed that it was intended that the accused should have an opportunity to be heard if he has not already had that opportunity in the course of a trial or inquiry held before a Magistrate. The section seems to presuppose that sanction is given or refused with reference to the trial or inquiry held before the Magistrate resulting in the dismissal of the complaint.

THE CHIEF JUSTICE.—I concur.

PARKER, J.—I concur.

KERNAN, J.—From the Sessions Judge's judgment (in criminal revision case No. 234) it appears that the accused made a complaint of false charge, against Madhava Ráu, 1st, before the Village Magistrate—2nd, before the police—and 3rd before the Second-class Magistrate, who referred the complaint to the police for report. It is not stated that he examined the complainant before referring it. The police, on the 1st of October, reported to him that the case was false, and asked for sanction to prosecute.

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After that, and before giving order for sanction, the Magistrate heard a case (No. 102 of 1885), in which Madhava Ráu charged the accused in this case and his son with assault. On the 5th of November the Magistrate took a statement from the accused (complainant), and on the 6th of November gave order for sanction under s. 195 to prosecute accused for false charge. The accused was committed to Sessions. The Sessions Judge held that the order for sanction was void, as the order was made on the police report without further inquiry and acquitted the accused.

The case came before this Court in revision. What the details of the statement of the accused to the Magistrate made on the 5th of November were, does not appear. But I do not doubt that the Magistrate made such investigation as he thought the circumstances required to satisfy himself whether an offence of false complaint was committed, and whether sanction ought to be granted before he made the order for sanction. He did not act merely on the report of the police. If he had done so, his order made merely on the police report should be held to be illegal. I quite agree in the principle of the decision in *Government* v. *Karimdad*,(1) and *Gopal Dhanuk*, in re,(2) approved of in *Rámásámi* v. *Queen-Empress*.(3)

It appears to me that sanction granted by a Magistrate merely on the report of the police is not the sanction required by law. The law requires the Magistrate to exercise his own judgment on the facts proved before him and decide whether the case is one in which sanction should be accorded. When a Magistrate hears a case and disposes of it, having heard the statement of the person (complainant) against whom an order for sanction may afterwards be given, I would not think it necessary that in such case any notice need be given by the Magistrate to the party before making an order for sanction. This is the view which I understand the Full Bench of Calcutta held in *Krishnanund Das* v. *Hari Bera*,(4) and it is not in conflict with the other cases above referred to.

BRANDT, J.—There is, no doubt, a conflict in the decisions. In addition to the cases cited (in criminal revision case No. 234) by the Sessions Judge, in *Abbilakh Singh* v. *Khub Lall* decided by a Divisional Bench of the Calcutta High Court in 1884, it was held that sanction to prosecute, when applied for after the termination of the proceedings in which the offence is alleged to have

(1) I.L.R., 6 Cal., 496. (2) I.L.R., 7 Cal., 96.
(3) I.L.R., 7 Mad., 292. (4) I.L.R., 12 Cal., 58.

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been committed, ought not to be granted without notice. But a Full Bench of the same Court, in 1885, unanimously declined to follow that decision in reference to sanction given by a Court before which an alleged offence has been committed—*Krishnanund Das* v. *Hari Bera.*(1) In *Giridhari Mondul* re,(2) it is observed that it is not a fair course to pursue towards a prosecutor to direct him to be placed on his trial without first giving him an opportunity of having a judicial inquiry into the charge originally preferred; and that the sanction was given without the exercise of proper discretion.

The question, however, before us is not whether or not a Court would not, in most, if not in all, cases exercise a proper discretion in giving a person for whose prosecution sanction is asked an opportunity of showing cause why it should not be given, but whether a conviction or commitment is illegal by reason of this not having been done.

This question should not be determined without due consideration given to the fact that in some instances express provision is made in the Code of Criminal Procedure where notice is required (see ss. 436 (*a*) and 439).

But, subject to the limitations expressed, I am not unwilling that the question should be decided upon the principles on which the judgments of Kernan and Muttusámi Ayyar, JJ., are based. It is obvious that in some cases great injustice might be done if notice were not given; in other cases in which the Court giving this sanction has before it material on which a judicial determination may be arrived at, it is not essential that there should be further inquiry on notice given, and it appears to me that we are not precluded from deciding the point upon general principles. In accordance with those principles, the test will be whether or not the Court giving or refusing the sanction had before it legal evidence upon which to form a decision;—as I concur with the Calcutta High Court in considering there would be in cases of the nature under consideration in *Krishnanund Das* v. *Hari Bera*, and on the other hand that there cannot be said to be legal grounds for a decision as to whether sanction should be accorded or refused, where the original complaint is dismissed upon a reference to, and report made by, a police officer alone.

(1) I.L.R., 12 Cal., 58. (2) I.L.R., 8 Cal., 435.

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The Court then made the following:—

ORDER:—In criminal revision cases No. 234 of 1886, the Sessions Judge passed an order purporting to acquit the accused without trial on the ground stated in *Karimdad's case.*(1)

Assuming that the Court was debarred from taking cognizance of the offence, with which the accused was charged, by reason of no sanction having been given, or by reason of the sanction given being invalid, s. 215, Criminal Procedure Code, provides that a commitment once made under s. 213 or 214 by a competent Magistrate can be quashed only by the High Court, and only on a point of law (except in the case of an irregular commitment provided for by s. 532, which does not apply here) and the Sessions Judge should have referred the commitment for the orders of this Court on the grounds stated by him for acquitting the accused.

The facts of this case as appearing from the record are as follows:—

One Basavva was committed to the Sessions Court, Bellary, charged with having preferred a false charge against a head constable and others. The original charge in which the accused imputed to the said head constable and others that they had broken into her house and stolen certain property therefrom, is decided by the Sessions Judge as having been made 'before the Village Magistrate of Harikbavi, before the inspector of police, Kudlighi, and before the Second-class Magistrate of Kudlighi.' When and how the charge was made to the police inspector does not appear, and is immaterial; as further explained, it seems that the charge was preferred or information given to the Village Magistrate, who submitted it to the Taluk Magistrate, and the latter referred it to the police. The police submitted a referred charge sheet stating that the charge was false and suggesting that the complainant should be prosecuted: and sanction for her prosecution was given, but not before the Magistrate had disposed of a case in which the head constable was charged with assault by the complainant and her son and brother, and in which, after trial, the accused were acquitted, and after a further statement had been taken from the woman Basavva. In these circumstances the sanction given for the prosecution of Basavva was not illegal.

(1) I.L.R., 6 Cal., 496.

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The order of acquittal by the Sessions Judge must be set aside, but considering the length of time which has elapsed since that order was made, and seeing that other proceedings may in the meanwhile have been taken, we think we should not direct a retrial.

In criminal revision case No. 226 of 1886, the order of the District Magistrate refusing to sanction the prosecution is in accordance with the principles held by us to be applicable, and no interference is called for.

In criminal revision case No. 242 of 1886, the Second-class Magistrate dismissed the charge against Viran of house-breaking, but did not grant sanction to prosecute complainant. Viran complained to a Sub-Divisional Magistrate against the former complainant charging him with the offences of wrongful confinement and making a false charge, and that Magistrate framed a charge against Viran for having made a false charge, without sanction. The Magistrate was removed and a succeeding Magistrate dismissed the charge against Viran for want of sanction. The District Magistrate ordered on the 14th November 1885 full inquiry by the Assistant Magistrate, but subsequently saw reason to think he ought not to have ordered the inquiry, and for the reasons he gives he was right. In January 1886 the Assistant Magistrate reported to the District Magistrate that the Second-class Magistrate had refused sanction. While the District Magistrate was considering the matter, the Assistant Magistrate dismissed the case against Viran for having made a false charge, on the ground that no sanction had been given, but he inquired into the original case without any orders from the District Magistrate under s. 437, and having examined complainant's witnesses sanctioned the prosecution of the complainant. It is quite clear that the direction of the District Magistrate for further inquiry was, for the reasons he gives, illegal. Therefore the inquiry of the Assistant Magistrate and his order for sanction were without authority and illegal. No other sanction had been given and the sanction granted by the order of the Assistant Magistrate of the 10th of February 1886 must be set aside. We do not think we should make further order in the matter.

PRIVY COUNCIL.

P.C.
1887.
March 8, 9, and 10.

PÉTTACHI CHETTIAR AND OTHERS (PLAINTIFFS),

and

SANGILI VIRA PANDIA CHINNATAMBIAR (DEFENDANT).*

[*On appeal from the High Court at Madras.*]

Civil Procedure Code, Act VIII of 1859, *s.* 264—*Execution of decree against a member of an undivided family by sale of his personal interest in the family estate, which was an impartible zamíndárí; such interest, by reason of his death before the sale, consisting only of the rents and profits then uncollected.*

On a sale of the right, title, and interest in an impartible zamíndárí in execution of decrees against the zamíndár, the head of an undivided family, the question was whether (*a*) only his own personal interest, or (*b*) the whole title to the zamíndárí, including the interest of a son and successor, passed to the purchaser. The proclamation of sale purported to relate to (*a*) only; and between the dates of proclamation and the auction sale the zamíndár died.

On the argument that, this having given rise to an ambiguity, the Court must be understood to have sold all that it could sell, and that under the circumstances it could sell, and was bound to sell, (*b*); because, the debts, the subject of the decrees under execution, not having been incurred by the late zamíndár for any immoral purpose, the entire zamíndárí formed assets for their payment in the hands of his son:

Held, that the question of what the Court could, or should, have sold had not arisen. All that required decision was what the Court had sold. If (*a*) only was put up for sale, then that interest only could have been purchased. Two Courts having concurred in finding that (*a*) only was sold, in which also their Lordships agreed, only that interest passed to the purchaser.

APPEAL from a decree (17th January 1882) of the High Court, affirming a decree (18th March 1880) of the District Judge of Tinnevelly.

The question on this appeal related to a sale of the right, title, and interest in an impartible zamíndárí in execution of decrees against the late zamíndár, deceased at the time of the sale. The late zamíndár was the head of an undivided family, and the question was whether the interest, sold as his, and acquired by the purchaser at the sale, consisted only of his personal interest, or included the interest of his son, and successor in the zamíndárí, as forming part of the right, title, and interest sold. If only the life-

* *Present*: Lord WATSON, Lord FITZGERALD, and Sir BARNES PEACOCK.

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interest was sold, it was no more than the right to the rents and profits uncollected and due at the death of the late zamíndár, amounting to Rs. 39,000; and this was all that the Courts below held to have passed by the sale.

The suit giving rise to this appeal was brought by twelve plaintiffs, who held decrees against the late zamíndár, to obtain possession of the Sivagiri zamíndárí, consisting of twenty-three villages in the Tinnevelly district. The zamíndárí having been attached in the lifetime of the father, the sale in execution took place after his death, and after the son had obtained possession. The price paid by Subramania Moodelly, the purchaser, was Rs. 12,600. He was in the employment of one of the decree-holders, and to them he immediately transferred his purchase.

The zamíndárí of Sivagiri was an impartible zamíndárí formed out of an ancient hereditary polliem at the permanent settlement. On the death in 1819 of the zamíndár, who in 1802 had received the first sanad-i-milkíyat-i-istimrár, his daughter, Viramamlal Nachiar, succeeded him. On her death in 1835 she was succeeded by the elder of her two sons, Varaguna Rama Pandia Chinnatambiar, referred to in this report as the late zamíndár, whose transactions gave rise to this litigation. He contracted many debts; and decrees were passed against him, both for money, and upon hypothecations of parts of the zamíndárí.

In 1871 the whole estate was attached by a creditor, and a receiver was appointed. This continued till 1874, and the creditors, having issued their attachments, received rateable distribution to about 34 per cent. of their debts. In 1872, the present respondent, as son, obtained a declaratory decree that the life-estate of his father was alone affected by the incumbrances. Pending an appeal, however, by the creditors, who set up that the zamíndárí was not ancestral estate of such a character that the son took a vested interest in it, the late zamíndár died, on the 20th September 1873. The above declaration being then no longer necessary, the suit for the declaratory decree was dismissed (25th November 1873).

Application for sale of the zamíndárí had in the mean time been made (18th November 1872), the present respondent objecting; and a proclamation of sale was issued, relating only to the right, title, and interest of the late zamíndár during his life. It stated that he was then in his fifty-fifth year. Before the sale took

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place he died, as above mentioned. The present respondent, as his son and successor, then obtained an order that the zamíndárí be made over to him, stating also that he was not entitled to the rents due at the death of the late zamíndár.

On the application of two decree-holders for a sale of the property attached, the Court (19th December 1873) again ordered issue of proclamation for the sale of the right, title, and interest of the late zamíndár. It was notified that the zamíndárí of Sivagiri, the estate of the late zamíndár, would be sold, and that the sale would extend "only to the right, title, and interest of the said deceased defendant, in the estate."

On the 5th February 1874 the respondent filed a petition against the sale, stating that he was in possession, and that the estate was not answerable for his father's debts. This petition was dismissed, and the sale took place on 25th February following, the zamíndárí being said to be subject to other incumbrances, amounting to Rs. 1,40,000.

The sale-certificate (18th April 1874) was as follows: "We do hereby declare that in the public auction held before the Court on the 25th February 1874 for the amounts, &c., of the decrees in the said suits, Subramania Moodelly purchased for Rs. 12,600 the right, title, and interest of the judgment-debtor, the said defendant, deceased, in the properties hereunder mentioned." Then followed particulars of the twenty-three vanithamas making up the entire zamíndárí, and a note "The hills in the said villages also are included in the sale of the said villages."

The present respondent on the 24th April 1874 petitioned that all proceedings taken in execution of the decrees without giving notices to him, should be cancelled; but this was rejected, on the ground that the execution was not against the petitioner as the legal representative of the deceased, but against such right, title, and interest as the late zamíndár had in the estate.

The auction purchaser having applied (4th September 1874) for delivery of possession of the estate purchased by him, a warrant for delivery by proclamation was issued under s. 264 of the Code of Civil Procedure (Act VIII of 1859). He having also issued notices to the karnam and raiyats that rents should be paid to him, the respondent instituted a suit against him for an injunction to restrain him from interfering with the estate as he had

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only acquired the right to the rents due down to the death of the late zamíndár.

The appellants (having bought the purchaser's rights for Rs. 13,600) were then made defendants in the above suit. Of these four were so made, on their own petition of 13th April 1875. But the respondent, as he was in possession, was considered not to be entitled to a declaratory decree. Meanwhile some of the decree-holders, whose decrees had proceeded upon hypothecation of parts of the zamíndárí, contested orders made by the Court refusing to declare the sale subject to their liens. In the course of the litigation that took place in reference to these last matters, the High Court in *Muttayan Chetti* v. *Sangili Vira Pandia Chinnatambiar*(1) decided that the zamíndárí was not, as the creditors had attempted to make out that it was, the "self-acquired" property of the late zamíndár in consequence of its having been inherited through a maternal ancestor: a decision which on this point was supported by the Judicial Committee (which, however, would not express any opinion about the rights of a son upon birth in property so inherited), holding that the property, at all events, was liable to be attached and sold for the father's debt.(2)

The creditors now sued (3rd November 1877) for possession of the zamíndárí, and for mesne profits from November 1874, making title through the purchaser. The plaint, among other things, alleged that the late zamíndár having succeeded to the inheritance as a daughter's son, had full power to dispose of the estate. The defence was that the defendant held the zamíndárí by hereditary right as ancestral property, and that the purchaser acquired only the arrears of rent due at the death of the late zamíndár.

The District Judge dismissed the suit, being of opinion that the auction sale only conferred a right to the rent in arrear at the date of the death of the late zamíndár. On 31st January 1879 the High Court reversed that decree, remanding the suit for decision. The result was another judgment to the same effect upon issues, for the settling of which the remand had been made; and the principal of these related to the nature of the right, title, and interest acquired under the sale-certificate.

An appeal to the High Court was dismissed by a divisional bench (Turner, C.J., and Muttusámi Ayyar, J.). On the incidental

(1) I.L.R., 3 Mad., 370. (2) I.L.R., 6 Mad., 1: L.R., 9 I.A., 128.

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question, relating to the descent of the zamíndárí from Viramamlal's father, the Judges observed that until the effect of the descent of an estate from a maternal grandfather, as distinct from its descent in the male line, had been recently decided in another suit connected with the same estate, it was regarded as a controverted point whether a son's right, acquired upon birth, extended to such property; but that it was not necessary to enter upon the subject. They would dispose of the case in reference to the main question. Their judgment continued as follows:—

"The main question is, as the Judge has rightly apprehended, what was the nature of the right of the judgment-debtor of which the sale was ordered and effected. Where the language of the orders passed in execution of decree respecting the attachment and sale of property is ambiguous, it is no doubt pertinent to the determination of that issue to consider what interest the Court was competent to sell. But where the orders of the Court afford a sufficiently clear indication of the nature of the interest the Court intends to sell, it is immaterial that the Court was competent to have sold a larger interest than it has actually sold, since the purchaser would not be entitled to take advantage of the circumstance and claim a larger interest than it is apparent from the orders of the Court it was the intention of the Court to sell. If a Court directs the sale of an interest less than that of which the decree-holder is entitled to demand the sale, the remedy lies in an appeal by the decree-holder before the sale takes place.

"Assuming then for our present purpose that the Court executing the decrees was competent to order the sale of the zamíndárí so as to bind the interest of the respondent, it must be determined whether the entire estate was in fact sold or no more than the right alleged by the respondent. We allow that the appellants cannot be affected by the report made by the Judge to the High Court subsequently to the sale, and that it would be unsafe to deduce any inference from the action of those of the decree-holders who held mortgages. The inadequacy of price too is a circumstance not unimportant in determining whether the bidders were aware of the character of the rights offered for sale. It may well be, as has been suggested on the part of the appellants, that the apprehension of claims of incumbrancers would have greatly affected the prices bid, if the entire zamíndárí had been offered for sale. To ascertain what was sold, we must look to the

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proceedings which preceded and resulted in the sale, and of which intending purchasers were bound to inform themselves."

The judgment then referred to the proceedings, of which the principal are mentioned above, and continued thus:—

"These references to the death of the judgment-debtor and the restriction of the sale to the right of the deceased only point to an estate distinct from the interests of which the living zamíndár was then in possession.

"It is to be noticed that at the time the order for the second sale was obtained, no steps had been taken to make a representative of the deceased judgment-debtor a party to the proceedings in any of the suits under execution, and the earliest orders passed for this purpose, which have been put in evidence, are the orders of the 19th January unserved before the 1st February, whereby the respondent was not, as the Code requires, called on to show cause, but informed he had been admitted as representative of the judgment-debtor.

"The respondent at once took exception to the terms of the sale proclamation, which was certainly ambiguous and inappropriate if the Judge intended to sell no more than he had declared available for sale. Unfortunately, advantage was not taken of the occasion to correct the notification.

"The grounds of the objection were not disallowed, but the Judge on dismissing the application gave as his reason that the right, title, and interest of the judgment-debtor was attached, was still under attachment, and would be sold. Construing this declaration in the light of his previous orders, it is plain he considered the right, title, and interest of the judgment-debtor was the right, title, and interest which alone the Judge believed the judgment-debtor possessed, and which was defined in the first proclamation. The receiver's accounts were made up, and before the sale the purchasers had the means of knowing the amount undistributed, and approximately the amount of arrears. The respondent produced no evidence to show what took place at the sale, but one of the witnesses for the appellants, himself a decree-holder, had sworn that he heard it given out at the time of the sale that the interest of the late zamíndár alone was sold, and that he heard it stated the profit due to the late zamíndár was alone being sold. What took place subsequently to the sale has no material bearing on the main issue. The appellants, it is true, obtained an order

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for the delivery of possession of land in the possession of raiyats. It may be that this order was considered not inappropriate, seeing that there were rents outstanding due to the interest sold—the estate of the deceased judgment-debtor—and it is noticeable that the application for such an order as would be made when the judgment-debtor or his representative is himself in possession, was not persisted in. We are unable to say that the Judge was in error in finding that all that was offered for sale and bought was the arrears of rent due up to the date of the decease of the third zamíndár."

The plaintiffs appealed.

Mr. J. D. Mayne, and *Mr. H. H. Shephard*, for the appellants, argued that the decree-holders were entitled under the purchase by their assignor at the auction-sale to the whole estate, including the interest of the respondent. If when the proclamation of sale, dated 26th April 1873, was made, the Court held the erroneous opinion that the impending sale would not affect the interest of the zamíndár's successor, the intention of the creditors was to sell all that they could attach during the zamíndár's life; and it was the law that the sale of the son's interest, as well as that of the indebted father, was authorized in order to satisfy the debts of the latter. Inasmuch as the debts, the subject of the decrees under execution had not been incurred for any immoral purpose, the entire estate was, in the hands of the son of the late zamíndár, assets for their discharge. The entire estate was, in fact, attached, and in offering for sale the right, title, and interest of the late zamíndár, the Court offered what was legally available for sale; and it was bound to sell every interest which was capable of being sold, to satisfy the creditors. The amount of interest which passed by the sale could not be affected by any error on the part of the Judge as to the legal result of that sale. Moreover, the wording of the second proclamation was consistent with the sale of every interest which could be disposed of in satisfaction of the judgment-debts. The legal operation of an execution sale so conducted did not depend upon the view taken of it by the Court, which view moreover was not shared by those who really brought the zamíndárí to sale, viz., the creditors whose rights rested upon the law as declared in *Girdharee Lall* v. *Kantoo Lall.*(1)

(1) L.R., 1 I.A., 321; 14 B.L.R., 187.

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(LORD WATSON.—The questions were—What did the Court intend to sell; and what did the purchaser understand that he bought?)

If these were the only questions, they were inseparable from a prior one, viz., what estate had the Court the power to sell, and what was it bound to sell? The purchaser could not be prejudiced by any mistake on the part of the Court as to what interest it could sell, when the language of the proceedings was sufficient to comprise all that it was empowered to sell.

Reference was made to *Suraj Bunsi Koer* v. *Sheoperaad Singh*,(1) *Pitam Singh* v. *Ujagar Singh*,(2) *Muttayan Chettiar* v. *Sangili Vira Pandia Chennatambiar*.(3)

Besides the above reasons, it was suggested that the entire estate in the zamíndárí passed at the sale, because the son had not obtained an interest at his birth, on account of the zamíndárí not having descended from a line of fathers, but from a mother's father, to the late zamíndár. As to this, however, it was observed that there having been a brother of the late zamíndár, it was not only the interest of a son that might be brought in question in regard to what was sold, but also that of another member of the family.

Mr. J. Graham, Q.C., and *Mr. G. P. Johnstone*, for the respondent, were not called upon.

Their Lordships' judgment was delivered by

SIR BARNES PEACOCK.—This is an appeal from a decision of the High Court at Madras affirming the decision of the Lower Court upon the first issue in the suit. That issue was—"What is the nature of the right, title, and interest acquired under the sale-certificate issued by this Court to the purchaser?"

The first Court, after considering all the facts and the evidence in the case, came to the conclusion that all that was offered for sale, and all that was purchased under the sale, was the interest which the father of the defendant had at the time of his death.

The High Court stated the facts very fully, they considered them very maturely, and they reviewed them very carefully; and they came to the conclusion that the decision of the Judge of the first Court was correct.

(1) I.L.R., 5 Cal., 149; L.R., 6 I.A., 88. (2) I.L.R., 1 All., 651.
(3) I.L.R., 3 Mad., 371; and on appeal to P.C., I.L.R., 6 Mad., 1 L.R., 9 I.A., 128.

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There were two concurrent findings of the Courts. It may be said that they were not upon a mere question of fact, but on a question of mixed law and fact. As regards the fact, both Courts came to the conclusion that what was offered for sale, and what was intended by the purchaser to be purchased, was the right and interest which the father had at the time of his death.

There is no doubt that when the execution was issued, and the attachment made, in the time of the father, the proclamation expressly stated that all that was to be sold was the life-interest of the father. At page 220 of the Record it will be found that a petition was put in by the creditor in one of the suits, praying that that notification might be altered. He said: "I pray therefore that in conformity with the above sections of Civil Procedure Code, a fresh advertisement may be made the expunging the words 'during his lifetime.'" Those words having been put into the proclamation that nothing was to be sold except the interest which the father had in his lifetime, one of the creditors asked to have those words expunged. But the Court made this order (page 221): "The advertisement is that the right, title, and interest of the said defendant in the estate during the term of his life be sold, the judgment having distinctly declared that only such is liable for this decree debt. This prayer cannot therefore be granted." At that time, in the father's lifetime, it was expressly decided by the Judge that what was intended by the decree to be sold, and what could be sold under the decree, was only the interest of the father during his lifetime. The sale was postponed at the instance of the creditors, in consequence of the father's illness. They said: "As the estate is to be sold only for the father's interest during his lifetime, the sale will not fetch so much during his illness as it would if he were in a better state of health," and therefore they asked to have the sale postponed in consequence of the illness of the father. The sale was postponed. If it had taken place during the lifetime of the father, the purchaser would have obtained all that the father was entitled to during his life, and that only, and he would have been entitled to possession of the estate during the father's lifetime, and to receive the rents which were then in arrear.

The father died. No fresh attachment was made. The sale was to take place after the father's death upon the attachment which had been made during his lifetime. The proclamation

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stated that the property was to be sold only for the interest of the father; but after the father's death, as it appears, the Court allowed the son, notwithstanding the attachment (because it was only for the life-interest of the father) to take possession of the estate, stating that all that was to be sold was the life-interest of the father, viz., not then the right to the possession of the estate, but the right to receive the rents in arrear.

The property was put up for sale, and it is said that the proclamation was ambiguous, that it did not state that the sale was merely for the life-interest of the father, but that it was a sale of only the interest of the father. And it is contended on behalf of the appellants that by the change of the terms the purchasers necessarily thought that they purchased the whole interest in the estate. But, even if the fresh proclamation was ambiguous, the purchasers, if they had made the ordinary inquiry which they ought to have made, would have discovered that all that was intended in the first proclamation was the life-interest of the father in the property which had been attached, and that the same interest was intended to be sold under the second proclamation.

The purchaser purchased for a small sum, about Rs. 12,000, but he had not the money to pay. He paid merely a deposit. He subsequently conveyed to the creditors themselves. There can be no doubt, in their Lordships' minds, that when he purchased he was purchasing benamee for those creditors, and although they might have purchased in their own names, they did not do so, because, if they had done so, they would have purchased having themselves the knowledge of all that had previously taken place. They therefore allowed the property to be purchased in the name of a clerk of one of the execution creditors in order that it might appear that it was purchased by a man who had no notice of what had taken place previously.

It is unnecessary to go into the question whether the estate came from the paternal ancestors, or, in other words, whether it was ancestral estate or not. The learned counsel, in a very ingenious argument, endeavoured to show that a difference existed in consequence of its being an estate which came from the maternal and not from the paternal grandfather, and consequently that it was not ancestral estate. But that makes no difference in the present case. If the whole estate could have been put up for sale it was not put up. It is not a question of what the Court could have done,

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or what they ought to have done, but they did, what was put up for sale, and what was purchased. If what was put for sale was merely the estate which the father had in his lifetime, then what the purchaser purchased was only that interest.

The High Court having carefully reviewed the whole of the evidence, and the whole of the documents, came to the conclusion that the first Court was right in finding that all that was intended to be sold, and all that was sold was the life-interest of the father, and not the whole interest in the zamíndárí.

Their Lordships entirely agree with the conclusion at which the High Court has arrived, and they will therefore humbly advise Her Majesty to affirm the decree of the High Court, and the appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants—*Messrs. Burton, Yeales, Hart, and Burton.*

Solicitors for the respondent—*Messrs. Lawford, Waterhouse, and Lawford.*

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SUBBAYYA (PLAINTIFF), APPELLANT,

and

SÚRAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1886. July 27. 1887. March 22.

Hindú Law—Self-acquired immovable property—Nuncupative will—Disinherison of an undivided son.

Under 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.

A, a Hindú, took up some abandoned waste land and brought it into cultivation: *Held*, that the true test as to whether the land is his self-acquired property or not, is whether it was brought under cultivation by family or self-acquired funds, and the *onus probandi* lies upon those who alleged the latter.

APPEAL against the decree of T. Ramasámi Ayyangár, Subordinate Judge of Cocanada, in Appeal Suit No. 87 of 1884, confirm-

* Second Appeal No. 703 of 1885.

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ing the decree of A. F. Elliot, District Múnsif of Cocanada, in Original Suit No. 188 of 1883.

This was a suit for a declaration of the plaintiff's title to certain land, and, to set aside a lease, by which part of it was demised for three years to plaintiff by defendant No. 3. Defendants Nos. 1 and 2 were the sons of one Chowdry, deceased, and defendant No. 3 was his widow. The land in question was found to have been the self-acquired property of Chowdry, being waste land brought under cultivation by self-acquired funds, and the evidence showed that the day before his death he told defendant No. 1 that he should divide the land with defendant No. 3 in equal portions. The land was divided shortly afterwards, and by the lease sought to be set aside, part of it was demised by defendant No. 3 to the plaintiff for three years. Defendant No. 2, who had been disinherited, objected to the plaintiff's taking possession, but he subsequently executed a sale-deed to the plaintiff of the whole of the land, under which the plaintiff now sought to have his title declared.

This suit was dismissed in both the Lower Courts, and the plaintiff appealed.

Mr. *Norton* for appellant argued that the father of defendant No. 2 had no right to dispose of the whole of the family property, even if it were his self-acquisition, without making any provision for his son, and that a mere expression of intention on the part of Chowdry to divide the property between defendants Nos. 1 and 3 could not deprive defendant No. 2 of his rights over it.

Mr. *Michell* for respondents.

The further arguments adduced on this Second Appeal appear sufficiently for the purpose of this report from the order of the Court (Collins, C.J., and Parker, J.).

"ORDER.—The plaint land appears to have been taken up by Chowdry 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 Chowdry 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 Chowdry *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 alleged the latter. The Subordinate Judge has clearly put the issue upon the wrong side.

"We must ask the Subordinate Judge to re-try this 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 Chowdry 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 Chowdry died—if it is true—would establish a bequest to take effect after the death of the testator and not a gift, *inter vivos*."

The Subordinate Judge having found the above issues in the affirmative, the Court delivered the following

JUDGMENT:—We must accept the finding of the Lower Court that the land is the self-acquisition of Chowdry, and we have already expressed our opinion that the evidence of what took place the day before Chowdry's death would establish a bequest to take effect after the death of the testator and not a gift, *inter vivos*.

The power of a Hindú governed by the law of the Mitákshará to make a testamentary disposition is unquestioned, as also his power to make it by nuncupative will—*Vallináyagam Pillai* v. *Pachche*,(1) *Crinivásammal* v. *Vijáyammál*,(2) *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Perdab Sahee*.(3) The only contested question is as to his power to make such a testamentary disposition to the complete disinheriting of any one of his male descendants.

We can see no reason to differ from the view expressed by the late Chief Justice of this Court in *Ponnappa Pillai* v. *Pappuvayyangár*,(4) that the power of the father to deal with self-acquired immovable property at his pleasure is unfettered by legal obligation, though the exercise of the power to the extent of depriving his family of the means of support would still be considered as

(1) 1 M.H.C.R., 326.
(2) 2 M.H.C.R., 37.
(3) 12 M.I.A., 1.
(4) I.L.R., 4 Mad., p. 42.

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contravening a moral duty. These observations were concurred in by our learned colleague Muttusámi Ayyar, J.

The same rule was followed in *Baba* v. *Timma*(1) as far as self-acquired property was concerned; and the Allahabad High Court in a case precisely similar to the present, *Sital* v. *Madho*,(2) which was also a case under Mitákshará law, has taken the same view as to the validity of an exclusive gift to one son of self-acquired property. It is admitted that in Bengal a father has such powers.

It is urged that the Privy Council in *Lakshman Dada Naik* v. *Ramchandra Dada Naik*(3) have thrown out doubts upon the former Madras rulings, but that decision was anterior to the Full Bench case—*Ponnappa Pillai* v. *Pappuváyyangár*, and the doubts expressed were as regards ancestral and not self-acquired property.

We may refer also to the remarks of this Court in the *Sivagiri case*(4) on the distinction between ancestral and self-acquired property. But in Chapter 1, s. V, cl. 9, the author of the Mitákshará says: "The grandson has a right of prohibition, if his unseparated father is making a donation or sale of effects inherited from the grandfather, but he has no right of interference if the effects were *acquired* by the father. On the contrary, he must acquiesce, because he is dependant." In clause 10 he states: "Consequently the difference is this; although he have a right by birth in his father's and his grandfather's property, still he is dependant on his father in regard to the paternal estate, and since the father has a predominant interest *as it was acquired by himself*, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction (if the father be dissipating it)." According to Vignyanésvara Yogi, the author of the Mitákshará, the son's ownership in ancestral estate is not subordinate but co-ordinate, and it is dependent only when the father himself acquires the property.

That decision was subsequently varied by the Privy Council—*Muttayan Chetti* v. *Sangili Vira Pandia Chinnatambiar*(5) on the ground that the Court should have followed the rule laid down in *Girdharee Lall* v. *Kantoo Lall*,(6) and that the whole interest in the zamíndári, which defendant had taken by heritage from

(1) I.L.R., 7 Mad., 357.
(2) I.L.R., 1 All., 394.
(3) L.R., 7 I.A., 181.
(4) I.L.R., 3 Mad., 370.
(5) L.R., 9 I.A., 128.
(6) L.R., 1 I.A., 321.

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his father, was liable as assets by descent for the payment of his father's debts. That, however, does not detract from the weight of the remarks distinguishing between the son's rights in ancestral and paternal self-acquired property.

On these grounds, we are of opinion that the finding of the Subordinate Judge was correct, and we dismiss this Second Appeal with costs.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, and Mr. Justice Brandt.

QUEEN-EMPRESS

against

KOTAYYA AND ANOTHER.*

1887. February 22. March 18.

Penal Code, ss. 22, 378, 379—Theft—Movable property.

A dug up and immediately carried away, without any authority or right, several cart-loads of earth, part of unassessed lands of a village:

Held, that A was not guilty of theft.

THIS was a case referred for the orders of the High Court, under s. 438 of the Code of Criminal Procedure, by W. R. Weld, Acting District Magistrate of Kistna.

The case was stated as follows:—

"The two accused in this case have been convicted of theft punishable under s. 379 of the Indian Penal Code for taking some cart-loads of earth from a piece of poramboke land."

The accused did not appear.

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

The arguments adduced in the support of the conviction appear sufficiently for the purpose of this report from the judgment.

The Court (Collins, C.J., and Brandt, J.) being equally divided in opinion recorded the following opinions, under s. 429 of the Code of Criminal Procedure:—

COLLINS, C.J.—The defendants have been convicted of theft under s. 379, Indian Penal Code, and fined 5 rupees each.

* Criminal Revision Case No. 340 of 1886.

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The facts are as follows :—

On the outskirts of the village of Amaravaram there is some unassessed waste land. The defendants removed a portion of this land and carted away some cart-loads of the earth. Section 378 enacts—Whoever intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft. Explanation 1 to that section says, a thing so long as it is attached to the earth not being movable property is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Section 22, Indian Penal Code, defines movable property as intended to include corporeal property of every description except land and things attached to the earth or permanently fastened to anything which is attached to the earth.

The defendants were convicted not of stealing any "thing" severed from the earth, but the earth or land itself. The case of *The Queen* v. *Tamma Ghantaya*(1) is undoubtedly good law, but the point there decided is a very different one from this.

I am of opinion that the charge of theft cannot be sustained and that the conviction must be reversed and the fine returned to the defendants.

BRANDT, J.—The accused dug out and removed some cart-loads of soil from a piece of waste land belonging to Government; the accused had no right to take the soil, and it is found that they took it dishonestly, for their own private use, for gain to themselves by unlawful means, they not being entitled to the property taken.

The rule that by Common Law larceny cannot be committed of things which savour of the realty and are part of the freehold, does not apply in respect of theft as defined by the Indian Penal Code; see Explanations to s. 378; (see also 5 M.H.C.R. App. XXXVI) I also accept the exposition of the law on this subject contained in *The Queen* v. *Tamma Ghantaya*(1) that the rule as to things immovable becoming movable by severance, applies in the case of "stones quarried, minerals, iron or salt collected, as well as to timber which has grown or edifices which have been raised on the land;" and I am unable to draw any distinction between

(1) I.L.R., 4 Mad., 228.

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such material objects and gravel, soil or earth excavated and reduced into possession after severance from the land or earth in which it was embedded or to which it was before 'permanently attached.' Nor is it material, as it seems to me, that there was no interval between the severing and the taking.

"Movable property" is defined in s. 22, Indian Penal Code, as including "corporeal property of every description except land and things attached to the earth or permanently fastened to any thing attached to the earth," but under the Explanation to s. 378, the very things which so long as they are attached to the earth are not the subject of theft, become so by severance.

Soil before it is removed from the earth or land of which is a part, might be described as 'land;' but the theft is not of 'land' but of soil or earth severed from the land, and I am not prepared to hold that the conviction is bad in law. Stating the proposition conversely, I hold that, under the Code, theft may be committed in respect of soil removed from land in which before severance it was embedded or to which it was 'permanently attached.' And I would refuse to interfere in revision.

This case, with the above opinions, was laid under section 439 of the Code of Criminal Procedure before Kernan, J., who delivered the following

JUDGMENT :—The accused dug up and immediately carried away, without any authority or right, several cart-loads of earth, part of unassessed lands of a village. He was convicted under s. 378 and sentenced under s. 379, Indian Penal Code.

I think the facts do not bring the offence within s. 378, Indian Penal Code, inasmuch as the property taken was not "movable property" within ss. 22 and 378 of the Code. Section 22 of the Code states "the words 'movable property' are intended to include corporeal property of every description, *except* land and things attached to the earth or permanently fastened to any thing which is attached to the land."

Section 378 provides that dishonest taking of *movable* property is theft. Explanation 1 to s. 378 states that a thing which is *attached* to the earth not being movable property, is not the subject of theft, but is capable of being subject of theft, as soon as it is severed from the earth.

The illustration "*a*" to s. 378 gives the case of a tree growing, which A severs with dishonest intention of taking it, and

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states that as soon as he severs it, he has committed theft. It will be observed that in ss. 22 and 378, Indian Penal Code, and in the Explanation No. 1 to s. 378, certain property mentioned as being a possible subject of theft is property "*attached*" to the earth. The illustration "*a*" though not exhaustive, clearly explains that the property that may be so subject, means property different and distinguished from the earth itself. In this case, the accused severed and took (not what was attached to the earth but) what was itself part of the earth.

Section 22 and s. 378, are framed on the lines of the Common Law of England as to larceny, with some of the modifications introduced by statute.

At Common Law, larceny could only be committed in respect of "mere personal goods." But of personal goods which savoured of the realty, no larceny could be committed such as corn and grass growing on the ground, or fruit upon trees or wood growing, but if the owner cut any of them, then larceny might be committed of the thing cut.(1)

Several statutes provided that if any one stole or severed with intent to steal such things, he might be convicted of larceny.(2)

The case in 5 M.H.C.R. App. XXXVI was theft of a tree, and was clearly within s. 378.

In *The Queen* v. *Tamma Ghantaya*,(3) the point referred was, whether on the facts found, the Government were in legal possession of the salt which it was stated in the reference that the accused took.

The salt was a natural produce of the earth, being an efflorescence from it on the surface of it and was attached to the earth. The Court so treated the salt in that case and thus the taking of it was held to be as much within ss. 22 and 378 as the taking of grass growing on the ground, corn, fruit and trees attached to the earth. That case is not an authority for the proposition, that if a person quarried stone or minerals, or dug up and severed part of the earth from the rest of the earth, the material so quarried or severed became changed from being part of the earth and as such, not movable property, to the condition of being "movable property" within ss. 22 and 378, Indian Penal Code.

(1) 3 Co. Inst., 109.
(2) 3 Will. and M., c. 9; 7 and 8 Geo. 4, c. 29; 24 and 25 Vic., c. 96.
(3) I.L.R., 4 Mad., 228.

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The owner of land could alter the character of any part of the land or of things attached to the land by severance and then the things severed became personal goods. Stone and minerals quarried by the owner and trees or other produce of the earth severed from it by the owner, were always treated as personal goods; and I see no reason why clay (part of the earth) dug up by the owner and set apart for removal and use, in a loose state, should not also be considered as movable property.

But if a person severed things attached to the earth and if he *immediately* took them away, such taking was not, at Common Law, considered larceny.(1)

However, Explanation 2 to s. 378 meets this point as regards things *attached* to land, by providing that a moving effected by the same act which effects the severance, may be theft.

But the case where a thief quarries stone or minerals or digs up part of the earth is not provided for by s. 378.

In my judgment, the conviction for theft should be set aside and I order accordingly. The fine, if paid, to be refunded.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

1887. March 22. April 20.

SÍTAYYA (PLAINTIFF), APPELLANT,

and

RANGÁREDDI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Indian Limitation Act—Act XV of 1877, s. 19, sch. II, art. 85—Acknowledgment —Mutual open and current accounts.

A acted as commission agent for B and C. A furnished a debit and credit account in February 1878. The account was disputed and the matter was referred to arbitration: for which purpose in March 1880 a "Memorandum of items to be settled" was drawn up and signed by B and C, in which they denied that any balance would be found due to A, but admitted that accounts must be taken and that they would be liable if any balance were found due to A. In June 1880 B signed and supplied to the arbitrator an account on behalf of himself and C, which contained a similar admission. The arbitrator made an award which was set aside. A filed a suit against B and C in September 1882 for a balance due to him:

(1) 3 Co. Inst., 109.

* Appeal No. 111 of 1885.

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Held, that the accounts were mutual open and current accounts; that B and C had made an acknowledgment of their debt to A; and that the suit was not barred by limitation.

APPEAL against the decree of L. A. Campbell, District Judge of Kistna, in Original Suit No. 7 of 1883.

This was a suit to recover the sum due on an account stated between the plaintiff and defendants Nos. 1 and 4. Defendants Nos. 2 and 3 were merely made parties to have the accounts taken in their presence.

The plaintiff acted as commission agent for the defendants Nos. 1 and 4, and bought and sold goods on their account and occasionally received goods from them on his own account.

In February 1878, the plaintiff furnished them with an account up to 20th January 1878, showing a sum due to him. The defendants paid a certain sum on account, but said the accounts were incorrect. On the 25th September 1878, defendant No. 4 wrote a letter to the plaintiff (filed as exhibit B), in which the following passage occurred:—

"Had you come with him (meaning the plaintiff's brother) the accounts could have been looked into in our presence, and it would have been convenient to settle all disputes personally. Though R wrote to you to come in that manner, you did not do so. Therefore the following discrepancies have been found on comparing with the telegrams and your letters which are here."

It was subsequently agreed to submit the disputes to arbitration, and on 31st March 1880, defendants Nos. 1 and 4 signed a document (filed as exhibit A) headed "Memorandum of items to be settled" between them and the plaintiff, as to the contents of which see the judgment of the Court *infra* p. 262.

On the 14th June 1880, defendant No. 4 by the direction of the arbitrator made out an account (filed as exhibit RR) on behalf of himself and defendant No. 1, giving a list of shipments and prices of goods sent by and to the plaintiff, and alleging that a balance would ultimately be found due from the plaintiff. The arbitrator made an award which was subsequently set aside by the Court.

The plaint was filed on the 5th September 1882. The District Judge dismissed the suit on the ground that it was barred by limitation, holding that the accounts between the parties were not mutual accounts within the meaning of the Indian Limitation Act,

sch. II, art. 85; that the defendants never admitted indebtedness to the plaintiff; and that consequently there was no acknowledgment of the debt by the defendants.

The plaintiff appealed.

Bháshyam Ayyangár and *Désikacharyar* for appellant.

Rámá Ráu for respondents.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (Kernan and Muttusámi Ayyar, JJ.).

JUDGMENT.—The plaintiff sues to recover a balance of Rupees 22,751-15-4 alleged to be due by the defendants Nos. 1 and 4 to the plaintiff on account of mutual dealings between them. The District Judge dismissed the suit as being barred by limitation.

The facts are—

The plaintiff who lives at Masulipatam agreed in 1876 with the defendants Nos. 1 and 4 who live at Nellore to buy grain, oil-seeds, &c., and to forward the goods to the defendants, and the defendants agreed to pay the plaintiff therefor by remittances in cash or in hundies or drafts, and to pay him commission on the amount of such goods.

The plaintiff, during the year 1877, forwarded to the defendants Nos. 1 and 4 large quantities of grain and other goods, and received from time to time large remittances from the same defendants. In the month of December 1877, the defendants Nos. 1 and 4 forwarded to the plaintiff a quantity of "horns" at a price of Rupees 1,734-9-4 purchased by the defendants at the plaintiff's request to be paid for by the plaintiff. In the month of December 1877, the defendants Nos. 1 and 4 forwarded to the plaintiff 3,000 gunny bags to be sold for the account of the defendants.

In January 1878, the plaintiff sold on account of the defendants 1,508 gunny bags at, it is said, Rupees 227.

In February 1878, the plaintiff furnished to the defendants an account, up to the 26th January 1878, of the goods sent by him to the defendants, and of moneys received therefor, and of the sale of the 1,508 gunny bags, showing an alleged balance, on the accounts due to the plaintiff, of Rupees 19,915-6-10.

That account did not debit the plaintiff or credit the defendants with the residue of the 3,000 gunny bags, nor did it debit the plaintiff or credit the defendants with the price of the horns sent by the defendants to the plaintiff at his request. In 1878, plaintiff's brother

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went to Nellore in reference to the plaintiff's account so furnished, and received about Rupees 4,000 from the defendants, but the defendants objected to the account. In a letter dated the 25th September 1878 (exhibit B) to the plaintiff from defendant No. 4, the latter refers to the account sent by plaintiff and to the absence of the defendant No. 1 at Madras and to the fact that the plaintiff's brother and gumasta had not the plaintiff's vouchers, and says that the accounts could not then be settled. He says, "Had you come with him (the plaintiff's brother) the accounts could have been looked into in our presence, and it would be convenient to settle all disputes personally." He then points out many objections made by the defendants to the plaintiff's accounts, and amongst others the omission to introduce into the account to the debit of the plaintiff the price of the horns supplied.

The difference between the plaintiff and the defendants related to large sums, and it was agreed in 1880 that accounts between the parties should be, and they were, referred to Koka Alasangari Naidu as mediator. On the 31st of March 1880, the defendants Nos. 1 and 4 signed the exhibit A, which is headed "Memorandum of items to be settled between Sítayya (the plaintiff) and the defendants Nos. 1 and 4, presented to K. Alasangari Naidu (mediator) residing in Nellore, by Burla Ranga Reddi and Muttarazu Venkata Row (defendants)." This document refers to the letter of the 25th September 1878 already mentioned, and states that the plaintiff did not reply, and that the items specified in that letter should be recovered. It concludes that "according to what Sítayya (plaintiff) has mentioned in the cash account, proper vouchers have to be looked into in person. As it is not convenient to mention all those items in this memorandum, we will look into and settle the same on the day which may be appointed by you in respect of this. You should receive proper vouchers from us and Sítayya (plaintiff) in respect of the items of difference of prices mentioned above and in respect of all the items which should be allowed and is due, and settle the same."

That memorandum was delivered by the defendants Nos. 1 and 4 to the mediator; and the parties on the 11th of November 1881 proceeded to have their mutual accounts examined by the mediator. The mediator made an award which was set aside by the District Court, and afterwards by High Court.

This suit was filed on the 5th of September 1882, stating the

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substance of the matter above stated, but alleging that an account was furnished by him to the defendants down to the 25th January 1878, and another account to the 23rd of March 1881, taking up the prior account and crediting in 1879 and in 1881 certain sums received by plaintiff on the sale by him of the residue of the gunny bags and other items and showing a balance of Rupees 19,820-11-7 due to plaintiff. In the plaint, the letter of the 25th September 1878 and the memorandum of the 31st of March 1880 are stated, and the plaintiff prayed for a decree that the sum claimed, amounting to Rupees 22,751-15-4 and costs, should be paid to him. The defendants pleaded that the suit was barred by limitation; that there were no mutual accounts between plaintiff and defendants. At the trial, the plaintiff proved amongst other things the furnishing of the accounts to the defendant in February 1878 and in March 1881, and the letter of the 25th September 1878, and memorandum of the 31st of March 1880, and also an account (exhibit RR) made out on behalf of the defendants Nos. 1 and 4 by the defendant No. 4 by direction of the mediator, signed the 14th of June 1880. In this account (exhibit RR), the defendants gave a list of the shipments of grain, seed, &c., and the value and expenses and remittances, and also of the money received by plaintiff, Rupees 231, for gunnies sold in 1878, and of Rupees 1,734-9-4, the price of the horns supplied to the plaintiff by the defendants. In a note to that exhibit RR., defendant No. 4 remarks that it is not convenient to make any kind of entry in the head "balance of accounts" and disputes the correctness of the plaintiff's allegation and alleges that there will not be under any circumstances any thing found due by them, but there will be a balance found due to them by the plaintiff. To that list is added an explanation as to very many items, supporting the contention of defendants and showing a balance of Rupees 13,946-7-4 due to defendants.

The third issue framed was, "Is the plaintiff's suit barred by limitation?" On this issue, the plaintiff put forward two answers—

First, that the dealings between the plaintiff and defendants were mutual accounts under sch. II, art. 85 of the Limitation Act, 1877; and the last item admitted or proved in that account was in 1879 and 1881, and therefore the suit is not barred.

Second, that there was an acknowledgment under s. 19 of the Limitation Act, 1877, by the defendants Nos. 1 and 4 in 1880, of

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liability by them in respect of plaintiff's right to have any balance due to him paid.

The District Judge held that the accounts between the parties were not mutual accounts within art. 85. In this he is clearly wrong.(1) Plaintiff had a claim against the defendants for the value of the goods bought by him and shipped to the defendants, and pending that account, the defendants had a claim against the plaintiff for the value of horns supplied to plaintiff at his request, and for the price of gunny bags consigned by the defendants to plaintiff for sale. The account never was settled between the parties, and it was open and current, and there were reciprocal demands between the parties. But the Judge did not credit the plaintiff's allegation that the last item in the account either admitted or proved was in January 1879 or March 1881, and he held the plaintiff's suit was barred. On the evidence before the Judge, we cannot say he was wrong as to the facts. This subject will be referred to hereafter.

As to the acknowledgment. The District Judge observed that the letter of the 25th September 1878 (exhibit B) and the memorandum signed by the defendants on the 31st of March 1880 (exhibit A) pointed out that the accounts furnished by the plaintiff were incorrect and that many discrepancies existed between his telegrams and letters, and that the accounts had to be settled between the parties in person. He held that there was no acknowledgment in exhibit A or admission that anything "is due" to the plaintiff. He says that it renewed exhibit B and the defendants' objections thereon, and that from first to last the defendants "never admitted indebtedness" to the plaintiff.

But the Limitation Act of 1877 does not require as an essential of an acknowledgment an admission of money being due, or an admission of indebtedness, as was required in s. 4 of Act XIV of 1859, and in s. 20 of Act IX of 1871. Both of which Acts have been repealed. Under the Acts last mentioned, the operation of an acknowledgment to bar limitation was limited to suits to recover debts and legacies, and for redemption of mortgages, and pledges of property and to certain execution proceedings. But in the Act of 1877, s. 19, the operation of an acknowledgment extends to any "suit or application in respect of any property or right." That section provides that if, before the expiration of

(1) (Reporter's Note) see *Lakshmayya* v. *Jagannathan*, *ante* p. 199.

the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing, signed by the party against whom such property or right is claimed, a new period of limitation according to the nature of the original liability shall be computed from the time when the acknowledgment was so signed. Such acknowledgment may be made to a person other than the person entitled to the property or right—see s. 19, explanation 1. In s. 19, explanation 2, it is declared that "signed" in that section means either personally or by an agent duly authorised in that behalf.

The right claimed by the plaintiff was, and is, a right to recover from the defendants Nos. 1 and 4 a balance which he alleges to be due to him on the accounts between them. The defendants in exhibit A, though they deny that any balance is or shall be found due by them, acknowledge that the accounts must be taken, and that they are liable in respect of plaintiff's right to pay him any such balance, if any, that might be found due to him—see concluding paragraph of exhibit A, *ante* page 262, and see exhibit RR. Such acknowledgment of liability is a clear inference from the terms and provisions of exhibit A. When exhibit A was signed, there was no doubt that limitation had not applied and there was no difficulty in each side admitting liability for any balance found due.

For the purpose of an acknowledgment of right to bar limitation the fact that the defendants in the acknowledgment contended that nothing would be due to plaintiff on taking the accounts is immaterial—see *Prance* v. *Sympson*(1) and *River Steamer Company* re.(2) The acknowledgment is of the plaintiff's right to have the accounts taken and of the defendants' liability to pay any balance that might be found due to the plaintiff. What was the balance must depend upon the taking of their accounts. The acknowledgment contained in exhibit A, dated 31st March 1880, was made within time under s. 19 of the Limitation Act, 1877. The result is the decree of the District Judge must be reversed and the case remanded for trial, as the Judge disposed of the case on the preliminary issue of limitation which excluded evidence on the record.

(1) Kay p. 678. (2) L.R., 6 Ch. App., 822.

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No relief is sought by the plaintiff against the defendants Nos. 2 and 3, as they are merely made parties to have the accounts taken in their presence. No objection has been taken by them or on their behalf.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muthusámi Ayyar.

1886. October 11. November 13.

PADAKANNAYA (DEFENDANT No. 2), APPELLANT,

and

NARASIMMA AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Rent Recovery Act—Act VIII of 1865—Mulageni lease—Encumbered tenancy—Sale for arrears of rent.

A demised land to B on a mulageni lease. B mortgaged his tenancy to C. The rent under the mulageni lease fell into arrears, and A obtained a decree against B for the amount:

Held, that arrears of rent are not a first charge on the tenant's holding, and accordingly that the landlord could not execute his decree by sale of the tenancy free from the mortgage created by the tenant—*Rájágopál* v. *Subbarâya* (I.L.R., 7 Mad., 31) followed.

APPEAL against the decree of H. M. Winterbotham, District Judge of South Canara, confirming the decree of A. Venkatarámayya, District Múnsif of Mangalore, in Original Suit No. 40 of 1884.

The plaintiff was the mulagár or proprietor of certain lands of which defendant No. 1 was the tenant under a mulageni or permanent lease granted by the plaintiff's father. The lease reserved a certain annual rent which subsequently fell into arrears. The plaintiff sued defendant No. 1 to recover the arrears of rent and obtained a decree for the amount in Original Suit No. 302 of 1881 on the file of the District Múnsif of Bantval, and in execution of the decree attached the mulageni right of defendant No. 1. But, long before the suit, defendant No. 1 had mortgaged his mulageni right to the father of defendant No. 2 under exhibit II of which the material parts are set out in the first paragraph of the judgment of the Court, see *infra*. Defendant No. 2 accordingly preferred a claim as mortgagee in the attachment by the plaintiff, and his claim was allowed. The plaintiff brought this suit under s. 283 of the Code of Civil Procedure for a declaration that he was entitled to execute his decree by the sale of the mulageni right of defendant No. 1 free from the mortgage of defendant No. 2.

* Second Appeal No. 13 of 1886.

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Both the Lower Courts decreed in favor of the plaintiff, and defendant No. 2 preferred this second appeal.

Ramachandra Rau Saheb and *Srinivasa Rau* for appellant argued that the plaintiff could only sell the mulageni interest subject to the mortgage of defendant No. 2, because defendant No. 2 did not undertake to pay rent either expressly or impliedly, and was not a party to the decree sought to be executed. They further urged that the decree was only a money decree, and that neither it nor the mulageni lease made the rent a charge on the mulageni interest of the tenant; and relied, *inter alia*, on *Rájágopál* v. *Subbarâya* (I.L.R., 7 Mad., 31).

Gopala Rau for respondents.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.)

JUDGMENT.—On the 29th June 1854, the plaintiff's father granted the land in suit to the defendant No. 1 on a "Mulageni" or permanent lease. On the 22nd April 1865, defendant No. 1 mortgaged his "Mulageni" right to the father of defendant No. 2 with possession. Exhibit II, which is the instrument of mortgage, contained the following provision:—"Henceforth we shall cultivate the said mortgaged garden and land *as under you*, and pay Government assessment out of the produce of the garden, 25 muras of rice for mulageni to the muli proprietor out of the geni of the fields, and from the remaining rice, we shall pay you 23 muras, at 45 polike as fixed on, at your house at the two suggi (second crops) of Kartigai within the 30th Palguna Bahula of every year, and get receipt for the same. The time fixed for redeeming the mortgaged land is 16 years from this date, that is to say, the Mesha Sankramana (the commencement of the Mesha month) of the next Vikrama year. Should any of the loan obtained by us and part of *the interest* remain unpaid, we shall pay for the balance of rice its price during the year, with interest thereon at the fixed rate, and release the mortgage deed and the

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mulageni chit and the tahanama, the mortgage deed executed to Ballukraya and the simple bond which we have given you and the garden land, &c."

Subsequently to this mortgage, the defendant No. 1 allowed the rent due to the plaintiff (mulagar or proprietor) to fall into arrears; and in Original Suit 302 of 1881 on the file of the Múnsif at Bantwal, the latter obtained a money decree against the former for those arrears. In execution of the decree, the plaintiff attached the mulageni right of defendant No. 1, but defendant No. 2 preferred a claim with reference to his mortgage. This claim being allowed, the plaintiff brought this suit under s. 283 of the Code of Civil Procedure to obtain a declaration that he was entitled to recover the arrears of rent decreed to him by the sale of the mulageni right free of the encumbrance created thereon by the mortgagee in favor of defendant No. 2. The Courts below decided in favor of the claim. The District Múnsif observed that the mulageni right assigned to defendant No. 2 by way of mortgage vested in him subject to the pre-existing liability to pay rent; and on appeal, the District Judge agreed with him and held that the liability to pay rent was inseparably attached to the right of occupancy, and that the one could not be severed from the other by a mortgage executed by the tenant in favor of a third party.

Defendant No. 2 contends in second appeal that rent is not a first charge on land as considered by the Judge, and relies on *Zamíndár of Rámnád* v. *Rámamany Ammál*(1) and *Virappa* v. *Kathana*.(2)

He also drew our attention to *Múnisámi* v. *Dakshanamurthi*(3) and stated that it was overruled by the Full Bench decision in *Rájágopál* v. *Subbarayá*.(4)

In the *Zamindár of Rámnád* v. *Rámamani Ammál*(1) one of the questions raised for decision was, whether the rent due to the zamíndár was a charge on a maganam or division of the zamíndárí, and whether the persons who purchased it subsequent to the date on which the rent claimed accrued due were liable for its payment by reason of the purchase. It was held in 1880 by a Division Bench of this Court that poruppu (annual payment) due to the

(1) I.L.R., 2 Mad., 234. (2) I.L.R., 6 Mad., 428.
(3) I.L.R., 5 Mad., 371. (4) I.L.R., 7 Mad., 31.

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zamíndár was *rent* and not peshcush, and that as such, it was a debt due to the zamíndár and not a charge on the maganam.

In *Múnisámi* v. *Dakshanamúrthi*(1) a mittadár at Salem brought to sale the interest of a puttádár on his estate for arrears of rent under the provisions of Act VIII of 1865, and the then plaintiff became purchaser; one Kuppaiya obtained a decree against the puttádár upon a prior hypothecation for the sale of the puttádár's interest in satisfaction of his debt. The question raised for decision was whether the interest that passed to the purchaser at the sale under Act VIII of 1865 was subject to, or free of, the prior hypothecation. It was held that the rent was first charge on the land, and that the puttádár's interest, which was the subject of hypothecation, was an interest defeasible on the exercise by the mittadár of his power of sale, subject to the provisions of Act VIII of 1865.

In *Rájágopál* v. *Subbaráya*(2) the question, whether a sale by a landlord of a tenant's interest in his holding for non-payment of rent under Madras Act VIII of 1865, defeated existing incumbrances, was again raised before a Division Bench. As the prior decisions upon that question were conflicting, it was referred to a Full Bench consisting of four Judges. It was ruled that the sale was subject to the existing encumbrances. The ground of decision was that the course of legislation from 1802 and the provisions of Act VIII of 1865 were incompatible with the view that what the landlord was entitled to sell for arrears of rent was the tenure itself, and not simply such property as existed in the tenant at the time of the sale.

In *Virappa* v. *Kathana*(3) there was a competition between a prior purchaser at a Court-sale of the tenant's interest in execution of a mortgage decree and a subsequent purchaser at the sale held for arrears of rent under Act VIII of 1865. The decision was in favor of the former, and it followed the Full Bench decision.

We must take it then that arrears of rent are not a first charge on the tenant's holding.

Another contention in second appeal is, that by agreement between the mortgagor and the mortgagee, the rent payable to the mulagár or landlord was charged on the land. But exhibit II,

(1) I.L.R., 5 Mad., 371. (2) I.L.R., 7 Mad., 31.
(3) I.L.R., 6 Mad., 428.

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on which the contention is based, evidences only an undertaking on the part of the mortgagor to pay the mulageni rent due to the landlord out of each year's produce. Further, the landlord was no party to this instrument, and we cannot say that the contention is well founded. However this may be, the decree under execution is only a money decree, and in the case of a competition between the decree-holder and a mortgagee, the former is certainly not entitled to bring to sale the execution debtor's property free of existing incumbrances.

We decree the appeal and reverse the decrees of our Lower Courts. The first respondent will pay the appellant's costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

1887. April 19.

ÁLWAR AYYANGÁR AND ANOTHER (PLAINTIFFS), APPELLANTS,

and

SÉSHAMMÁL AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, ss. 98, 99, 157, 158.

A District Múnsif struck a case off the file of his Court on neither party appearing. Subsequently on an application by the plaintiffs the case was restored. The order of restoration was reversed by the District Judge.

Held, (1) that the order to strike off the case was illegal;

(2) that assuming that the case was dismissed, no appeal lay to the District Judge whose order was accordingly made without jurisdiction.

SECOND appeal against the decree of J. H. Nelson, District Judge of Chingleput, reversing the decree of N. R. Narasimhayyar, District Múnsif of Trivellore, and Civil Revision Petition, under s. 622 of the Code of Civil Procedure, praying the High Court to revise an order of J. H. Nelson, District Judge of Chingleput, dated 18th April 1885, reversing an order of N. R. Narasimhayyar, District Múnsif of Trivellore, dated 21st January 1885.

A suit filed in the Court of the District Múnsif of Trivellore was by an order, dated 13th December 1884, struck off the file on neither party appearing. On 21st January 1885 the District Múnsif on an application by the plaintiffs made an order restoring

* Second Appeal No. 770 of 1885 and Civil Revision Petition No. 245 of 1885.

the case to his file. Against the last-mentioned order the defendants appealed.

The District Judge reversed the order of 21st January 1885.

The plaintiffs appealed.

Subramanya Ayyar for the appellants argued that the proceedings, dated the 13th December 1884, having, according to the Múnsif, been passed under s. 98 of the Code of Civil Procedure, no appeal lay to the District Court against the order, dated 21st January 1885; and that if the case was one falling under s. 158 of the Code of Civil Procedure, the District Court should have upheld the order of the District Múnsif, dated the 21st January 1885, whereby the order, dated the 13th December, was set aside.

Mr. Subramanyam and *Srirangáchariyár* for respondents.

The further arguments adduced in this case appear sufficiently for the purpose of this report from the judgment of the Court (Kernan and Parker, JJ.).

JUDGMENT.—The order of the 13th day of December 1884 of the Múnsif records that neither party appeared and that he struck the case off the file. That was illegal. There is no authority in law justifying the Múnsif to make such order. He had power under ss. 98 and 157 to dismiss the suit as neither party appeared.

Assuming he did dismiss it, then it was open to the plaintiff to apply under s. 99 to restore it. The Múnsif on notice restored the case, and against that order no appeal lay.

An appeal was, however, made to the District Court, and that Court finding that there was no appeal against an order to restore, treated the order to strike off the file as decision under s. 158. Now s. 158 did not apply to this case, as the application to adjourn to the 13th was not made by the plaintiff alone, but was made on the joint application of defendants and plaintiffs. Section 158 applies where any one party had a case adjourned and on the day of adjournment he is not ready. That is not this case. Again the Múnsif did not decide the case, as he was bound to do if s. 158 applied. His order was to strike the case off the file.

In *Comalammal* v. *Rungasawmy Iyengar*(1), *Ambalavana Padeiyátchi* v. *Subramánia Padeiyátchi*(2), the plaintiff who got time did not produce his witnesses on that day.

(1) 4 M.H.C.R., 56. (2) 6 M.H.C.R., 262.

ÁLWAR v. SESHAMMÁL.

The Múnsif says he proceeded under ss. 98 and 157.

We think that the order of the District Judge was made without jurisdiction, and we accordingly reverse his decree of the 18th of April 1885 and restore the order of the Múnsif of the 21st of January 1885 with costs of the appeal in the Court below and the costs of this appeal.

This judgment disposes also of the Civil Revision Petition 245 of 1885.

APPELLATE CIVIL.

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

1886. November 22. 1887. April 5.

VENKATACHALAM (PLAINTIFF), APPELLANT,

and

MAHÁLAKSHMAMMA (DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act VIII) of 1859, *s.* 148—Res judicata. *Previous suit by next friend dismissed for default—Evidence of fraud of next friend—Limitation—Contract by a minor—Ratification by acquiescence.*

A sued in 1885 to recover certain estates from B, alleging claim under his adoption which took place in 1865. A suit to recover the same estates had been filed on behalf of A by his next friend and had been dismissed for default in 1872. In 1875 A, being still a minor, relinquished his claim to the estates for Rs. 12,000 under exhibit B; but now alleged that he thought he was relinquishing it only in favor of the defendant's predecessor in title who died in 1883, having been in possession of the estates since 1867. The plaintiff attained his majority in 1878:

Held, that the claim was *res judicata*, the plaintiff having failed to prove fraud on the part of his next friend: that whether the cause of action arose in 1865 or 1867, it was equally barred from 1879: that assuming the plaintiff was a minor of 15 years of age at the date of the deed of relinquishment, it is not likely he would not have understood its effect, or that he failed to ascertain it when he attained his majority in 1878.

Per cur.—The plea of *res judicata* ordinarily presupposes an adjudication on the merits; but s. 148 of the Code of Civil Procedure (Act VIII) of 1859 contains a statutory direction that in case the plaintiff neglects to produce evidence and to prove his claim as he is bound to do, the Court do proceed to decide the suit on such material as is actually before it, and that the decision so pronounced shall have the force of a decree on the merits, notwithstanding the default on the part of the plaintiff.

APPEAL against the decree of J. Kelsal, District Judge of Vizagapatam, in Original Suit No. 6 of 1885.

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* Appeal 146 of 1885.

VENKATACHALAM v. MAHÁLAKSHMAMMA.

This suit was filed on 20th June 1885 to get possession of certain estates in the possession of the defendant, a Hindú lady, and for a declaration of the plaintiff's title thereto.

The plaintiff set up the following case.

In 1837 the estates in question descended to two brothers, Venkata Ráu and Rámá Ráu. Venkata Ráu managed the estates until 1845, when he died leaving a son Venkatachalam. The Court of Wards then undertook the management of the estates for Rámá Ráu and Venkatachalam, and in 1863 (Rámá Ráu having died in 1851) handed them over to Venkatachalam. He died in 1865 leaving a widow Rámáyamma for whom the Court of Wards undertook the management for two years, and who remained in possession till her death in 1883 when she was succeeded by her daughter, the present defendant. The plaintiff now alleged that he had been adopted on 19th August 1865 at the age of three years by Bhanamma, widow (since deceased) of Rámá Ráu, acting under the authority of her deceased husband, and claimed accordingly.

The defendant denied the authority and the adoption, and further alleged that Rámá Ráu had never any interest in the estate. It was also pleaded that the matter was *res judicata* by reason of a suit brought by the plaintiff's father (exhibit III) as his next friend in 1872, which was dismissed; that the plaintiff was estopped from suing by a document (exhibit B) executed by him in February 1875 to Rámáyamma, by which he surrendered his claims on the estate in consideration of receiving Rs. 12,000; and that the suit was time barred as not having been filed within 12 years from the date of the alleged adoption, or within 3 years of the date when the plaintiff attained the age of 18, viz., 1878.

The plaintiff said, with regard to the plea of *res judicata*, that the suit of 1872 was dismissed for default, owing to the fraud of his next friend, and to collusion between him and the defendant; with regard to the plea of estoppel, that exhibit B was executed by him when still a minor and was obtained from him by fraud and misrepresentation, as he was induced to believe that he was relinquishing his rights only as long as Rámáyamma lived; with regard to the time-bar, that under Act IX of 1875, s. 3, he only attained his majority at the age of 21 years, and further that the cause of action arose only on the death of the defendant's mother in 1883.

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The District Judge dismissed the suit on the ground that it was precluded by the decree in the former suit and barred by limitation. With regard to the allegation of fraud against the plaintiff's next friend in his conduct of the former suit the District Judge made the following observations (referred to by the High Court) in paragraphs 25–27 of his judgment:—

"25. The first six witnesses have been examined as to the conduct of Original Suit 7 of 1872. Rama Jogi (first witness), a pleader, acted in it as the adviser of the next friend who refused to go on with the case, because an adjournment was refused, or to examine even the witnesses in attendance, because he wanted them examined at the same time as others not in attendance. About the conduct of the case in appeal he thinks 'the next friend' was 'not much interested' in it. Venkayya Garu (second witness) gives evidence to same effect.

"26. Venkat Row (third witness) is brother of plaintiff's mother. He considers the next friend mismanaged the case. 'He was not calling witnesses properly and changed his vakil from time to time. He was in communication with the defendant and told me he thought of compromising the suit as he could not stand the trouble.' Another uncle (fourth witness) considers the suit was mismanaged because the next friend did not attend Court in person and changed his vakil several times. The fifth witness is a man who was summoned in Original Suit 7 and though present was not examined. Somiajulu (sixth witness) was another witness who was not called, and he says the 'next friend' told him he had arranged a compromise and that the suit had been dismissed, but did not mention the terms of the compromise.

"27. There is absolutely no evidence of any fraud on the part of the next friend or of any collusion between him and the defendant Ramayamma."

The plaintiff appealed.

Mr. *Shephard* and *Venkata Subba Ráu* for appellant argued, *inter alia*, that even if the plaintiff was not misled as to the effect of the deed of 1875 (exhibit B), it was for the defendant to prove that he ratified his promise not to disturb the heirs of the defendant' smother: and that at any rate after the date of exhibit B, the possession of the defendant's mother was permissive and not adverse to the plaintiff.

VENKATA-CHALAM v. MAHÁLAKSH-MAMMA.

The Advocate-General (*Hon. P. O'Sullivan*) and Mr. *Spring Branson* for respondent.

The further arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (Muttusámi Ayyar and Parker, JJ).

JUDGMENT.—This is an appeal from the decree of the District Judge of Vizagapatam, who dismissed, with costs, the appellant's suit to recover from the respondent possession of the estates of Kasimkota and Melupaka. The party last in possession was one Rámáyamma, the respondent's mother, and upon her death in August 1883, the appellant commenced the present litigation. Assuming that Rámáyamma was the lawful owner, there can be no doubt that the respondent, her daughter, is entitled to succeed to her in preference to the appellant.

But the appellant's case was that his title was superior to that of Rámáyamma. K. Venkatachalam was the male ancestor under whom both parties to this appeal claim, and upon his death in 1837, without male issue, the two estates in suit devolved on the sons of his daughter named Venkata Ráu and Rámá Ráu. Of these the former died in 1845 and the latter in 1851. Venkata Ráu left a son named Venkatachalam, and Rámá Ráu left a widow named Bhanamma, and in 1851 Venkatachalam was the surviving male coparcener of the joint Hindú family which consisted previously of Venkata Ráu and Rámá Ráu. The properties in question then vested in him as sole owner, and continued in his possession until the 2nd May 1865, when he died leaving him surviving the respondent, a daughter, Rámáyamma, a widow, the lady last in possession, and Bhanamma, his uncle Rámá Ráu's widow. Under the Mitakshara law which governs the parties, the estates devolved on Venkatachalam's widow upon his death. The appellant's case was that Rámá Ráu authorized Bhanamma in 1851 to adopt a son for him, and that, in pursuance of that authority, she adopted the appellant, when he was a child of three years of age, on the 19th August 1865. It is alleged for him that the adoption divested Rámáyamma of the property which vested in her husband as sole owner during his life and in her upon his death and constituted the appellant the sole owner under the law of survivorship. On the other hand, the respondent denied that Bhanamma adopted the appellant or that Rámá Ráu authorized her to adopt, or that by such adoption the appellant acquired any right to the estates

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which she inherited from her father through her mother. The Judge, however, did not go into the merits, but disallowed the appellant's claim on the ground that it was *res judicata* and that it was barred by limitation. The only question which we have now to determine in this appeal is whether the suit was properly dismissed for the reasons mentioned by the Judge.

On the death of Venkatachalam in 1865, a disagreement arose between his widow, Rámáyamma, and uncle's widow, Bhanamma, and the Court of Wards assumed management of the estates now in litigation. Each of the ladies claimed a certificate under Act XXVII of 1860 to collect the debts due to Venkatachalam, but the widow's claim prevailed, the uncle's widow being referred to a regular suit to establish the appellant's adoption. In 1867 the Court of Wards restored the estates to Rámáyamma and placed her in possession, and Bhanamma died in June 1869. In Original Suit No. 7 of 1872, the appellant's natural father, Sítá Rámayya, alleged his adoption, and as his guardian and next friend claimed from the respondent's mother possession of the estates. That suit came on for final disposal in October 1872, but an adjournment was applied for, and on it being refused, the appellant's guardian declined to call such of his witnesses as were in attendance. Thereupon the Judge dismissed the suit under s. 148 of Act VIII of 1859, and from the decision passed under that section, the guardian preferred Appeal No. 43 of 1873. On the 16th June 1873, the High Court ordered that upon payment, within one month, of the costs incurred by the then defendant, the respondent's mother, the decree of the District Judge be reversed and the suit be remanded for retrial, otherwise that the appeal be dismissed. The appellant's guardian failed to comply with the order and the appeal was dismissed. Thus the suit, which the appellant's guardian commenced in March 1872 to establish the adoption and eject the respondent's mother, ended finally in an adverse decision on the 16th June 1873. But on the 4th February 1875, the appellant executed in favor of Rámáyamma exhibit B which premised his adoption and his claim thereunder and purported to relinquish it in her favor and that of her heirs in consideration of Rs. 12,000, which sum it was recited was agreed to be paid to him. When this document was presented for registration, the Registrar held an inquiry in regard to the appellant's age. It appears, however, from exhibit D, dated the 16th February, one

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Achuta Rámayya, the respondent's father-in-law who deposed that he was then Rámáyamma's agent or manager, wrote a letter to one Lingam Lakshmaji, a relative of the appellant, to the effect that the compromise was brought about by him and that no execution would be issued for the costs decreed in favor of the respondent's mother in Original Suit No. 7 of 1872 (exhibit D). During the inquiry before the Registrar, the appellant made a deposition on the 18th February 1875 and addressed a petition on the 25th February 1875 (exhibits I and II). These documents show what the appellant stated repeatedly that he was then 19 years of age, that he executed exhibit B with his free consent and that those who wrote anonymous petitions to the Registrar, that the appellant was a minor, ought not to be trusted. Exhibit B was then registered on the 10th March 1875, and on the 11th March the appellant granted the receipt (exhibit C) acknowledging payment in ready money on that day of Rs. 12,000, the consideration for exhibit B. Neither the appellant nor his father since instituted any proceeding or took any action with reference to his alleged adoption, until the respondent's mother died in August 1883, when the appellant commenced the present suit stating that a false representation was made to him by Lingam Lakshmaji and Sítarámayya that exhibit B would be operative only during Rámáyamma's life, that it would not preclude him from asserting his claim after her death, and that he discovered the true legal effect of the document shortly after Rámáyamma's death in 1883.

As to the plea of *res judicata*, it is urged in appeal that Original Suit No. 7 of 1872 was dismissed for default, and that unless there was in fact an adjudication of the merits, after full investigation, the claim could not be treated as *res judicata*. The plea no doubt ordinarily presupposes an adjudication on the merits as contradistinguished from an adjudication of which the effect consists in suspending the right of action until a certain event occurs or for some time. It appears to us that the learned Counsel for the appellant overlooks the fact that there may be a statutory direction that in case the plaintiff neglects to produce evidence and to prove his claim as he is bound to do, the Court do proceed to decide the suit on such material as is actually before it, and that the decision so pronounced shall have the force of a decree on the merits, notwithstanding the default on the part of the plaintiff. We are of opinion that s. 148 of Act VIII of 1859 under which there

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was a decision against the appellant in Original Suit No. 7 of 1872 contained such direction. It was held in *Comalammál* v. *Rungasawmy Iyengar*(1) that the decision under s. 148 was a decree and open to appeal. The material words of the section are "The Court may, notwithstanding such default, proceed to decide the suit forthwith" and the intention which they suggest is that litigation should not be vexatiously prolonged. The ground of decision under that section is not simply that there was default, but that there were no merits proved. In this connection we are referred to several decided cases, but none of them is in our judgment in point. As to the decision in *Rungráv Ráviji* v. *Sidhi Mahomed Ebráhim*(2), the first suit was dismissed under Act X of 1877, s. 381, on the ground that the plaintiff who resided out of British India did not furnish security for costs as directed by the Court. The learned Judge who decided that case observed that the dismissal under s. 381 was like a decision under s. 102, not final within the meaning of s. 13. This observation was made with special reference to the fact that the second suit was not brought by the plaintiff in the first suit, and to the contention that the dismissal of the latter precluded him from pleading in the second suit, as a matter of defence, the ground on which the claim was rested in the first suit. The learned Judge guarded himself by saying "I give no opinion as to the result if a plaintiff, whose suit had been dismissed under s. 381, should attempt again to litigate the subject matter of the dismissed suit. Possibly a reference to s. 373 may be found sufficient to preclude him from so doing." Assuming (and we express no opinion on the point) that what is not available as a ground of defence in a second suit is available as a ground of attack, the decision is certainly not in favor of the appellant.

Another case cited is *Bessessur Bhugut* v. *Murli Sahu*(3). The first suit was in that case held to have been dismissed under s. 97 of the Code of Civil Procedure, and the right to bring a fresh suit is then expressly reserved by s. 99.

As to *Denobundhoo Chowdhry* v. *Kristomonee Dossee*(4), the decision proceeded on the ground that the party in the first suit was not represented in the second suit.

(1) 4 M.H.C.R., 56. (2) I.L.R., 6 Bom., 482.
(3) I.L.R., 9 Cal., 163. (4) I.L.R., 2 Cal., 152.

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As to *Keshava* v. *Rudran*(1), the decision proceeded on the view that the matter in contest was withdrawn from adjudication in the first suit under the Indian Oaths' Act.

We may here refer to the case of *Eshan Chundra Safooi* v. *Nundamoni Dassee*(2) wherein it was held, with reference to s. 97 of Act VIII of 1859, that a party who withdrew a suit without leave of Court was precluded from bringing a second suit on the same cause of action. Sir Richard Garth, C.J., observed that "though the withdrawal did not constitute a case of *res judicata* properly so called, there was a statutory prohibition, and that the rules applicable to cases of *res judicata* generally applied to a statutory bar of this kind." We may also refer to Act X of 1877, s. 103, or Act VIII of 1859, s. 114, as creating another case of a statutory bar.

As to the contention that s. 148 did not expressly prohibit a second suit, it should be remembered that it directed that the Court might proceed to decide the suit, notwithstanding the default, constituting thereby the decision on the imperfect material on the record into a decree on the merits which under s. 13 would bar a second suit. No express rule of prohibition is inserted because the decision is a decree on the merits and not a mere judgment by default. We entertain therefore no doubt that the claim is *res judicata*, unless the appellant showed fraud on the part of his guardian who conducted the former suit.

As to the fraud imputed to the guardian, the Judge has, in our opinion, come to a correct conclusion. Exhibit III, which is a copy of the judgment in Original Suit No. 7 of 1872, shows how the guardian conducted that suit, and the oral evidence on the question of fraud, in connection with it, is stated by the Judge in paragraphs 25-27 of his judgment. Exhibit III shows, no doubt, that the guardian changed his Vakil twice, that he first cited one set of witnesses, and then endeavoured, when it was too late, to cite another set of witnesses. But it does not follow that he did not act *bonâ fide*. Again, it shows that after the Judge refused an adjournment the appellant's father declined to call the witnesses who were in attendance and to proceed with the suit. This likewise shows great imprudence, but it appears that he had then a Vakil to advise him. In the absence of any

(1) I.L.R., 5 Mad., 259. (2) I.L.R., 10 Cal., 357.

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evidence to indicate that those witnesses were ready to prove his claim, we cannot say that the father intended to injure his son, for there was no motive for his seeking to defraud the appellant. The imputation is further inconsistent with his conduct in preferring an appeal to the High Court, in trying to raise money, according to the appellant's fourth witness, to comply with the order made in appeal. As to the statement made by the third and fourth witnesses that the appellant's father was in communication with Achuta Rámayya, and that he said that he could not conduct the suit and desired to effect a compromise, we cannot say that the Judge was in error in not attaching weight to it. The appellant is the nephew of these witnesses, and assuming that what they say is true, it does not prove that the endeavour was not honest. It is argued in appeal that what took place in 1875, in connection with the execution of exhibit B, should be referred back to the time when the suit was pending, and that the Judge was in error in not doing so. There is not a particle of reliable evidence to show that any negotiation for a compromise took place during the pendency of Original Suit No. 7 of 1872, and we are not prepared to hold that the Judge was wrong in treating exhibit B as a transaction concluded long after the final decree. We agree therefore in the opinion of the Judge that there is absolutely no evidence of fraud on the part of the next friend or of any collusion between him and Rámáyamma. The conclusion we come to is that the Judge was right in holding that the appellant's claim was *res judicata*.

As to limitation, the appellant's adoption took place according to him on the 19th August 1865, whilst Venkatachalam died in May 1865, and the present suit was brought in March 1885. It appears that on Venkatachalam's death, the Court of Wards assumed management of the estates for some time and placed Rámáyamma in possession in 1867. Whether the original cause of action arose in 1865 or 1867, the claim was equally barred from 1879. In view, however, to avoid the operation of the Limitation Act, the appellant alleged that he was only three years old when Bhanamma adopted him. It is found by the Judge that he attained his majority in 1878, and even assuming that the appellant came of age only in 1880 as now alleged by him, the additional term of three years to which he would be entitled on account of his minority expired in 1883, whilst the suit was instituted only in 1885. In this connection the learned Counsel for the appellant drew our attention to exhibit B and argued that the appellant, who was a minor, was induced to execute it by a fraudulent representation that it would operate as a relinquishment of his claim only during Rámáyamma's lifetime, and that he discovered the fraud shortly after her death in August 1883, which was within three years before suit. As to the alleged fraud, the Judge has found that it was not proved, and we see no reason whatever to come to a different conclusion. It is admitted by the appellant in his evidence that he wrote exhibit B and it contains the words "I have agreed to receive Rs. 12,000 in money as consideration for the relinquishment and I will not therefore hereafter prefer any claim whatever at any time against you and your heirs in any respect of any matter." Assuming that he was then a minor of 15 years of age, it is not likely that he would not have understood that he was completely relinquishing his right, or failed to ascertain its effect when he attained his majority in 1878.

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Again, exhibits I and II, which are copies of the appellant's deposition and petition in the record of the Registrar, show that he was anxious to get the instrument registered and he did not then consider that he relinquished his claim only during Rámáyamma's life. Further, Lingam Lakshmaji, to whom fraud is now imputed, is the appellant's relative, and it is far more likely that he interfered in bringing about the execution of exhibit B rather to secure Rs. 12,000 for his relation than to defraud him. Exhibit D favors this view of Lakshmaji's conduct. Nor would the appellant's father have stood by and allowed his son to be defrauded. Though the eighth, nineth, and twelfth witnesses have now deposed that Lingam Lakshmaji said, during the execution of B, that the estates would go to the appellant after Rámáyamma's death, only one of them appears to have attested the document. We cannot say that the Judge was wrong in refusing to accept their evidence as it is opposed to the probabilities of the case. The evidence conveys the impression that the appellant, after getting Rs. 12,000 through the interference of Lingam Lakshmaji and by representing that he was 19 years of age under the guidance of his father and Lakshmaji, now feigns fraud on the part of Lakshmaji, his father, and the respondent's father-in-law in order to renew a litigation which was set at rest by the decree in Original Suit No. 7 of 1872. The appeal fails and we dismiss it with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1887. March 3, 22.

THÁYAMMÁL (PLAINTIFF), APPELLANT,

and

MUTTIA (DEFENDANT), RESPONDENT.*

Rent Recovery Act (Madras), Act VIII of 1865, s. 11—Water-cess—Tenants—Cultivation improved by water taken from landlord's tank.

A landlord has a right to charge water-cess when his tenant cultivates a wet crop on dry land or a second wet crop on wet land by means of water taken from the landlord's tank.

SECOND appeal against the decree of J. Hope, District Judge of South Arcot, reversing the decree of the Temporary Deputy Collector of Cuddalore.

This was a summary suit under the Madras Rent Recovery Act, s. 9, to compel the defendant to accept a pattá from, and execute a muchalká to the plaintiff of whom he held certain land. The defendant objected to a water-cess inserted in the pattá on account of water taken from a tank belonging to the landlord, but it was admitted that he had used it to cultivate a wet crop on his dry land and a second crop on his wet land.

The Temporary Deputy Collector decreed in favor of the plaintiff: the defendant accordingly appealed to the District Court which modified the original decree by directing that the water-cess should be struck out of the pattá.

The plaintiff preferred this second appeal.

Rámá Ráu for appellant argued that the introduction of the water-cess or kasar in the pattá was not an enhancement of rent, but that it was a charge which the landlord was entitled to make on dry lands cultivated with the aid of his tank water.

Mr. *Spring Branson* for respondent argued that the charge was an additional rent which could only be charged under s. 11 of the Madras Rent Recovery Act, and cited *Kottasawmy* v. *Sandama Naik* (5 M.H.C.R., 294).

* Second Appeal 753 of 1886.

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT:—The question is whether the landlord has a right to charge water-cess when a wet crop is cultivated on dry land, and when a second wet crop is cultivated on wet land.

It is not denied that the water taken for these purposes is taken from the proprietor's tank.

This is not a question of a landlord having, at his own expense, repaired a tank and rendered land formerly cultivated as punjah cultivable as nunjah, as in *Kottasawmy* v. *Sandama Naik*(1), but the question is whether the tenant can be called upon to pay for extra water taken from the landlord's tank for special crops. There is nothing illegal in such a charge see *Vaythenátha Sástrial* v. *Sámi Pandither*(2).

In the present case there is no dispute about the rate of assessment.

The appeal must be allowed and the decree of the Lower Appellate Court reversed and that of the Temporary Deputy Collector restored.

The respondents must pay appellant's costs in this and in the Lower Appellate Courts.

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. Oct. 13. 1887. April 29.

MUTTIA (COUNTER-PETITIONER), APPELLANT,

and

VÍRAMMÁL (PETITIONER), RESPONDENT.*

Hindú Law—Execution of decree for maintenance of widow—Liability of ancestral estate.

Maintenance decreed to a coparcener's widow by reason of her exclusion from succession in a joint family cannot be regarded as a charge on the family estate or the decree treated as a decree against the managing member of the family for the time being.

(1) 5 M.H.C.R., 294. (2) I.L.R., 3 Mad., 116.

* Appeal against Appellate Order No. 1 of 1886.

MUTTIA v. VÍRAMMÁL.

A, the widow of an undivided member of joint Hindú family, obtained a decree for maintenance against B, the brother of her deceased husband, not expressed to be a decree against the head or representative of the joint family.

B died, and C, his son, having been brought in as his representative, resisted the execution of the decree by attachment of the family estate:

Held, that the family estate was not liable.

Per cur.—In a regular suit, C may clearly be held liable to pay maintenance to A, and a decree may be passed against him; but in execution proceedings the decree must be taken as it stands and executed against the son as his legal representative in the mode prescribed by s. 234 of the Code of Civil Procedure, and it is not open to extend the scope of the decree in such proceedings—*Karpakambál* v. *Subbayyan* (I.L.R., 5 Mad., 234) approved and followed.

APPEAL against an order of J. W. Reid, District Judge of Coimbatore, confirming an order made by P. Náráyanasámi Ayyar, District Múnsif of Coimbatore, in Original Suit No. 19 of 1872.

In the above suit one Vírammál obtained a decree for maintenance against Venkatakristna Gounden, the undivided brother of her deceased husband, not expressed to be a decree against the head or representative of the joint family. The decree was executed from time to time against Venkatakristna Gounden, and, on his death, his son, Muthu Gounden, was brought on to the record as his legal representative. The plaintiff now filed Civil Miscellaneous Petition No. 210 of 1885 in the above suit applying for the execution of her decree by the attachment of a house, which formed part of the ancestral property of the family.

The defendant opposed the petition on the ground that the maintenance decreed to the petitioner did not constitute a charge on the family estate.

Both the Lower Courts held that the family house was liable for the decree amount and ordered accordingly.

Bháshyam Ayyangár for appellant.

The decree to be executed was only a decree for money passed against the appellant's father in a suit to which the appellant was no party; therefore, the decree-holder is not entitled to execute the decree by the attachment of ancestral property which has passed to the appellant by survivorship.—*Karpakambál* v. *Subbayyan*, I.L.R., 5 Mad., 234, does not apply; for, in the present case, the property sought to be made liable was not the self-acquired property of the father.—*Nanomi Babuasin* v. *Modhun Mohun* (I.L.R., 13 Cal., 21) was also referred to.

Rámánujácháryár for respondent.

The further arguments adduced on this appeal appear sufficiently for the purpose of this report from the order of reference and the judgment of the Court.

This appeal came on for hearing on 30th July 1886, before Muttusámi Ayyar and Brandt, JJ, who seeing reason to doubt the correctness of the decision in *Karpakambál* v. *Subbayyan*, decided to refer the case to the Full Bench, and accordingly made the following

ORDER OF REFERENCE:—The respondent, the widow of a deceased brother of the minor appellant's father, an undivided member of a joint family, had a decree for maintenance against the appellant's father, now deceased.

The minor appellant's name was entered on the record as the representative of the original decree-debtor, and the question is whether the Courts below are right in holding that the ancestral property of the family now represented by the minor is liable in execution of the decree.

The District Múnsif referred to the Full Bench decision in the case of *Karpakambál* v. *Subbayyan*(1), but held, on the authority of the *Sivagiri case*(2), subsequently decided, that the "estate which a son takes by heritage from his father constitutes assets by descent for the payment of the father's debts," being debts not incurred for vicious or immoral purposes.

The District Judge appears to have considered *Karpakambál's* case to be an authority for holding that a decree for maintenance, such as we have to deal with here, can be executed against all the right and interest of the son to the extent of the assets descended to him from his father, and that the right and interest of the son in the ancestral property descending to him constitute assets liable in execution of such decree.

It is doubtful if the District Judge rightly apprehended the principle of the decision in *Karpakambál's* case, and we are bound by that decision, which, unless it be reconsidered and modified or overruled by another Full Bench decision, is conclusive, and the orders of the Courts below must be reversed.

Having considerable doubts as to whether that case is decided on correct principles, and seeing reason to doubt whether the view now propounded is not more correct, we resolve to lay this case before the Full Bench in view to discussing the question whether

(1) I.L.R., 5 Mad., 234. (2) I.L.R., 6 Mad., 1.

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there are or are not sufficient grounds for reconsidering that decision on the following grounds.

If the decree passed against the deceased had been expressed to be passed against him as representing the undivided family, or if the ancestral property had been indicated as the source from which the maintenance was to be provided, it could no doubt be executed against that property in the hands of the appellant. Is it not an inference necessary from the facts of the case itself that the decree was passed against the deceased in his capacity of representative of the family, and that it was intended to be satisfied by means of the ancestral property, if any? It is suggested that the true principle upon which the solution of the question appears to depend is as follows: according to the Mitakshara law, widows of coparceners are excluded from inheriting their husbands' shares, and in consideration of their exclusion from such inheritance, the right of survivorship is burdened with the obligation to provide for their support. The right then that survived to the appellant's father survived as a potentiality, in other words what actually survived was the difference between the value of the undivided share, and the cost of the widow's maintenance during her life; and having regard to this legal basis of a decree for the maintenance of an undivided brother's widow, the decree might be taken to be a decree passed against the appellant's father as the head or representative for the time being of his branch of the joint family. We would observe that it does not appear from the report in *Karpakambál's* case, whether the maintenance was awarded to the widow of an undivided coparcener, or to a mother, or other female relative.

We would also draw attention to the results which must follow if the decision in that case is correct; it would, in such case, be necessary for a widow of a coparcener in a joint Hindú family in Southern India to institute a fresh suit for maintenance as often as the head or managing member of the joint family happens to die.

The decision must be in accordance with the true principles of the law applicable, but if decrees for maintenance in such cases cease to have effect on the death of the person originally made a party to the suit, it may be matter for consideration whether it is not desirable to have recourse to the assistance of the Legislature.

This appeal came on for hearing before the Full Bench

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(Collins, C.J., Kernan, Muttusámi Ayyar, Brandt and Parker, JJ.), on 13th October 1886 and on 29th April 1887, the following judgment was delivered:—

JUDGMENT.—In this case the respondent obtained a decree against the appellant's father, since deceased, for her maintenance, in Original Suit No. 19 of 1872 on the file of the District Múnsif of Coimbatore. It is conceded that the maintenance awarded was not charged in the decree against family or ancestral property. Nor does it appear that the decree was in terms a decree against the head or representative of the joint family. So long as the appellant's father was alive, the decree was executed against him from time to time. For some time after his death, the appellant's guardian paid the maintenance whenever the decree was put into execution. When the respondent attempted to execute the decree in 1885 by attaching a house, the guardian objected to the attachment, alleging that the appellant's father left no separate estate, and that, as the ancestral property survived to the appellant on the death of his father, a mere personal decree against the latter could not be executed against the former who had inherited no separate estate from the judgment-debtor. The District Múnsif overruled the objection on the ground that the house, which was ancestral, formed assets in the son's hands available for the payment of the father's debts, provided they were neither vicious nor immoral. The District Judge upheld the order in appeal, relying on the decision of the High Court in *Karpakambál* v. *Subbayyan*(1). In that case, there was a decree for maintenance against the respondent's father, but it did not appear on the face of the decree that he was sued as the manager of the family. It was held by the Full Bench of this Court that, though a decree can be executed against the sons for arrears which have accrued since their father's death, it can only be executed against them as representatives of their father, and, until his assets are exhausted, it being, of course, understood, that, on the father's death, the interest he had in his lifetime in joint ancestral property lapsed, and would not be available as assets.

This decision, far from supporting the order made by the Judge, is clearly an authority against it.

Muttayyan v. *Sangili Vera Pandia Chinnatambiar*(2), on which

(1) I.L.R., 5 Mad., 234. (2) I.L.R., 6 Mad., 1, s.c. L.R., 9 I.A., 128.

MUTTIA v. VIRAMMÁL.

the District Múnsif relied, shows only that in a regular suit ancestral property that has survived to the son may be treated as assets for the payment of the father's debts, those debts being neither vicious nor immoral. It is not a decision as to the extent to which a personal decree against the father can be executed against his son as his representative under s. 234 of the Code of Civil Procedure.

The question referred by the Division Bench in this appeal is, whether maintenance decreed to a coparcener's widow by reason of her exclusion from succession in a joint family cannot be regarded as a charge on the family estate or the decree treated as a decree against the managing member of the family for the time being. It now appears, upon further consideration, to Muttusámi Ayyar and Brandt, JJ., who entertained some doubt on the point, as well as to the rest of the Court, that the question must be answered in the negative. In a regular suit the appellant may clearly be held liable to pay maintenance to the respondent, and a decree may be passed against him; but, in execution proceedings, the decree must be taken as it stands and executed against the son as his legal representative in the mode prescribed by s. 234 of the Code of Civil Procedure, and it is not open to extend the scope of the decree in such proceedings. As to the observations contained in the order of reference, it may be pointed out that the difficulty suggested may be obviated by the person entitled to maintenance obtaining a decree making it a charge on the family property, if any, or making the judgment-debtor liable as the representative of the undivided family. We are, therefore, of opinion that the decision of the Full Bench in *Karpakambál* v. *Subbayyan*(1) must be adhered to, and that the case must be referred back to the Division Bench for disposal with reference to the foregoing observations.

This second appeal came on for hearing on 15th July 1887 before the Division Bench (Muttusámi Ayyar and Brandt, JJ.), when the following judgment was delivered :—

In accordance with the decision of the Full Bench, the orders of the Courts below are set aside, and the application for execution is dismissed with costs throughout.

(1) I.L.R., 5 Mad., 234.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1887. March 23.

SUBBAMMAL AND OTHERS (DEFENDANTS Nos. 1—3), APPELLANTS,

and

VENKATARÁMÁ AND ANOTHER (PLAINTIFF AND DEFENDANT No. 4), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, ss. 131, 135—Notice—Assignment of actionable claim—Rights of transferee for value.

A sued for principal and interest due on a mortgage assigned to him for value by the mortgagee. No notice of the assignment was given to the mortgagors before the plaintiff's demand. The sum sued for exceeded the amount paid by the plaintiff for the assignment and reasonable interest on it; but such amount was not paid or tendered to the plaintiff:

Held, that the plaintiff was entitled to a decree for the whole amount due on the assigned mortgage.

APPEAL from the decree of A. J. Mangalam Pillai, Subordinate Judge of Madura (West), reversing the decree of P.A. Lakshmanan Chettyár, Acting District Múnsif of Madura, in Original Suit No. 546 of 1884.

This was a suit to recover Rs. 149-4-0, being principal and interest due on a registered mortgage-deed, dated 1st July 1881, and executed by defendants Nos. 1, 2 and 3 to Venkatáchalam Ayyar. The plaint alleged that on 16th April 1884 he obtained an assignment of the mortgage from the mortgagee for the sum of Rs. 100. No notice of the assignment was given to the mortgagors before the plaintiff's demand. Defendant No. 4 asserted a mortgage lien over part of the property included in the mortgage sued on.

The District Múnsif dismissed the suit on the ground that the mortgage sued on was obtained by fraud.

The Subordinate Judge reversed the decree of the District Múnsif and decreed "that subject to the mortgage right of defendant No. 4 in plot No. 3, the plaintiff is entitled to recover the sum sued for."

* Second Appeal No. 477 of 1886.

SUBBAMMAL v. VENKATA-RÁMÁ.

Defendants Nos. 1, 2 and 3 preferred this second appeal; the plaintiff and defendant No. 4 being joined as respondents.

Venkatrámayyar and *Seshagiri Ayyar* for appellants argued that the assignment was invalid for want of notice to the mortgagors under s. 131 of the Transfer of Property Act, and that in any case the plaintiff was only entitled to a decree for the purchase money and interest under s. 135 of that Act.

Subramanya Ayyar for respondents pointed out, as to the contention that the plaintiff could not recover the whole claim, that no payment or tender of the purchase-money and interest had been proved.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Parker, J.)

JUDGMENT.—The principal point argued before us is that no notice of transfer was given under s. 131 of the Transfer of Property Act. This point was not raised at settlement of issues.

We follow the rulings in *Lala Jugdeo Sahai* v. *Brij Behari Lal* (1) that the transfer came into operation when the debtors became aware of it (and he became aware of it when the action was brought), and in *Grish Chandra* v. *Kashisauri Debi* (2) that plaintiff is not debarred from recovering the full amount.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

1887. April 9.

ÁLWAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

and

SÉSHAMMÁL AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, ss. 98, 99—Decree passed in a restored suit pending appeal against order of restoration.

A suit was filed in a Múnsif's Court, but neither party appeared for the hearing, and the suit was dismissed. The Múnsif subsequently on review made an order restoring the suit and eventually decreed for the plaintiff. The defendant in the meanwhile appealed to the District Court against the order of restoration, and after

(1) I.L.R., 12 Cal., 505. (2) I.L.R., 13 Cal., 145.

* Second Appeal No. 1112 of 1886.

ÁLWAR v. SÉSHAMMÁL.

the date of the decree, the District Court made an order allowing the defendant's appeal. The plaintiff appealed to the High Court and the order of the District Court was reversed and the order of restoration upheld:

Held, that the Múnsif's decree was not passed without jurisdiction.

SECOND appeal from the decree of S. T. McCarthy, Acting District Judge of Chingleput, reversing the decree of N. R. Narasimhayyar, District Múnsif of Trivellore, in Original Suit No. 830 of 1883.

This was a suit to recover principal and interest due on a mortgage bond executed by defendant No. 1 in favor of the minor plaintiff's father. On 12th January 1885, the Múnsif dismissed the suit under s. 98 of the Code of Civil Procedure; but on 21st January he made an order restoring the case of the file of the Court, and eventually passed a decree in favor of the plaintiffs on 20th March. Meanwhile an appeal had been preferred against the order of 21st January, and the late District Judge heard the appeal and reversed the order appealed against on 18th April. The defendants appealed against the Múnsif's decree of 20th March, alleging as their first ground of appeal that the decree of the Lower Court was void in that the Múnsif's order of restoration had been set aside on appeal. S. T. McCarthy, the Acting District Judge, heard the appeal and reversed the decree appealed against as having been passed without jurisdiction, but expressed an opinion favorable to the plaintiffs on the evidence.

The plaintiffs preferred this second appeal; the order of the District Court, dated 18th April, having been meanwhile reversed by the High Court. See *ante*, p. 270.

Subramanya Ayyar for appellants argued that the order of the District Judge setting aside on appeal the Múnsif's order of 21st January having been made subsequently to the Múnsif's decree, the decree was not passed without jurisdiction.

Srirangácharyár for respondents argued that the Múnsif's decree was *ultra vires*.

The Court (Kernan and Parker, JJ.) delivered the following

JUDGMENT:—The District Judge on 18th April 1885 reversed the order of the Múnsif to restore of the 21st January 1885, and in appeal reversed the decree of the Múnsif of the 20th March 1885. The appeal against the decree of the Múnsif was filed on the 8th of May 1885 and the hearing was on 1st September 1886. By the decree the District Judge reversed the decree of the Múnsif on the ground that the decree of his predecessor

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of April 1885 reversed the order to restore the suit, the effect of which was that the suit was no longer in Court and the decree of the Múnsif was wrong.

The present District Judge expressed an opinion in favor of the plaintiff on the merits, in order that the Court might, if it felt justified, act on that opinion. But we cannot do so, as the District Judge had no jurisdiction to pronounce such an opinion as long as the decree of his predecessor stood.

We have reversed the decree of 18th April 1885. Therefore the order of restoration stands and the decree of the Múnsif made before the decree of 18th April 1885 stands.

We reverse the decree of 1st September 1886 and direct the District Judge to rehear the appeal on the merits, but not on the first ground of appeal which we have already decided. Costs of this Appeal to be paid by the respondents to the appellants and the costs of the appeal to the Lower Appellate Court and of the original suit are to abide the result of the suit.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1887. March 28, 29.

GANAPATI (DEFENDANT), APPELLANT,

and

SÍTHÁRÁMÁ (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 561—Appeal from appellate decree disallowing memorandum of objections—Limitation Act—Act XV of 1877, s. 12—Karnam—Rights of de facto karnam.

A filed a plaint on 28th June 1882 for a declaration of his title as karnam of a village and for arrears of dues payable to him as such, including those for fasli 1288, which accrued due on 1st July 1879. His family had held the office and discharged its duties for three generations, but there was no evidence of any formal appointment of A or his ancestors:

Held, that the plaintiff was entitled to the dues as *de facto* karnam, and his claim was not barred in respect of any of the arrears claimed.

Per cur.—The preliminary objection taken by the respondent that no second appeal lies from so much of the decree of the Subordinate Judge as disallowed the objections filed by the appellant under s. 561 of the Code of Civil Procedure is without weight.

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* Second Appeal No. 361 of 1886.

GANAPATI v. SÍTHÁRÁMÁ.

APPEAL against the decree of S. Gopaláchári, Acting Subordinate Judge of Madura (East), modifying the decree of P. S. Gurumúrthi Ayyar, District Múnsif of Tirumangalam, in Original Suit No. 584 of 1883.

This was a suit to declare the plaintiff's right to, and to recover arrears of, certain dues alleged to be payable to the plaintiff as karnam of a certain village. The arrears sued for were for faslis 1288—1290. The plaint stated that the karnam mirasi of the village of Pattam belonged to the plaintiff, and that he and his ancestors since the faisal, had performed the duties of the office and enjoyed the emoluments (mannihams and swatantrams) appertaining to it; and that the defendant did not pay the swatantrams assessed on the land cultivated by him. The plaint was filed on 28th June 1882.

The defendant pleaded that the plaintiff was not the karnam of the village and had no right to the dues in question.

The District Múnsif held that the plaintiff was the mirasi karnam of the village in question and made a decree for the payment to him of the dues of faslis 1289 and 1290, but held that the claim for the dues of fasli 1288 was barred by limitation.

The plaintiff appealed to the Subordinate Court in respect of that part of the decree which refused part of his claim, and the defendant filed a memorandum of objections.

The defendant preferred this second appeal.

Kaliánárámayyar for appellant argued that the plaintiff had no mirasi right to the office, as he was not appointed by the zamindár, and referred to Regulations XXV and XXIX of 1802 and Regulation VI of 1831; that the formal requisites of the appointment of a karnam cannot be dispensed with, and that as *de facto* karnam he was not entitled to the dues claimed. It was further argued that in any case a claim for the arrear of fasli 1288 was time-barred.

Kistnasámi Ayyar for respondent objected that no second appeal lies from so much of the decree of the Lower Appellate Court as disallowed the defendant's objections. This contention was overruled.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.).

JUDGMENT.—This was a suit brought by the respondent to

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recover the swatantram (emolument) payable by the appellant for faslis 1288—1290 to the karnam of the village in question. It was not shown by the appellant that he ever held the office; or that he was entitled to it, or that he was under no obligation to pay. It has been found that the respondent has been serving as karnam for the last five or six years; that his grandfather held the office during his lifetime, and that one Subramanyam served as their gumastah during the minority of the respondent, and during the lifetime of his father. It was also in evidence that the respondent was described as karnam in the Inam Register of 1864, and that the appellant, his father and his guardian paid the swatantram to the gumastah (agent) Kuppu Subramanyam, until fasli 1287.

Upon these facts, we are of opinion that the Subordinate Judge properly decreed the respondent's claim. It is true that one Picha Pillai was the karnam at the time of the permanent settlement, and that the respondent is in no way related to him. Nor is it proved when, by whom, and in what circumstances the respondent's grandfather was appointed to the office, or whether there was a formal appointment at all. But the recognition of the respondent's claim contained in the Inam Register of 1864 and the fact of his family having held the office for three generations are sufficient to raise the presumption that there has been a valid appointment.

Another contention is that the claim to the emolument due for fasli 1288 was barred by limitation. It is conceded that it accrued due on the 1st July 1879, and the period of limitation began therefore to run only from that date, which must be excluded from computation under s. 12 of Act XV of 1877. The decision of the Subordinate Judge that the claim was not barred is right.

The preliminary objection taken by the respondent that no second appeal lies from so much of the decree of the Subordinate Judge as disallowed the objections filed by the appellant under s. 561 of the Code of Civil Procedure is without weight, and the decree appealed against was a decree passed in appeal within the meaning of s. 584, whether it dealt with the grounds of appeal urged by the appellant or the objections taken by the respondent under s. 561.

This second appeal fails, and we dismiss it with costs.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, and Mr. Justice Parker.

QUEEN-EMPRESS

against

RANGI AND ANOTHER.*

1886. Nov. 29. 1887. Jan. 12.

Criminal Procedure Code, ss. 342, 364—Withdrawal of uncorroborated evidence by the witness—Examination of the accused—Confessions.

A and B were charged with the murder of C, the husband of B. There was some evidence that B had said her husband was dead, a few days after his disappearance; and some bones, a skull, and some cloths were found in a neighbouring burying ground which were identified as those of C. B made a statement, recorded on June 4 by the Village Mánsif, to the effect that she had lured C into a garden, and that A, who was her paramour, had murdered him in her arms, which statement she repeated frequently with greater detail in answer to questions from the committing Magistrate, and subsequently before the Sessions Court. On her appeal to the High Court after she had been sentenced to death, she retracted her former statements and made the usual charges of ill-treatment against the Police. A made a statement to the committing Magistrate which he subsequently repudiated before the Sessions Court, to the effect that he had assisted in disposing of the corpse of C at the request of his brother-in-law, who corroborated the statement in two depositions before the Magistrate which were likewise repudiated by the deponent before the Sessions Court:

Held, that the conviction of A was wrong and further (Parker, J., dissenting) that the conviction of B was wrong.

Per Kernan, J.—"As the second prisoner has withdrawn all the confessional statements made by her, it is necessary, according to the rulings of this Court, to examine the evidence and see if there is reliable independent evidence to corroborate to a material extent and in material particulars the statements contained in the withdrawn confessional statements. If no such corroborative evidence exists, then the contradictory statements of the second prisoner remain and doubt exists as to which statements is true, and the confessional statements cannot be safely relied on against the prisoner."

Semble.—The same rule should be followed when a witness withdraws his deposition before the Sessions Court.

Per Kernan, J.—The examination of an accused person under Criminal Procedure Code 364 is subject to the purpose referred to in s. 342, viz., "to enable him to explain any circumstances appearing against him," and not to supplement the case for the prosecution against him to show that he is guilty.

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* Referred Trial No. 38 of 1886 and Criminal Appeal No. 429 of 1886.

QUEEN-EMPRESS v. RANGI.

THIS was a case referred to the High Court by the Sessions Judge of Kistna for confirmation of the sentence of death passed upon the second prisoner and appeal by the first and second prisoners against the sentences passed upon them.

The most important exhibits in this case were—exhibit B, a memorandum of confessional statement made by the second prisoner to the Village Múnsif, dated 4th June; exhibit J^1, dated 6th June, exhibit J^2, dated 14th June, exhibits J^3 and J^4, dated 15th June, and J^5, dated 25th August, all being confessional statements made by the second prisoner to the Second-class Magistrate of Bezvada, but not all recorded as having been voluntarily made. Some of these were made in answer to numerous questions from the Magistrate and all of them were made when the prisoner was in the custody of the Police. Further, the second prisoner made a self-incriminatory statement in the Sessions Court and finally filed a petition of appeal in the High Court withdrawing all the previous statements.

Mr. *Kernan* for the appellants.

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

The facts of the case and the arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgments of the Court.

The Court (Collins, C.J. and Parker, J.), before whom this appeal came on for hearing in the first place, delivered the following judgments:—

COLLINS, C.J.—I am of opinion that the evidence against the first prisoner Meer Shufee is not sufficient to convict him, and the Government Pleader did not press the case against him; the conviction should therefore be reversed and Meer Shufee discharged.

The case against the second prisoner Rangi, who was sentenced to death, is very different from that against the first prisoner.

The man who is said to have been murdered was her husband; they had been living apart for many years, and there is strong evidence that Rangi was carrying on an adulterous intrigue with Meer Shufee. It is alleged that Vengataswami, the husband of Rangi, was murdered on the 22nd May 1886, and the 4th witness for prosecution, the brother of the second prisoner, alleges that Vengataswami, who was living at Talagatur, came to Vallur where his wife was living, apparently in the hope of inducing his wife to return with him to Talagatur, and there is evidence that Vengataswami and Rangi were together about that date, that

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he saw both of them walking up the Kistna embankment, and some time afterwards Rangi, the second prisoner, came back alone, that upon being questioned, she said she had told her husband that as she was giving milk to two children in the village she would go three days afterwards, that he (her husband) got angry and went away, and would be at that time at Chagantipadu, a place on the way to Talagatur where her husband lived. The fact of second prisoner and her husband being together about this time is also spoken to by the fifth witness for prosecution. The second prisoner went to Talagatur on the third day after this interview with her husband, taking her children with her. The third witness for the prosecution, the daughter of Rangi and Vengataswami, says that the last she saw of her father was when her mother's elder brothers came to Talagatur and took him to Vallur saying, "they would send his wife." This witness also deposes that when her mother Rangi returned some nine days after her father had left for Vallur, she asked her where her father was, that the second prisoner tried to beat her with a brass vessel and said, "your father is rotting in a pit." In June inquiries were made about Vengataswami. A man named Budden Sahib was arrested on suspicion, and he, after he had been in custody for a considerable time, gave an account of how he and the first prisoner had buried the body of Vengataswami, and on the 15th June he took the Second-class Magistrate to the place of the supposed burial, and bones, flesh, pieces of blanket, &c., were found there. It appears, however, that on the 3rd June a search had been made at this spot, which was used as a burial ground, by the Constable, the seventh witness, and the Village Múnsif, and that two skulls and other bones, pieces of blanket and other things were found there. Budden Sahib when before the Sessions Judge retracted the whole of his former statement and declared that the Police had instigated him to make it.

Rangi when arrested made a long statement in which she alleged that the first prisoner had induced her to lure her husband into a garden for the purpose of having connection with her; that whilst her husband was, as she describes it, "sitting on her," the first prisoner came from behind some bushes and struck her husband on the head with a large stick, that on the second blow being given the head broke and the brains came out. She made a very similar statement before the Sessions Judge when on her

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trial, and it is clear, if her confessions are to be believed, that she took her husband into the garden at the suggestion of the first prisoner and for the purpose of the first prisoner's killing him. The second prisoner in her appeal petition to the High Court declares that she knows nothing of the alleged murder, and that the Police *teased* her into making the statement incriminating herself and the first prisoner.

I am of opinion that it would not be safe to convict this woman of murder under the circumstances. In the first place I am not satisfied on the evidence that Vengataswami is really dead. The Sessions Judge in his statement to the High Court under date 11th September 1886 says, "it is highly improbable that he (Vengataswami) '*will ever turn up in the flesh*,' and although he has sentenced the woman to death, he recommends that 'the possibility of such an event happening (that is, Vengataswami turning up in the flesh) should be taken into consideration and that an irrevocable sentence should not be passed.'"

One of the daughters of Vengataswami and Rangi called before the Magistrate but not before the Sessions Judge deposed that her maternal uncles made her father lie down by some bushes and one of her uncles cut her father's throat with a small knife. "He cut," she says, "as if he did a sheep and killed him." She also said she made this statement which she afterwards said was false, because her grandfather and paternal uncle told her to say so.

Another daughter, third witness, is bold enough to swear that one of the skulls dug up from the burial ground is her father's, because she "*used to pick lice out of his head.*" She also swears, "the bones are my father's."

With regard to the skull indentified as that of Vengataswami it was when found (so say the witnesses) broken into two pieces. The second prisoner in her confessional statement says that first prisoner "broke" her husband's head. The apothecary who examined it, however, says that in his opinion the fracture was caused *after death* and gives good reasons, in my judgment, for his opinion.

Taking into my careful consideration the whole of the evidence of this case, I cannot say that the statement of the first prisoner that he heard the Police tutoring the second prisoner as to what she should say is false beyond reasonable doubt and that the confessions relied on against the second prisoner are true, it may

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be she made them in the hope of saving her brothers who are described as "*ruffians*," from being accused of the crime. But above all, the suggestions of the Sessions Judge who tried the case, heard the witnesses and observed their demeanour, that the extreme sentence of the law should not be carried out for the only reason apparently that the man supposed to be murdered might turn up some day in the flesh, leaves me no alternative but to say that the safer course is to acquit the second prisoner.

PARKER, J.—The appellants in this case, Meer Shufee and Rangi, have been convicted of the murder of one Vengataswami on or about the 22nd May last. The second prisoner in the case, Rangi, is the wife of the deceased, and the first prisoner a man with whom she had been carrying on an illicit intercourse.

The evidence shows that deceased and his wife had been living apart for some three or four years, the deceased in the village of Talagatur with one daughter and a son, and Rangi with the younger children at Vallur where her brothers also lived. Deceased used to go now and then to Vallur, but was not on good terms with his wife's brothers.

The case for the prosecution is that Vengataswami left Talagatur for Vallur with his wife's brothers some time in May, —the date is not accurately fixed, but it is endeavoured to fix it with reference to some local festival—and did not return. About 31st May Rangi returned to Talagatur without him, and was met with inquiries as to where he was. She said he had left her to return alone, but her answers were regarded as suspicious and her husband's brother Gopadu was not satisfied about Vengataswami's disappearance. The village people appear to have taken second prisoner to Vuyyur where she was kept in the lock-up while Gopadu and Ammallu, her elder daughter, went on to Vallur to make inquiries. On 2nd June the Police and the Village Magistrate were searching about Vallur for traces of Vengataswami, as Gopadu and his daughters declared a murder had been committed. On 3rd June were found by the Village Múnsif and the Police Constable No. 40 (seventh witness) two skulls, some leg bones, pieces of arms, &c., in a pit in the burial-ground which appears to be situated close to the bank in the bed of the Kistna river; with these were found some pieces of blanket and also bits of two cloths which Ammallu identified as belonging to her father. An inquest was held the same day in which it was reported that the remains

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were those of Vengataswami who appeared to have met his death by violence and that seven persons, including the brothers of Rangi, were suspected of the crime.

The Village Múnsif Ganganna (second witness), who conducted the inquest, has deposed that Rangi was then present, having been brought by the Police and others, and confessed to him then and there that her husband had been beaten and killed by Meer Shufee, the first prisoner, in her presence. He speaks to a statement (exhibit B) as having been made by her at the time, and recorded in writing by him in which she confessed to him that she had decoyed her husband into the garden in order that Meer Shufee might kill him, and that the first prisoner had been lying in wait for them and had killed her husband in accordance with their joint plan,—having previously arranged that Vengataswami should be first intoxicated.

This statement is dated however on 4th June, and though Ganganna declares that he began it on the 3rd and finished it on the 4th (exhibit B being really a fair copy of the original statement given), there is reason to believe he was not telling the truth in regard to this. From the evidence of the Police Constable H. Nammayya (seventh witness) I find that Rangi was not present at the inquest, but was sent for from Vuyyur—where she was in the Police Station—on the following day, *i.e.*, 4th June, and the absence of all allusions in the inquest paper to the statement, said to have been made by her before the inquest, is almost proof positive that the statement had not been then made. Ganganna's explanation of the absence of any reference to it in the inquest paper is that he considered Rangi was not speaking the truth, and therefore he put down what her daughters stated, viz., that the suspicion was upon her brothers; but this statement appears to me to have been probably made to cover the originally inaccurate statement that Rangi was present at the inquest.

It is however certain that the statement (exhibit B) was made by Rangi on 4th June and was forwarded to the Second-class Magistrate of Bezvada on the same date with the covering report (exhibit C), which bears the Magistrate's initials of receipt on 8th June.

Seeing that there has been an inaccuracy in describing the circumstances under which and the date on which exhibit B was

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taken, I should have put it altogether out of consideration had the evidence against Rangi,—so far as it is based on confessions—depended upon that document alone. This however is not the case. On 6th June, two days later, Rangi made a confession at Vuyyur—which was recorded under s. 164 of the Criminal Procedure Code—before the Second-class Magistrate of Nuzvid, and which she repeated in much greater detail before the Second-class Magistrate of Bezvada on 14th June. She repeated it again on 15th June on which date she made two statements,—after pointing out the place to the Magistrate where the murder was committed,—one at Vallur and the other at the place where the body was found. More than two months later, viz., on 25th August and again on 28th August, she repeated the same story, nor did she vary it when she was tried at the Sessions. It is now for the first time in her appeal to this Court (after she has been sentenced to death) that she retracts her former statements, and makes the usual charges of ill-treatment against the Police.

The first prisoner Meer Shufee was arrested at Secunderabad on 13th July by the tenth witness Mahomed Ali, a Police Constable. Before the Second-class Magistrate of Bezvada, on 18th August, he made a statement that he had assisted in disposing of the dead body of Vengataswami in the pit at the request of Budden Sahib, his brother-in-law; but he denied all knowledge of how Vengataswami met his death. This statement he repudiated at the Sessions saying he was suffering from pain and did not remember what he had said. In his appeal petition he urges that the charge has been brought against him through enmity.

It was urged upon us by the learned Counsel for the second prisoner that the death of Vengataswami was not established by sufficient evidence, and that for that reason it would not be safe to convict any one of his murder. I entirely agree with the Sessions Judge that the evidence of identification of the remains found in the pit is not sufficient to enable us to find with certainty that those remains are the remains of Vengataswami. But the evidence of the death of Vengataswami does not rest only on evidence of identification of the remains. There was the unretracted statement of the second prisoner at the Sessions that her husband had been murdered and that his remains had been deposited in that pit, and further the statement of the first prisoner himself before the Magistrate to that effect, though the statements of the two prisoners

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differed as to the circumstances of the murder. Beyond that there was the evidence of Budden Sahib which the Judge was justified in admitting in evidence under s. 288 of the Code of Criminal Procedure, I think under the circumstances that there was evidence not really open to reasonable doubt on which the Judge might find that Vengataswami is in truth dead, and that his body was buried in that pit. As there is evidence that other persons had also been buried there, it is obviously quite impossible to tell with certainty whether the particular skull and bones produced before the Court were those of Vengataswami or not.

It is then urged that the various confessions made by the second prisoner may not have been voluntary, and we are referred to slight discrepancies between the different statements as to the degree of light and the place where she waited, &c. As the prisoner made no less than seven statements at different times and after intervals of time, some of which statements entered much more into detail than others, it would be surprising if one or two small inconsistencies could not be perceived,—but none that have been mentioned at all affect the main features of the story. It is suggested that Rangi may have told a false story in order to shield her brothers, the real culprits; but if this were so, she would hardly have invented one which throws so much of the guilt upon herself. That the village authorities at first suspected her brothers, and that Gopadu was ready enough to suspect them is obvious, and it is clear that the first suspicions which fell upon them were dissipated by the statements of the second prisoner herself. It would appear from the evidence that deceased went to Vallur at the invitation of his wife's brothers who were anxious that she should return to Talagatur with her husband possibly with the wish to put an end to the intimacy between her and first prisoner as is suggested by the evidence of fourth witness Ramaswamigadu. The fact that deceased had gone at their invitation would naturally incite Gopadu's suspicions against them in the first instance when he found that his brother had disappeared.

The story told by the second prisoner that her husband went away with her in the direction of the Government garden and that she returned alone is corroborated by the evidence of Ramaswamigadu.

Upon all this evidence and upon Rangi's own statements at the Sessions trial I am of opinion that the Judge was justified in

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finding that she enticed her husband to the garden in order that he might be murdered and therefore that she has been properly convicted.

With regard to the first prisoner Meer Shufee it is admitted by the learned Government Pleader that on the evidence on record the conviction can hardly be supported. Rangi's statements are not evidence on which he can be convicted, and there is nothing else against him except the retracted deposition of Budden Sahib, which was given after ten days' detention in custody on suspicion of being himself in some way concerned. The first prisoner's statement of 18th August contains no admission of being in any way an accomplice in the murder, and with regard to him I think that the conviction and sentence should be reversed.

Accepting the second prisoner's statements as regards herself I do not find that she suggested the murder and it is possible that her action was more or less dictated by fear of the anger and jealousy of her paramour. Her confession to which she adhered up to the time of her conviction was given almost as soon as the restraint of his presence was removed. I do not think that weight is due to the suggestion that possibly the first prisoner may have surprised Rangi and her husband in the garden and killed the latter without any previous concert with Rangi. No such defence has been set up by the prisoner herself at any stage of the proceedings, and as she has not scrupled to admit her intimacy with the first prisoner she would hardly have omitted to advance a plea so much in her favor, had it been a true one.

But having regard to the possibility that she may have acted as she did through fear of her paramour I would not confirm the capital sentence, but reduce the sentence to transportation for life.

The first prisoner Meer Shufee should be set at liberty.

The case of the second prisoner was then referred, in accordance with the provisions of s. 378 of the Criminal Procedure Code, to Kernan, J., who delivered the following judgment:—

KERNAN, J.—The two prisoners, Meer Shufee and Kuthada Rangi, have been convicted by the Sessions Judge of Kistna of the murder of Vengataswami, husband of the second prisoner, on or about the 22nd May 1886. I have to consider only whether the conviction of the second prisoner who has appealed is right.

The principal questions will be—

1. Is it proved that Vengataswami is dead?

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2. Whether certain confessional statements made by the second prisoner and retracted in appeal are under the circumstances of, and on the evidence in the case, satisfactory evidence that her husband was murdered, and that she was a party to the crime?

Upon the evidence it appears that Vengataswami (of the Yerakala caste) who lived by labour as a cooly was married several years to the second prisoner, by whom he had four children, and that for some years the second prisoner, lived with him at Talagatur village, and that about four years ago she went to the village of Vallur to a vacant house of her parents leaving two of the children with her husband and having with herself two others of the children.

The fourth witness for prosecution, the second prisoner's brother, says that her husband came to her hut at Vallur, and they were on good terms, and stayed about three days, and that he said to this witness he would take his wife back with him as she was saying she would go, and that he would go at night.

This witness says that the husband spoke something to his wife in the hut, and he with his wife went out, up the Kistna embankment, saying he would come back,—that it was then lamp-lighting time, that she returned at 8 o'clock, and in reply to a question by witness where her husband was, she said she told her husband that she would go with him to the village in three days, and he got angry and went away. The witness says that on the third day after, she left with her children and went to the village of Talagatur. It appears that on the 31st May, she made a statement before the Station-house Officer, Vuyyur, which was put in evidence to the effect that her brothers brought her husband fifteen days before to Vallur and that ten days before her brothers and her husband quarrelled and he went away—and that she arrived at Talagatur the day before yesterday thinking her husband was there, that she did not know whether her husband died or had gone anywhere, that her brothers did not kill her husband. Ammallu, her daughter, stated to the Station Officer that the second prisoner said when she came to the village that "her husband would come but he was not dead." It is alleged by Ammallu in her evidence at the Sessions that the second prisoner on her arrival at the village when questioned by her daughter as to her husband said, "your father is decaying in a

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pit." The eighth witness, K. Gopalu, paternal uncle of Ammallu, in his evidence before the Sessions Court, says the same.

As to Ammallu, no such statement was made by her to the Station Officer, and it is contrary to her statement above referred to. As to K. Gopadu, Ammallu says that he and she complained against the brothers of the second prisoner from suspicion that they might have killed him. Now a complaint was made by K. Gopadu and by Lakshmidevi, another daughter, to the Station Officer. Lakshmidevi stated that her maternal uncles in her presence laid her father on the ground, and that her uncle Lakshmigadu cut his throat. She says in her deposition before the Magistrate, dated 28th August 1886, that the same K. Gopadu, her paternal uncle, told her to say that her maternal uncles had killed her father. In the same evidence before the Magistrate, she was obliged to admit that her statement to the Station Officer was entirely untrue. It is quite plain that no reliance can be placed on the statement of Lakshmidevi or Ammallu or on that of K. Gopadu.

The only complaint of any kind up to the 31st May was made against the brothers of the second prisoner for killing her husband. But the second prisoner denied that—see Station Officer's report, 31st May. No information being obtained up to the 2nd June about K. Vengataswami and his body not having been found, the Police brought to Vallur the second prisoner and her daughters, and K. Gopadu, her brother-in-law, as appears in the evidence of the Village Múnsif, the second witness. This witness says that the children were crying and said a murder had been committed. The witness then stated that he searched in the village and in the burning and burying ground of the village in the sand near the river, that on the 3rd June he took Nammayya, a Constable, seventh witness, with him and that he dug up with his stick one piece of skull and bones and pieces of hair, gochi, langoti, sikatadu for tying the hair, and that the second prisoner and her daughters were brought there, and they, the daughters, said those things were of their father and that the second prisoner said 'yes.' He says that some flesh was adhering to the bones and that the remains appeared to have been there about fifteen days, and that bones, big bones, were scattered on all sides there. The Constable, seventh witness, says that they searched the *smasana*, burning and burying place, that a pit was dug and they found

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two skulls, leg bones and three pieces of arms, sikatadu, pieces of cloth and other cloths. These two witnesses, viz., the Múnsif and the Constable, say that the Inspector came afterwards, but although some pieces of cloths and bones found, the pit was not fully dug out. Several witnesses were examined to identify the pieces of the cumbly and the sikatadu and of the cloths found as belonging to the second prisoner's husband, but upon the evidence it appears that articles of the same description are used by all "Yerakalas," and no special reasons for identification are given by the witnesses. I do not think any reliance can be placed on the evidence as identifying any of the things found as those which were worn by second prisoner's husband. The daughters of the second prisoner and their paternal uncle said that one of the skulls was that of the second prisoner's husband. One of the daughters said his skull was round, and she used to take lice from his head, and therefore she knew it. This is not satisfactory evidence of the skull being that of Vengataswami. The place where the skull bones were found was the burning and burying place for the village, and the discovery of such remains as these would most probably be made there. A punchayat was held on the 3rd June 1886, and its report was put in evidence. It records amongst other things that no body was found and that bones were found. It also records a statement made then by Ammallu, the daughter, and K. Gopadu, the brother of second prisoner's husband, that the latter was killed by the brothers of the second prisoner. It also records that the bones were those of a man who died by violence, but that there was no corpse, and the punchayat could not identify the remains. That punchayat was signed on the 3rd June. The Múnsif says the second prisoner was at the punchayat, but was not examined before the punchayatdars, and he says that after the punchayat, the second prisoner made a statement to him which he wrote down on the 3rd June, but that he did not do so at the request of the Police. He also says that next day on the 4th June a copy was made and was read to the second prisoner and that she signed it, and it is marked as exhibit B. In exhibit B the second prisoner implicates herself as a party to the murder of her husband. It is not explained by the prosecution how or why or under what circumstances that statement came to be made. All that is proved is that the second prisoner was brought to the punchayat by the Police, and that she on the 3rd June, after the

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punchayat was over for that day, is stated to have made an original statement not produced, and that she signed exhibit B on the 4th. It is stated she was not arrested until the 4th. Before the second prisoner made that statement she was aware of the allegations against her brothers. That statement and her subsequent statements J^1, J^2, J^3, J^4, and J^5, all implicating herself in the murder, are inconsistent with her statements made up to the 3rd June. Though the second prisoner adhered to those statements even in the Sessions Court before the verdict was given and before sentence of death was pronounced on her, she in appeal to this Court says that she made the statements at the instance of the Police, who teased her greatly, and that those statements are not true.

The case of the prosecution against the second prisoner depends on these statements, and on the supposed corroboration of them principally by the evidence of Budden Sahib made before a Magistrate on the 14th and 15th June and on the 26th August, and also on other evidence after referred to. In the statement by the second prisoner in exhibit B, dated the 4th June 1886, she states where she and her husband had lived and that he came to Vallur and that she agreed to return with him as before set forth. So far there is no reason to doubt her statement. She says, however, in exhibit B, that the first prisoner used to have illicit intercourse with her and threatened her on three or four prior occasions of visits of her husband to Vallur, that he would kill him, and that on the occasion of the last visit the first prisoner induced her to decoy her husband after dark into a garden near Vallur called the Circar gardens, in order to have intercourse with her, and that he, the first prisoner, said he then would kill her husband. She says that the first prisoner arranged with Veerama, the fifth witness, a toddy-seller, to give the second prisoner's husband toddy and arrack, on the afternoon of the day that he was to be decoyed into the garden. She says that in accordance with that agreement she and her husband drank toddy at Veerama's shop, and that the second prisoner brought her husband into the Circar gardens in the evening, they lay down, and that while her husband was having intercourse with her, the first prisoner, who was hiding behind trees, came and struck her husband on the neck with a stick two cubits long, that her husband fell on one side of her and then the first prisoner struck another blow on her husband's head, which broke his head, and he then died, and that she went

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home, and at dawn in the morning the first prisoner came and told her that he and the first witness Budden Sahib had buried the corpse, but refused to tell her where.

On the 6th June 1886 the second prisoner made a statement recorded as a confession, exhibit J^1, before the Second-class Magistrate in which she repeats in substance what she stated in exhibit B, but she added that while the first prisoner was coming to where her husband was having intercourse with her, there was noise of leaves, and her husband asked what it was and she said it was perhaps a pig, and that the first prisoner threatened to stab her if she said to any one that he killed her husband, and that the first prisoner's brother-in-law had brought a cumbly and mamoti from the house and dug a pit in which her husband was buried, and that she showed the Police the place where the murder took place.

Again the second prisoner made a statement on the 14th June, exhibit J^2, before the Second-class Magistrate of Bezwada which he certifies to be voluntarily made. In answer to the question of the Magistrate "when and why did your husband die," the statement appears to show that she repeated what was in the prior statements. The repetition occupies two pages of print. Then fourteen other questions appear to have been put to her by the Magistrate, the answers to which occupy two other pages of print.

Again on the 15th June she made a statement, exhibit J^3, before the same Magistrate at Vallur which is headed "scene of the offence." This statement *is not* certified to be made voluntarily, but the particulars of it have been used as a confession by the Sessions Judge. The opening questions are—"Where did your husband Kuthada Vengataswami drink toddy and arrack; and how did he and you come from that place into the Government garden? Where did you lie? How did your husband sit? How did Meer Shufee come and beat your husband? How did your husband fall down?" All these questions were put at the same time and before she answered any of them. The Magistrate asked her, how it was there was no blood at the place of offence? She replied that first prisoner told her, he wiped it away and that rain also fell. Then the Magistrate refers to her statement on the prior day, that leaves of the trees rustled while her husband was lying with her, and that she told her husband it was a pig—and

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he asked "Was the thing that was coming a pig, or what did you see and say so?" In reply she says the first prisoner told her that he would come and murder her husband, and that if the leaves rustled she should tell her husband that a pig perhaps was coming. Then the Magistrate asked her, was it convenient for her and her husband to lie down at home. She replied, it was not convenient as her brothers were living in her hut. As to this fact there is evidence of the fourth witness that she lived in a hut belonging to her father and that her brothers lived elsewhere. After recording the statement as taken, the Magistrate states he asked the second prisoner other questions, six or eight in all, and then he says, "I made the prisoner go before me and I went myself behind to the place at the scene of the murder," and then he records what she did and said.

Again on the 15th June the second prisoner made a statement, exhibit J^4, before the same Magistrate. The statement is headed "at the place where the corpse was buried." The Magistrate appears to have asked her, "to whom a clout and other articles dug there out of the ground at the burial place belonged," and that she replied that "they belonged to her husband and were worn by him when he was killed."

Again the same Magistrate examined the second prisoner on the 25th August 1886, when the first prisoner was brought before the Court, and she made a statement, exhibit J^5, apparently stating the facts against the first prisoner. No explanation is given by the prosecution of the circumstances under which any of those confessions were taken except the statement of the 25th August in the presence of the first prisoner, as to how they were brought about or whether the second prisoner expressed a desire to make them, or whether she was sent for by the Magistrate or brought up by the Police. She was in custody of the Police when she made all the statements except her statement before the Sessions Judge.

As the second prisoner has withdrawn all the confessional statements made by her, it is necessary according to the rulings of this Court, to examine the evidence and see if there is reliable independent evidence to corroborate to a material extent and in material particulars, the statements contained in the withdrawn confessional statements. If no such corroborative evidence exists, then the contradictory statements of the second prisoner remain,

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and doubt exists as to which statement is true, and the confessional statements cannot be safely relied on against the prisoner. In this case there is special reason for requiring such corroborative evidence before acting against the second prisoner on the confessional statements, because the second prisoner up to the 2nd June, had made statements about the absence of her husband different from the confessional statements. Again false evidence was given by at least one of the witnesses for the prosecution with the knowledge of another, charging second prisoner's brothers with the murder of second prisoner's husband and that statement preceded second prisoner's statement. It is suggested by one of the assessors that the statements of the second prisoner may have been made to save her brothers. Again she alleges that she made them under Police instruction. The reasons of the examinations and re-examinations in exhibits J^2, J^3, and J^4, by the Magistrate are not given. But one re-examination brings out the extraordinary addition made in the statement, exhibit J^4, supplementing the prior statements of the rustling of the leaves by showing that such circumstance had been anticipated, as the second prisoner says, by the first prisoner and an explanation provided if the second prisoner's husband inquired about it.

I now refer to the matters of alleged corroboration of the second prisoner's statements.

The fact that after the first confessional statement, the prisoner made several others subsequently to the same effect, including the confessional statement made at the trial, cannot be accepted as corroboration of the prior statement, as such subsequent statements themselves require corroboration as they are withdrawn. Moreover, the motive which induced the prisoner to make the first confessional statement, may have induced her to make all those made subsequently. That motive may no longer have affected the prisoner when she withdrew all the confessional statements on appeal to this Court.

The fact that the skull produced appears to be broken into two parts is supposed to afford some corroboration to the second prisoner's statement that her husband's head was broken, as she alleges. But the Apothecary Brown states his belief that that skull was broken after life was extinct, and not during life. Moreover, the skull is not at all identified as the skull of second prisoner's husband. The fact that the second prisoner's husband is missing

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is no corroboration of the statement (unproved) that he is dead. The fact that he was a man who never was in the habit of being absent formerly for any long time, is not evidence that he is not still alive. The brother and brothers-in-law and the two children of Vengataswami say he is dead, but this is mere assumption. There is no legal evidence that he is dead. As to the evidence given by Veerama the toddy-seller, though she says in her direct examination that the first prisoner directed her to give toddy to the second prisoner and her husband and paid her, and that she did so, yet on cross-examination she says the day was a festival day and that great numbers came, and that she cannot tell the names of any one else that got toddy that day, and that she cannot say that the man who came with the second prisoner was her husband, whom witness admits she did not know, but from the conversation between them she came to know they were husband and wife. The witness did not make her first information until the 15th June. It is highly improbable that in the crowd of people she would recollect these two people got toddy on that day. She says she did not know the husband of the second prisoner, and cannot say if he was one of the two. But if her recollection was correct, her evidence is not corroborative of any important fact in relation to the offence. It is consistent with her evidence that the second prisoner and her husband did not go to the garden as stated by the second prisoner.

As to the alleged corroboration by Budden Sahib.—He made two statements, exhibit A, as a witness before the Magistrate, one on the 14th June, and another on the 15th June. In the statement of the 14th June, Budden Sahib stated that the first prisoner came to witness' house about half past eight o'clock on the night in question and said that he and Vengataswami had a fight and that the latter was killed, and he, the first prisoner, would get into trouble if witness did not help him to conceal the body and that after some time witness agreed to do so, and that the first prisoner got a mamoti and cumbly from witness' house and went into the Circar garden and then saw and spoke to the second prisoner and that the first prisoner, tied up the body of Vengataswami, the second prisoner's husband, and that both the first prisoner and witness carried the body 50 or 60 yards to the sand of the Kistna and the first prisoner buried it there, having dug up the sand with a mamoti. In the statement of the 15th June made, as the heading of it shows, "near the place where the

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dead body was buried," Budden Sahib repeated in substance his statement of the day before, and pointed out the place where he said the act was done to which he was a party. To that statement the Magistrate appends remarks which are not evidence.

On the 26th August 1886 when the first prisoner was brought before the Magistrate, Budden Sahib was examined, and his depositions of the 14th and 15th June were read and the witness stated that the facts therein stated were true, and that no one taught him to state the circumstances deposed to by him. Budden Sahib, however, at the trial stated these depositions were untrue and were made under Police pressure. These depositions were read as evidence at the trial by the Sessions Court, under s. 288 of the Code of Criminal Procedure, the Sessions Judge having exercised his discretion given by that section. The Judge though with some doubt or difficulty believed they contained the truth and that the evidence given by the witness at the Sessions was untrue. The question now arises, was the reliance placed by the Judge on the truth of these depositions justified, and was the discretion vested in him properly exercised? At the trial before the Sessions Court, Budden Sahib admitted he made these statements in all these details, and says, he stated what is in those depositions because the Police told him to say so, but that he did not tell this to the Magistrate.

Cross-examined he says, "the Police put me in a lock-up in the case of the murder of Vengataswami. They arrested me on suspicion. I was in Police custody for nine days." "I was asked to state what I knew about the murder. I stated I knew nothing and that inquiry should be made regarding my conduct. The Police said 'you must tell, you cannot but tell. If you do not say against your brother-in-law, the first prisoner, we will take your children and keep them in the lock-up.' They said if I spoke against him they would release me and take me as a witness, and that if I did not, they would bring a charge against me. What I stated before the Magistrate is not true. I stated those words as I was told to say so." "I pointed out to the Tahsildar the different places, telling each place as the Police told me to say so; the Police tortured me."

Re-examined. "The Police beat me with hands. There are no marks. I did not complain to the Tahsildar. I was told not to complain." "For fear that I would be handed over again to the

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Police, I did not complain to the Magistrate. They kept me five days at Vuyyur and three days at Vallur. There is no station at Vallur. There is a chowki of Jamadar Sydalli. They put me in it. They released me on the day after the Tahsildar came to Vallur. The Tahsildar took a deposition from me before I was released. I was released on the day after that on which deposition was taken from me. I did not say on the 26th August fearing that they would beat me. The Police were present when my evidence was taken. I am saying in this way here as you gods are all here."

There are some facts stated in this evidence of Budden Sahib at the Sessions Court which are not contradicted, viz., that he was arrested and kept in the custody of the Police (who had access to him at all times for eight or nine days), and that he was released after he made his deposition on the 15th or 16th June, and that when he made these depositions and the deposition of the 26th August, the Police were present in Court and no doubt were listening to his depositions. His discharge from custody synchronizes with the making by him of the depositions, but of course there is not proof that he was coerced to say what he did. However, it shows that when the Police got from him the sworn information, he was no longer wanted by them. He had made a deposition after nine days' confinement, and if he retracted it, he might be prosecuted. He accounts for the re-statement of his evidence on the 26th August by saying that he was afraid of being sent again to the Police or of being beaten. In the Sessions Court, he found himself before a superior tribunal and assessors, and was apparently relieved from fear of the Police, and he says that he then told the truth.

No doubt the above observations may be applicable to all or nearly all cases where a witness chooses to deny the truth of his former statement. The difficulty is to ascertain which of the statements of the witness is the truth. A perjured man the witness must be whichever of his statements is acted on and the responsibility of relying on either statement is very great. It seems to me the course adopted by this Court in similar cases is the only safe one, viz., not to rely on either statement unless it is corroborated as to some main material fact of importance by independent evidence. Mr. Justice Morris in *The Queen* v. *Amanulla*(1) states

(1) 12 Beng. L.R., App. 16.

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the rule applicable to such case. He says, "it seems to me that under s. 288, Criminal Procedure Code, a Judge may base his judgment on the evidence given before the Magistrate in the presence of the accused, when there are special and particular reasons for considering that evidence to be honest and true, and when that evidence is to a certain extent corroborated by independent testimony before himself. In the present instance there is really nothing of this kind. There is really no one such substantive fact conclusively proved as can enable the Judge to say with confidence that the evidence given before the Magistrate was true as opposed to what was said before himself."

Now, if it is suggested that the facts that Budden Sahib pointed out the places of alleged burial and of the offence, and of his recognition of the pieces of cumbly and cloth, are corroborative, the answer is that these places and similar pieces of cumbly, &c., had been already shown to the Magistrate and to the Police, and were not discovered owing to Budden Sahib's information. Budden Sahib says he pointed them out by direction of the Police in whose custody he then was. The fact that Vengataswami has not been found either alive or dead is consistent with his being still alive. The evidence of Bakar Ali and others which purport to identify pieces of cumbly and cloth and other articles dug out of the pit is entirely insufficient to identify those articles as belonging to any particular person. I am unable to see that there was any independent satisfactory evidence before the Sessions Judge corroborative of the deposition of Budden Sahib to justify credit being given to the statement of Budden Sahib before the Magistrate, rather than to the evidence of that witness in the Sessions Court. I, therefore, do not think that the evidence of Budden Sahib before the Magistrate can be safely relied on as evidence of the facts stated therein or as corroborative evidence of the retracted confessions and depositions made by the second prisoner.

The conclusion I feel bound to arrive at is that it is not proved, beyond reasonable doubt, that Vengataswami is dead, or that if he is dead, the second prisoner was in any way a party implicated in causing his death. The conviction of, and sentence on, the second prisoner must be reversed.

I feel bound to notice the fact that the Second-class Magistrate has given no explanation why the recorded confessional statement, exhibit J^2, of the 14th June 1886 was taken. The second prisoner had already made the confessional statement,

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exhibit B, of the 4th of June and J^1 of the 6th of June. The statement of the 14th June goes over all the matters already stated in exhibits B and J^1. Many questions are put by the Magistrate which bring out answers that do not enable the accused under s. 342, Criminal Procedure Code, "to explain any circumstances appearing against her," but on the contrary seem calculated, both questions and answers, to supplement the previous story of the second prisoner told against herself and to fasten guilt on the accused—see the question amongst others as to "What was her intention in bringing her husband into the garden." Under s. 342, Criminal Procedure Code, the Magistrate had power for the purpose specified in that section to put questions necessary for that purpose. The examination referred to in s. 364 is subject to the purpose referred to in s. 342. In *Ex parte Virabudra Gaud*(1), and in the case of *Hossein Buksh*(2), and in other cases, it has been decided that the power to put questions to the accused is not given to force an accused to make criminating admissions after searching examinations. The same Magistrate examined the second prisoner on the 15th June—see exhibit J^3—and a second time on that day—see exhibit J^4. Neither of these examinations is certified as or purported to be a confession. No explanation is given why such examinations were had. It does not appear that these examinations were had to enable the second prisoner to explain any circumstances appearing in evidence against her. The examinations drew her on to criminating admissions—see the question as to how there was no blood on the spot of the offence, and the question as to the rustling of the leaves, and the question, "Did you see the wounds on your husband;" also the question was it convenient that she and her husband should have intercourse in her hut; see also the answers to the questions put in exhibit J^4. The answers to these questions, if true, were calculated plainly to supplement the case for the prosecution against her, and to show that she was guilty. The examination of the accused after she had confessed, and the bringing her for examination to the scene of the offence and of the supposed place of burial, require explanation.

(1) 1 M.H.C.R., 199. (2) I.L.R., 6 Cal., 96.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1887. March 17. April 19.

GURUVAPPA (PLAINTIFF), APPELLANT,

and

THIMMA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindú Law—Decree against an undivided brother—Mortgage of joint property.

A, an undivided member of a Hindú family, mortgaged part of the family property by way of conditional sale to B, to secure a loan. B having sued A personally for the amount due, A admitted the mortgage and said he would surrender the property in discharge of the debt, and a decree was passed accordingly. A's undivided brothers intervened in execution:

Held, that the decree not being passed against the joint family or its representative, and not describing the property, which it directed to be delivered to the plantiff by way of absolute sale to be family property, could not be executed against the family property.

SECOND appeal against the decree of W. F. Grahame, Officiating District Judge of Cuddapah, in Appeal Suit No. 3 of 1886, confirming the decree of S. Subba Ráu, District Múnsif of Proddatúr, in Original Suit No. 282 of 1885.

Kondadu, the brother of the defendants, mortgaged certain family property to the plaintiff by way of conditional sale, to secure a debt. The plaintiff sued the mortgagor to recover principal and interest in Original Suit No. 152 of 1885. The mortgage was admitted, and the mortgagor said he was willing to surrender the property; the present defendants, however, intervened under s. 332 of the Code of Civil Procedure and claimed two-thirds of the property as their share, and their claim was allowed. The plaintiff filed this suit to declare his title to the property; the declaration was refused by both the lower Courts.

The plaintiff preferred this second appeal.

Mr. *Párthásaradhi Ayyangár* for appellant argued that the present suit was maintainable and the plaintiff's claim should be allowed if he proved that the mortgage of conditional sale executed

* Second Appeal No. 574 of 1886.

by Kondadu, the brother of the defendants, was executed for the benefit of the family of which the said Kondadu was the managing member; and pointed out that the decree originally obtained by the present plaintiff was not a simple money decree, but one enforcing the sale.

Mr. *Rámasámi Ráju* for respondents.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.)

JUDGMENT.—The respondents had a brother named Kondadu, and in Original Suit No. 152 of 1885, the appellant obtained a decree against him. That decree, however, was not passed against him as the managing member or representative of the joint family. It was founded upon an instrument of mortgage which had been executed by Kondadu; and, although Original Suit No. 152 of 1885 was brought only to recover the mortgage debt, the decree directed, apparently by consent of the parties, that the mortgaged property be given up by way of absolute sale in satisfaction of the debt. On the appellant proceeding to take possession in execution of the decree, the respondents objected on the ground that they were not bound by a decree passed against Kondadu in respect of the property of their joint family. Their objection was allowed, and the appellant brought this suit to establish his right to the possession of the entire property mentioned in the decree inclusive of the respondents' shares. Relying on the decisions reported in *Virarágavamma* v. *Samudrala*(1) and *Umamahéswara* v. *Singaperumál*(2), the District Judge dismissed the suit with costs. In the last-mentioned case, the decree was against a Hindú father, and it is not precisely in point. The first case, however, was one between brothers, and as such, it is similar to the one before us. There it was held that a money decree against one brother who was not impleaded as the managing coparcener or representative of the family did not bind his other brothers, and that no more than the judgment-debtor's share was liable to be attached and sold in execution. It was also held that the question, whether or not the original debt was a family debt, could not be gone into in that suit. It is conceded that if that decision governed the case before us, the second appeal cannot be supported, but it is contended that the

(1) I.L.R., 8 Mad., 208. (2) I.L.R., 8 Mad., 376.

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decree in that case was a mere money decree, whereas the decree in the present suit executes a pre-existing mortgage. Reliance is also placed on the decisions in *Rámákrishna* v. *Namasivaya*(1) and *Narsanna* v. *Gurappa*(2).

The decree in Original Suit No. 152 of 1885 was admittedly not one passed against the joint family or its representative. Nor does it describe the property it directs to be delivered to the plaintiff by way of absolute sale to be family property. The principle laid down by the Privy Council in *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*(3) does not therefore apply to this suit. Nor is the decision in *Rámákrishna* v. *Namasivaya*(1) applicable; for in that case the decree in the first suit was against the father, and the Court held that the execution creditor was at liberty to show in the second suit that the character of the debt was such as to bind the son's interest, because it was not brought on the cause of action litigated in the previous suit. Nor are we prepared to hold that the decision in *Narsanna* v. *Gurappa*(2) is exactly in point. That was also the case of a decree against the father and of the liability of the son's interest in ancestral property to be sold in execution. This Court followed in that case the ruling of the Privy Council in *Mussamut Nanomi Babuasin* v. *Modun Mohun*(4). The ruling was, if in execution of a decree against a father, the purchaser bargains and pays for the entire ancestral property, the whole property would pass by the Court sale, provided that the decree debt was neither vicious nor immoral, because the purchaser might clearly defend his title by showing that the nature of the debt justified the sale in case the sons impugned it in a regular suit. The *ratio decidendi* was that the character of the debt, if it was neither vicious nor immoral, was a valid ground of defence in a fresh suit, and the Judicial Committee observed further in their judgment that the rule derived from the son's pious obligation to pay the father's debt was destructive of the son's independent coparcenary rights. But in *Virarágavamma* v. *Samudrala*(5) it was observed as follows:—"It is true that the liability is shown by the decree to have its origin in the father's debt, but there is nothing on the face of the decree to show that the claim was made or relief granted against the then

(1) I.L.R., 7 Mad., 295. (2) I.L.R., 9 Mad., 424.
(3) L.R., 6 I.A., 233. (4) L.R., 13 I.A., 1.
(5) I.L.R., 8 Mad., 208.

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defendant either in his representative character or as manager of the family, and that if we had felt ourselves at liberty to go beyond the decree, we should have acceded to the contention that the debt was a family debt and binding on the respondents." The possibility of a second suit was not contemplated, because there was no fresh cause of action as in the case of father and son. Again, the decree in Original Suit No. 152 of 1885 does not strictly execute the prior mortgage, but it is a decree by the consent of one coparcener that the mortgage be treated as if it were an absolute sale.

We are of opinion that this second appeal must fail, and we dismiss it with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

MAHOMED SAIB (PLAINTIFF)

and

AGGAS (DEFENDANT).*

1887. April 1, 14.

Civil Procedure Code, s. 468—Army Act of 1881, 44 & 45 Vic. c. 58, ss. 144, 151—Jurisdiction of Small Cause Courts over soldiers.

A sued a soldier to recover a debt not amounting to £30:

Held, that the suit was cognizable by a Court of Small Causes.

Semble.—The Commanding Officer of the defendant is bound to cause the summons of the Small Cause Court to be served on him.

CASE stated under s. 617 of the Code of Civil Procedure, by B. Ramasami Nayudu, District Múnsif of Bellary, in Small Cause Suit No. 667 of 1886.

The case was stated as follows:—

"In Small Cause No. 667 of 1886, the plaintiff, baker Mahomed Saib, brought a suit against Sergeant Aggas of the Ordnance Department for the recovery of a sum of Rs. 6-13-0 for bread supplied to the defendant. The defendant's summons was forwarded to the Commissary of Ordnance, Bellary, along with two other summonses; but they were returned unserved twice by that officer, stating that soldiers are under section 144 of the Army Act

* Referred Case No. 3 of 1887.

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not liable to be sued for any debt unless it exceeds £30. He quotes clause 8, section 190 of the Army Act, 1881, as an authority for the exemption. In a former suit, brought against Sergeant-Major Hill, I held that as he came under the definition of soldier under section 190, clause 6, he was exempt from being sued in this Court.

"My attention is now drawn to a proviso to section 144, clause 5 of the same Act which makes a soldier liable to such action notwithstanding anything in this section after a due notice in writing given to such soldier; and it is alleged by Mr. Shrienes, the plaintiff's vakil, that a notice in writing was given in this case.

"It would appear from a perusal of section 148 of the said Act that suits against soldiers of the regular forces are not cognizable by a Court of Requests. Therefore it appears to me that soldiers are practically not amenable to either forum, if the proviso to clause 5 of section 144 of the Act be not applicable to them. It is conceded that Sergeant Aggas is a soldier under the definition above mentioned; but the question which is urged for their Lordships' consideration is whether this action which is for less than £30 is cognizable by the Court of Small Causes under the proviso to clause 5 of section 144, granting that he is a soldier; and, secondly, is the Commissary of Ordnance right in refusing to serve the summonses, although I referred him to proviso to clause 5 of section 144, because it appears to me that he is bound to serve the summonses, leaving it open to the defendant to raise the plea of jurisdiction. It seems to me that a difficulty arises only in the execution of the decree and not before. The town of Bellary, being a large military station, suits of this kind are often filed in my Court."

Counsel were not retained.

The Court (Collins, C.J., and Brandt, J.) delivered the following

JUDGMENT :—The person against whom baker Mahomed Saib has filed a suit in the Court of the District Múnsif of Bellary on the small cause side of that Court is, it is understood, admittedly "a soldier" within the definition of the word as interpreted in clause 6, section 190 of the Army Act of 1881.

He is, therefore, under s. 144 (1) of that Act not liable to be taken out of Her Majesty's service by any process execution or

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order of any Court of Law, or to be compelled to appear in person before any Court of Law, the debt claimed not exceeding £30.

But under proviso (1) to that section, any person having a cause of action or suit against "a soldier of the regular forces may, after due notice in writing given to the soldier, proceed in such action or suit to judgment, and have execution other than against the person, pay, arms, ammunition, equipments, regimental necessaries or clothing of such soldiers."

There is no difficulty whatever in giving effect to the proviso. Except where the debt exceeds £30, a soldier cannot by any process or order of a Court of Law be taken out of the service, or compelled to appear in Court in person; but where a claim for a debt, damages or sum of money is under that amount, the creditor may proceed to judgment, as in any other case; after judgment where the debt, &c., exceeds £30 over and above all costs of the case, the prohibition contained in section 144 (1) does not apply in the case of decrees for debt, damages or sums of money; but where judgment is given in cases to which the first proviso to that section applies, the judgment-creditor is debarred from executing his decree otherwise than in the limited manner prescribed.

There may be some doubt whether the words in the proviso "may proceed in such action or suit to judgment" are controlled by the words "or to be compelled to appear in person before any Court of Law," but the question is not raised in the reference before us. There is of course nothing to prevent a soldier from so appearing with the permission of his Commanding Officer, if necessary, and Chapter XXXII of the Code of Civil Procedure makes special provision to enable officers and soldiers actually serving in a military capacity to defend suits when they cannot personally appear.

The question referred to us is not affected by section 148 of the Army Act, for the defendant in this case is not serving "beyond the jurisdiction of any Court of Small Causes" and the section deals only with "actions of debt and personal actions against officers and other persons subject to military law, with the exception of persons being soldiers of the regular forces."

The effect of section 151 of the Army Act is to recognize the jurisdiction of Courts of Small Causes in India to the extent of their powers, "in actions of debt and personal actions against all persons subject to military law other than soldiers of the regular forces," and in the case of the latter, *i.e.*, of soldiers of the regular

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forces, to restrict the extent of the powers of those as well as of other Courts, in the manner prescribed by section 144, but not absolutely to exclude such jurisdiction.

As to whether the Commissary of Ordnance, as the Commanding officer of the soldier in question, is bound to serve a copy of the summons upon the defendant it is sufficient to refer to section 468 of the Code of Civil Procedure.

APPELLATE CIVIL.

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

1887. February 18. March 18. April 9.

MOIDIN KUTTI (DEFENDANT No. 3), APPELLANT,

and

KRISHNAN AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

*Civil Procedure Code, s. 30—Malabar Law—Joinder of parties—*Res judicata*—Cancellation of deeds—Declaratory suit—Withdrawal of part of claim.*

A and B, junior members of a Malabar tarwad, sued to cancel certain mortgages executed by their karnavan and senior anandravan on the ground that the secured debt was not binding on the tarwad, and to appoint A to the office of karnavan. The last part of the prayer was withdrawn. The mortgages were executed to secure a decree-debt, the decree having been passed *ex parte* against the late karnavan of the tarwad. No fraud was alleged, but the Lower Courts found that the karnavan had been guilty of fraud in allowing the decree to be passed *ex parte*. The plaintiffs had not been parties to the decree, and the other junior members of the tarwad who had been joined were exempted from liability:

Held, that the nature of the debt was not *res judicata*, and that the plaintiffs were entitled to a declaration that the mortgages in question were invalid as against them.

Held further *per cur.*—All the members of the plaintiffs' tarwad should have been joined actually or constructively; but (Kernan, J., dissenting), the objection as to non-joinder is not essential, but merely formal, and weight should not be attached to it when it is first taken on second appeal.

SECOND appeal against the decree of W. Austin, District Judge of North Malabar, in Appeal Suit No. 660 of 1885, confirming the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in Original Suit No. 10 of 1885.

The plaintiffs were junior members of a Malabar tarwad, of which defendants Nos. 1 and 2 were, respectively, karnavan and

* Second Appeal No. 730 of 1885.

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senior anandravan. The other members of the tarwad were not joined as parties.

This was a suit to cancel certain mortgage deeds executed by defendant No. 1 in conjunction with defendant No. 2 in favor of the remaining defendants on the ground that the secured debts were not contracted for tarwad purposes, and, to appoint plaintiff No. 1, karnavan of the tarwad, in the place of defendant No. 1. The prayer for the removal of the plaintiffs' karnavan was withdrawn before the District Múnsif.

Exhibits II and III, two of the mortgage deeds in question, were executed in satisfaction of a decree on a bond passed in Original Suit No. 157 of 1875 against the plaintiffs' karnavan who did not defend the suit; the decree, however, exempted from liability all the anandravans of the tarwad who were joined as defendants in the suit. The present plaintiffs, however, were not parties.

Defendants Nos. 1 and 2 did not appear.

Defendant No. 3 pleaded that the binding character of the debts secured by the mortgages exhibits II and III was *res judicata*. The remaining defendants asserted mortgage rights over part of the property of the plaintiffs' tarwad. The Subordinate Judge decreed for the plaintiffs as far as concerned exhibits II and III (executed in favor of defendant No. 3) and exhibit XVII (executed in favor of defendant No. 5): ordering that the documents be set aside and declaring the invalidity of the incumbrances created thereunder.

The District Judge confirmed the decree of the Subordinate Judge.

Defendant No. 3 preferred this second appeal against the decree so far as it affected exhibits II and III.

This second appeal came on for hearing before Kernan and Brandt, JJ., when Kernan, J., expressed an opinion that since the plaintiffs were only individual members of a large tarward, and did not purport to sue on behalf of the tarward, they were not entitled to maintain the suit in the absence of the other members of the tarwad, and that the second appeal should be dismissed on this ground.

Brandt, J., not concurring in this opinion, the second appeal was heard by a Bench of three Judges (Kernan, Muttusámi Ayyar and Brandt, JJ.).

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Srinivása Ráu for appellant. The plaintiffs are not entitled to any decree on the plaint, partly on account of non-joinder of the other members of the tarwad, and because the suit, as now framed, is merely for a declaration; nor are they entitled to impugn alienations made by their karnavan and concurred in by their senior anandravan for the purpose of discharging a decree-debt binding on the tarwad. No fraud is alleged against the karnavan, and the binding nature of the debt is *res judicata*. It was further argued that the plaintiffs ought not to have been allowed to withdraw their prayer for the removal of their karnavan.

Sankara Náyar for respondent pointed out that the objection to the plaint on the ground of the non-joinder of the other members of the tarwad was only taken on second appeal, and argued that it was a merely formal objection.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgments of the Court (Kernan, Muttusámi Ayyar and Brandt, JJ.).

KERNAN, J.—The appellant was the defendant No. 3 in Original Suit No. 10 of 1885 on the file of the Subordinate Judge of North Malabar. In that suit, two out of nine or ten members of their tarwad, which is called Nambiattil, are plaintiffs, and the defendants Nos. 1 and 2 are, respectively, the karnavan and senior anandravan of that tarwad. Defendant No. 3 obtained from defendants Nos. 1 and 2, exhibit II, dated 1st April 1882, and exhibit III, dated 24th February 1882, mortgaging to defendant No. 3 certain lands of the tarwad. In the plaint it is alleged that their mortgages were not executed for the purposes of the tarwad, and that they are not binding on it, and prayed that exhibits II, III, IX, XVI and XVII may be cancelled; that defendant No. 1 may be removed from, and plaintiff No. 1 appointed to, the office of karnavan, and that the right of succession of defendant No. 2 may be cancelled. The defence of defendant No. 3, so far as necessary to be now alluded to, was that the lands of the plaintiffs' tarwad had been attached in execution of a decree in Original Suit No. 157 of 1875 obtained by him against the plaintiffs' tarwad for debts due by the plaintiffs' ancestors, and in discharge of the decree debt, exhibits II and III were executed.

The issues framed were (1) whether the deeds (exhibits II and III) were granted for proper tarwad purposes; (2) as to limitation, upon which no question arises.

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The Suit No. 157 of 1875 was brought by defendant No. 3, the appellant here, against the karnavan and seven or eight other members of the plaintiffs' Nambiattil tarwad, and against the karnavan and five or six other members of a branch tarwad called Eledath tarwad, to recover the amount of a debt due by the then karnavan, and the now karnavan and plaintiff contended that both branches of the tarwad were liable to pay the amount.

Evidence was given in that suit by defendant No. 3 (appellant) and his witnesses. The Eledath tarwad resisted the suit and it was dismissed against that tarwad; but at the hearing, the plaintiffs' Nambiattil tarwad did not appear, and a decree was made against the plaintiffs' karnavan on the ground that the debt was contracted for tarwad purposes, and the individual members of the tarwad were held not liable.

The decree in appeal is dated 19th July 1877. Exhibits II and III were executed to discharge that decree.

The plaintiffs were not parties to that Suit No. 157 of 1875, and, although applying the decision of the Full Bench in *Ittiachan* v. *Velappan*(1), they were bound by the decree against their karnavan in his capacity of karnavan, yet they were under the authority of the same decision at liberty to show that the debt for which the decree was obtained was not a tarwad debt.

The suit, as it now stands, after some amendments, is filed to have a declaration that the debt for which the decree was obtained, and in consideration for which exhibits II and III were executed, was not a debt properly due by the plaintiffs' tarwad. Evidence was given on both sides. The appellant and his witnesses were examined and were cross-examined. The appellant was cross-examined as to a deposition of his in Suit No. 157 of 1875. It is not necessary to go into the details of the evidence, as it is clear there was evidence entirely apart from the question of fraud in reference to the decree above referred to, from which it was open to the Court to find that the debt for which the decree in Suit No. 157 of 1875 was obtained was not a debt contracted for proper tarwad purposes. Both Courts came to that conclusion, in fact, and we cannot interfere with that finding. Exhibits II and III were given to appellant on condition that he was to pay a debt to defendant No. 5, which it is found was not paid. In second

(1) I.L.R., 8 Mad., 484.

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appeal it is contended that the decree in Suit No. 157 of 1875 was *res judicata* against the plaintiffs; but under the decision in *Ittiachan* v. *Velappan*(1), it cannot be so considered in a suit in which the plaintiffs, who were not parties to that suit, alleged that the debt was not contracted for tarwad purposes.

It was contended in appeal that "there was not any allegation or proof of fraud on the part of the karnavan or the decree-holder." This ground has reference to the judgment given by the two Lower Courts, to the effect that the conduct of the karnavan in reference to the original debt, and in reference to his not defending Suit No. 157 of 1875, and allowing the decree to pass against him was grossly negligent, if not fraudulent.

The District Judge states that he looks on the conduct of the karnavan in not defending Suit No. 157 of 1875 as a gross fraud.

On this point, I am bound to observe that there was no allegation of fraud in the plaint, and that no relief was prayed on the ground that the decree was obtained through fraud or gross negligence of the karnavan or through any fraud of the appellant. There was no issue on the point. A plaintiff must recover on his allegation and proof, and the evidence and decision of the Court on the facts must be guided by the issues. If it is intended by the plaintiffs to prove that the defendant acted fraudulently, and if it is intended to found relief on that ground, the allegations of fraud should be made in the plaint that the defendant may have an opportunity of meeting it. The only issue was whether the debts were proper family debts of the tarwad and not whether the decree in Suit No. 157 of 1875 was obtained by defendant No. 3 or yielded to by the karnavan by fraud. The act of a man may be mistaken or illegal without fraud. Very great prejudice may arise to suitors if the reasonable rules of pleadings and of procedure are departed from. The findings of the Lower Courts as to the alleged fraud and gross negligence in reference to the decree were, in my judgment, extra-judicial, and do not arise on any facts legally provable on the issues framed.

In the case referred to, *Thenju* v. *Chimmu*(2), the plaintiffs replied that the defendant was guilty of fraud in obtaining the decree. There was an issue on this point. Moreover the party

(1) I.L.R., 8 Mad., 484. (2) I.L.R., 7 Mad., 413.

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who dealt with the karnavan in that case was aware that the latter was acting outside his duty as karnavan.

On the hearing it appeared that the plaintiffs and defendants Nos. 1 and 2 alone of the members of the tarwad are parties to this suit, and it appeared there are others members of the tarwad. It also appeared that the plaintiffs do not in their plaint purport to sue on behalf of the tarwad. The members of the tarwad not parties to this suit are not bound thereby. Under these circumstances, I am of opinion that individual members of the tarwad, as regards tarwad property, have no rights vested in them separate from the tarwad, and that they can only sue as regards tarwad property in a suit when all the members of the tarwad are either joined as plaintiffs or are made parties as defendants to the suit. Members of a tarwad can consent to partition. It is the tarwad alone, as a body, that can sue, and this only for the tarwad, not for the benefit of any individual. The question was thus referred to a Bench composed of Muttusámi Ayyar, Brandt, JJ., and myself, whether the two plaintiffs, being members of a tarwad, are entitled to maintain this suit in the absence of the other members of the tarwad—see *Arundchala* v. *Vythialinga*(1). I am not able to agree in the opinion of my learned colleagues that the plaintiffs in the absence of the rest of the tarwad have any right of suit as regards tarwad property. The tarwad is a *quasi*-corporation, and the individual members have no separate right to, or in respect of, tarwad property, save right of maintenance. A karnavan may sue to be declared karnavan, but all the members of the tarwad should be parties. The right of a karnavan is not separate from the right of the tarwad. He represents in many instances the tarwad, and manages for the tarwad. I do not think that this is a question of procedure. It is one that goes to the root of the plaintiffs' title. If it were a question of procedure, the absence of objection taken would be conclusive, and so would be the answer that this ground is not taken in appeal. Assuming the plaintiffs were entitled to sue, what decree are they entitled to? They did not sue on behalf of the tarwad.

Moreover the decree in Suit No. 157 of 1875 bound defendants Nos. 1 and 2 in this suit, and all the other members of the tarwad who were defendants in that suit. The two Lower Courts *set aside*

(1) I.L.R., 6 Mad., 27.

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the deeds executed by defendants Nos. 1 and 2 in discharge of that decree. The suit was one for declaration only, and no other relief could be given. Again those deeds cannot be set aside altogether as the Courts below have done, as defendants Nos. 1 and 2 are bound thereby. The decrees are wrong in this respect. Then what decree were the plaintiffs entitled to as the result? It would be, as it seems to me, that the deeds are not valid as regards the interest of the plaintiffs in the tarwad property.

MUTTUSÁMI AYYAR, J.—The respondents are two junior members of a Malabar family called the Nambiattil tarwad; and as plaintiffs, they instituted the suit from which this second appeal arises to obtain a declaration that the incumbrances created by their karnavan, the defendant No. 1, under exhibits II, III, IX, XVI, and XVII in favor of defendants Nos. 3, 4, and 5 are not binding upon the tarwad or the tarwad property which those documents purported to encumber. The Subordinate Judge dismissed the claim so far as it related to exhibits IX and XVI, and the plaintiffs preferred no appeal. He decreed, however, the claim so far as it related to exhibits II, III, and XVII, and defendants Nos. 3 and 5, in whose favor they were executed, appealed to the District Court from the decision of the Subordinate Judge. The District Judge concurred in the opinion of the Court of First Instance that neither exhibit XVII nor exhibits II and III created a valid charge on the tarwad property, and dismissed the appeals. Defendant No. 3 alone has preferred a second appeal to this Court from so much of the decrees of the Lower Courts as invalidated exhibits II and III which had been executed in his favor. Exhibit II is a jenm panayom deed executed on the 1st April 1882 for Rs. 1,500 by defendants Nos. 1 and 2, and exhibit III is an otti granted by the same parties for Rs. 750 on the 24th February 1882. Both transactions were concluded in satisfaction of the decree passed in Original Suit No. 157 of 1875 on the file of the Pynad Múnsif against Govindan Nair, the karnavan of defendants Nos. 1 and 2, who was defendant No. 7 in that suit. That decree was founded upon a bond for Rs. 945 executed to the present appellant by one Raroo Nair who belonged to Eledath tarwad, a divided house from the Nambiattil house, and who held the stanom of Karingatical Nair in conjunction with Unichannen Nair who belonged to the respondents' tarwad and succeeded to the stanom on Raroo Nair's death. The appellant brought Suit No. 157 of 1875 against the

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members of the Eledath and Nambiattil houses who were defendants Nos. 2, 6, and 7—15 in that suit respectively. The former defended the suit, and the latter allowed it to be tried *ex parte*, and the appellant only showed at the trial that the debt was contracted for the necessity of the stanom and of the Eledath tarwad. The District Múnsif passed a decree against the then holder of the stanom, the karnavan of Eledath house, and the karnavan of the Nambiattil house, and exempted from liability all the anandravans of both houses who were then included as defendants. The karnavan of the Eledath house appealed from the decree, and it was reversed, so far as it was against him and his tarwad. As the respondents' karnavan did not defend the suit or prefer an appeal, the decree passed against him became final. The respondents who were not parties to the former suit or to exhibits II and III brought the present action. It is found by the Courts below that the decree debt in question is not binding on the tarwad, and that exhibits II and III are invalid, and, upon this finding, the second appeal must be dismissed. It will, however, be observed that defendants Nos. 7 to 15 in Original Suit No. 157 of 1875 were made parties to it as members of their tarwad, and that the respondents, who instituted the present suit, included as defendants only the defendant No. 1 their karnavan, and defendant No. 2 their senior anandravan. But the non-joinder of the other members of the family was not objected to by the appellant either in the Courts below or in his memorandum of second appeal, and it is conceded for him that he has in no way been prejudiced by this non-joinder. The decree appealed against being in favour of the respondents' tarwad, there is also no reason to think that any other member of the respondents' family may litigate the same matter again. But it is suggested that the respondents could not maintain the suit without making all the members of their tarwad either co-plaintiffs or defendants, or following the procedure prescribed by s. 30 of the Code of Civil Procedure, Act X of 1877, and that the objection is one which this Court ought to take in second appeal of its own motion, but in this opinion, I am unable to concur. Assuming that the non-joinder is only an error of procedure it is not a ground upon which we can interfere in second appeal under clause (*c*) of section 584 of Act X of 1877, for it is conceded that the appellant has not been prejudiced by the error. The substantial question then is whether the right which the respondents sought to enforce

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is an individual right or a right which vests in their family only in its collective capacity. Having regard to the family system that obtains in Malabar, I do not consider that a tarwad is a corporate body in the sense that no single member of it has an individual right to enforce. Each member of a tarwad has a right to be maintained in the tarwad house, and this is a personal right. He has also a right, if a male and not incompetent, to succeed to management in the order of seniority, and this is also a personal right. The tarwad property is not partible at the pleasure of any one member, and he cannot maintain a suit to enforce partition because no separate right to demand partition exists. The tarwad property is, however, a common fund for subsistence, and each member is entitled to see that the karnavan to whose management it is entrusted does not exceed his lawful authority and waste it, and this is an individual right vesting in every anandravan by reason of his position as such. If the anandravan is a female, there is the further right to see that the tarwad property is not wasted by the karnavan, and thereby divested from descent to her children. The conception of a tarwad is that of a joint family under the management ordinarily of the senior male, in which the anandravans have each a group of individual rights which they are entitled to enforce individually or collectively either as against the karnavan or his alienee or both. In the case before us, the karnavan and the senior anandravan who executed exhibits II and III and the alienee who accepted them are made defendants, and we cannot say that, as a matter of substantive law, the respondents had no individual rights to sustain the suit. Though other anandravans might not object to the alienation, yet the plaintiffs are entitled to object, and it is therefore a case in which numerous parties have the same interest in the object matter of the suit, but not one in which no one party has a separate right. The others ought to be parties because it is desirable to bring them all before the Court by following the procedure prescribed by section 30 of the Code of Civil Procedure to avoid multiplicity of suits. But the exigency is the outcome of a group of similar or equal rights vesting in the anandravans severally and jointly, and is therefore a matter of procedure. It is said that the relief claimed in the plaint is that the documents in question created no valid charge on the tarwad property, but it should be observed that the right is in its nature to see that the tarwad property is preserved, and

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that the relief claimed is an incident of that right. I agree with Brandt, J., that this second appeal should be dismissed with costs on the ground that as the non-joinder is only an error of procedure, and that, as the respondents were successful, the appellant could not complain that the other members of the tarwad might harass him by litigating the same matter again.

But I entirely concur in the opinion of Kernan, J., that in suits of this kind all the members of the tarwad should ordinarily be brought before the Court by either making them parties or by following the procedure prescribed in section 30 of the Code of Civil Procedure. Otherwise, in many cases, it may be possible for members of the tarwad to bring successive suits on failure of suits brought by one or more members of the tarwad. The necessity for following this procedure in cases in which members of a tarwad are numerous, was pointed out by this Court in *Kombi* v. *Lakshmi*(1), and approved by the Full Bench in *Ittiachan* v. *Velappan*(2). The old practice that obtained in Malabar consisted in one who is karnavan suing and being sued singly in respect of tarwad property, and in each anandravan being permitted to sue to set aside the decision against the karnavan for fraud. It was pointed out by the Full Bench in *Ittiachan* v. *Velappan* that a decree against the karnavan could only bind the tarwad when it is shown by the record itself that the decree passed against him was in his capacity as karnavan, and when the anandravans failed to prove that the decree debt was not binding on the tarwad. This opinion rests also on the rule of procedure that a decree can only operate *inter partes*. While I am clearly of opinion that as a matter of procedure it is in the highest degree desirable in suits instituted by anandravans, in order to check a succession of suits in respect of the same right, to follow the procedure laid down in section 30, so that the question litigated may once for all be determined, I feel precluded from holding that this second appeal should be allowed. The result is that this second appeal must be dismissed with costs.

BRANDT, J.—I am of opinion that this second appeal must be dismissed.

The respondents were not parties to the Suit No. 157 of 1875, and we have decided in *Ittiachan* v. *Velappan*(2) that members of a tarwad, who were not parties to a former suit, are not estopped

(1) I.L.R., 5 Mad., 201. (2) I.L.R., 8 Mad., 484.

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from showing that a debt in respect of which a decree has been passed in a suit against their karnavan as karnavan of the tarwad, is not binding on the tarwad.

The securities evidenced by exhibits II and III were given by defendant No. 1, Chatu Nair, as the karnavan, and defendant No. 2 as senior anandravan of the respondents' Nambiattil tavarai and were accepted by the appellant in lieu of the claim of the latter under the decree which he obtained against Govindan Nair, the then karnavan of the tavarai, in suit No. 157 of 1875.

And the finding of both the Courts below is to the effect that the debt for which that decree was passed was a debt not binding on the respondents' tavarai; that there was in fact no debt which their tavarai could have been compelled to pay; that had the then karnavan not egregiously failed in his duty as such, by neglecting to appear and plead that in the action of the plaintiff in that suit, (the present appellant,) no decree could properly be passed against his tavarai, the appellant must have failed.

In the case of such gross neglect of duty it has been held in *Thenju* v. *Chimmu*(1) and S.A. 982 of 1886 that the decision is not binding on the anandravans who were no parties to the suit.

It is no doubt true that the respondents did not in their plaint specially refer to the fact that the appellant had obtained a decree against the karnavan of their tavarai, and allege that that decree was the result of fraud on his part, or of gross negligence but for which the decree could not have been passed, but in proof that the debts now called in question were incurred for purposes binding on the tavarai, the appellant himself set up and filed in evidence the decree in the former suit, and adduced evidence in this suit in view to prove that the original debt was a debt binding on the Nambiattil tavarai, and I do not see that the appellant has been prejudiced by the irregularity or defect in the pleadings. The result of holding that it is not open to the respondents in this suit to go behind the decree in Suit No. 157 of 1875 would be that a creditor who has obtained a decree which an anandravan not being a party to the former suit might sue to set aside, and succeed in having set aside on the grounds indicated in *Thenju* v. *Chimmu*(2) can, by taking a mortgage or other security in lieu of his decree,

(1) I.L.R., 7 Mad., 413. (2) I.L.R., 7 Mad., see p. 416.

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succeed in doing indirectly that which he could not do if he stood upon his decree.

And if it is open to the respondents to go behind the decree—as I am of opinion that it is—then on the findings of the Courts below, the respondents undoubtedly succeed in showing that the original debt was a debt not binding on their tavarai and are entitled to relief.

Under the decree in this suit the deeds (exhibits II and III) are declared invalid and are set aside. The decree shall be modified by striking out the words "that the deeds II and III be and the same are set aside," and limited strictly to a declaration that the deeds are invalid as against the respondents and their interests in the tarwad property, but that this appeal be dismissed with costs.

The principle on which the decision reported in *Arunáchala* v. *Vythialinga*(1) was based, does not, in my opinion, apply here; the initial mistake was on the part of the appellant in not making all the members of the tarwad parties to his original suit, and it is in consequence of that omission that, in accordance with the principle laid down in the other cases above quoted, it is open to the respondents to maintain this suit; the case might have been different if this were the first occasion on which the family sued for a declaration that a security given by their karnavan was given for a debt not binding on the tarwad. I do not see how this suit can be held not maintainable on the ground stated in *Arunáchala* v. *Vythialinga*, and at the same time given effect to the principle contained in *Ittiachan* v. *Velappan*(2) and other cases above cited; but for the reason above stated, the circumstances being different, there is not, I think, any conflict between the former case and the latter cases.

I quite agree that ordinarily all members of the tarwad should be made parties to suits in which they are interested, actually or constructively, in the manner provided by s. 30 of the Civil Procedure Code; but I am not prepared to reverse the decree and to dismiss the respondents' suit on a ground not taken by the appellant, but with reference to an objection which presented itself to this Court at the hearing of the appeal.

(1) I.L.R., 6 Mad., 27. (2) I.L.R., 8 Mad., 484.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1886. December 7. 1887. April 19.

PARVATHI AND ANOTHER (DEFENDANTS), APPELLANTS,

and

THIRUMALAI (PLAINTIFF), RESPONDENT.*

Hindú Law—Rights of an illegitimate son of a Sudra—Position of legitimate, adoptive, and illegitimate sons and daughter's sons, compared—Construction of a deed of partition—Partial partition—Admissibility in evidence of petitions signed by a person available but not called as witness.

A, the son of a deceased zamíndár, sued B and C, his widow and brother, for possession of the zamíndárí, which was impartible. In order to prove that A was illegitimate, C filed two petitions purporting to have been signed and sent to the Collector of the District by C, in 1871, referring to A's mother as a concubine. C was not examined as a witness:

Held, that their contents were not evidence, but the petitions were themselves evidence to show that a complaint was made as mentioned therein.

In order to prove that C was divided from the late zamíndár, A filed and proved a deed of partition executed by them in respect of their movable property and of a house, which concluded as follows:—"There shall be connection only by relationship, but there shall be no pecuniary connection between us."

Held, that the deed effected only a partial partition, and that the last clause must be referred to the coparcener's right in partible property described in the instrument, and did not operate as a release of any right of succession to impartible property.

A was found to be an illegitimate son of the late zamíndár.

Held, that he could not exclude his father's coparcener or widow from succession to the impartible zamíndárí—*Krishnayyan* v. *Muttusámi*, I.L.R., 7 Mad., 407, and *Kulanthai Natchear* v. *Ramamani* (unreported), in which it was ruled that a widow's claim to inherit would exclude that of an illegitimate son, approved and followed. *Sadu* v. *Báisa*, I.L.R., 4 Bom., 37, and *Jogendro Bhuputi* v. *Nittyanund Man Singh*, I.L.R., 11 Cal., 702, distinguished.

APPEAL against the decree of K. R. Krishna Menon, Subordinate Judge of Tinnevelly, in Original Suit No. 4 of 1884.

This was a suit to recover possession of the impartible zamíndárí of Kollenkondan.

The plaintiff sued as the heir of the late zamíndár who died in 1883. Defendant No. 1 was the widow, and defendant No. 2, the brother of the late zamíndár. All the parties were Sudras.

* Appeal No. 27 of 1886.

The Subordinate Judge decreed as prayed in the plaint, finding (1) on the evidence in the case, including exhibits III and IV (which were two petitions purporting to have been signed and sent to the Collector of the district by defendant No. 2 in 1871, referring to the plaintiff's mother as a concubine,) that plaintiff was the illegitimate son of the late zamíndár; (2) on the construction of exhibit D (a partition deed, the terms of which are set out in the judgment of the High Court) that defendant No. 2 was divided from the late zamíndár; and (3) that according to Hindú law an illegitimate son was among Sudras a preferable heir both to a widow and to even an undivided brother.

The defendants preferred this appeal, and the plaintiff filed a memorandum objecting to the finding that he was illegitimate.

Bháshyam Ayyangár for appellant No. 1.

Subramanya Ayyar for appellant No. 2.

The position of an illegitimate son with regard to other heirs has been wrongly estimated by the Lower Court. Besides the authorities cited in the judgment, reference was made to "Mayne's Hindú Law," s. 465, *Sri Gajapathi Radhika Patta Maha Devi Garu* v. *Sri Gajapathi Nilamani Patta Maha Devi Garu*(1), *Katama Natchiar* v. *The Rajah of Shivagunga*(2). The agreement between the late zamíndár and appellant No. 2 shows on its true construction that defendant No. 2, while he became divided as regards the house and the movable property belonging to the family did not renounce his coparcenary right in the impartible zamíndárí: *Thakur Doyal* v. *Ram Narain Singh*(3), *Muttu Vaduganadha Tévar* v. *Dora Singha Tévar*(4).

The Acting Advocate-General (*Hon. J. H. Spring Branson*) and *Rámá Ráu* for respondent.

The evidence does not prove the illegitimacy of the plaintiff. Exhibits III and IV are no legal evidence against him, inasmuch as defendant No. 2 did not offer himself as witness and swear to the truth of their contents. That the right construction has been put on D is made the more probable by the fact (which was proved), that in 1869 the late zamíndár had an undoubtedly legitimate son, and the defendant No. 2 had accordingly only a claim for maintenance. But even if the plaintiff is illegitimate, he has a preferable

(1) 13 M.I.A., 497. (2) 9 M.I.A., 543.
(3) I.L.R., 8 Cal., 375. (4) I.L.R., 3 Mad., 290, 339.

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claim to a widow or any brother. The texts on the subject have been interpreted to mean that a father can enhance the share of his illegitimate son from a half to a full share, but he cannot refuse him any share: "Manu," chap. IX, ss. 178 and 179; "Mitakshara," chap. I, s. 12(1); "Yájnavalkya," II, slokas 133 and 134(2); "Dhayabhaga," chap. IX, ss. 29 and 30(3); "Dattaka Mimamsa," s. 2, cl. 26(4); "Dattaka Chandrika," s. 30(5); 3 "Jagannatha's Digest," CLXXIV, 1 "Strange's Hindú Law, pp. 57, 69, and 132.

There is also abundant authority in the Courts for the proposition that a dasiputra, who by mere birth, and without any form of legitimation, becomes a member of his father's family, *Pandaiyá Télaver* v. *Puli Télaver*(6), has a right to inherit his father's estate: *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn*(7), *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver*(8), *N. Krishnamma* v. *N. Papa*(9), *Ráhi* v. *Govind Valad Tejá*(10), and *Sarasuti* v. *Mannu*(11).

The present case is distinguishable from *Kishnayyan* v. *Muttusámi*(12) which proceeded on the assumption that a dasiputra is not a sapinda, and also on the ground that the person who claimed through the illegitimate son had treated the widow of the putative father's brother as the sole representative of the family and had left her in possession for many years.

The further arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.).

JUDGMENT.—The contest in this appeal has reference to the right of succession to the zamíndári of Kollenkondan in the district of Tinnevelly. It is conceded that it is an impartible estate capable of being enjoyed but by one member of the family owning it at a time. The last male holder was one Rámasámi Thirumalai Vandaya Tevar, who died on the 23rd September 1883, leaving him surviving the plaintiff (respondent), and the defendants (appellants), his widow and brother. As between the appellants themselves there was no dispute, and the widow acknowledged

(1) Stokes' Hindu Law-books, p. 426.
(2) Mandlik's edition, pp. 219, 220.
(3) Stokes' Hindu Law-books, p. 298.
(4) Stokes' Hindu Law-books, p. 551.
(5) Stokes' Hindu Law-books, p. 659, 660.
(6) 1 M.H.C.R., 478.
(7) 7 M.I.A., 18.
(8) 13 M.I.A., 141.
(9) 4 M.H.C.R., 234.
(10) I.L.R., 1 Bom., 97.
(11) I.L.R., 2 All., 134.
(12) I.L.R., 7 Mad., 467.

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that the brother, who is in possession, is the lawful successor of her husband. It was further admitted for the respondent that, when the late zamíndár died, he left a daughter's son among his survivors, and that that child, named Baggiam, has since died. As the plaintiff in ejectment the respondent had to make out a title superior to that of the widow and the brother, and he alleged that he was the eldest son of the late zamíndár by his second wife, Angammal, and that the second appellant was a divided brother. The appellants denied that the respondent was the son of the late zamíndár at all, and contended that the latter never married Angammal, that she was on the other hand married to one Subbaiya Servai, that the respondent was the issue of that marriage, and that the second appellant was an undivided brother. The Subordinate Judge found that Angammal was the concubine of the late zamíndár, and that the respondent was but his illegitimate son. He also found that Angammal was not married to Subbaiya Servai, and assuming, for the sake of argument, that they had been married as alleged, he observed that their conduct in relation to each other amounted to divorce according to the custom of the caste to which they belonged. He considered further that exhibit D showed that the second appellant was a divided brother, and that it contained a clause, whereby he relinquished all his interest in the zamíndári. Finally, he was of opinion that, according to Hindú law, an illegitimate son was, among Sudras, a preferable heir, both to the widow and to the undivided brother, and, accordingly, he gave judgment for the respondent. Each of the findings and the law laid down by the Subordinate Judge are impeached in appeal. It is also argued, for the respondent, that the grounds on which the Subordinate Judge refused credit to the evidence offered in proof of legitimacy are, by no means, satisfactory.

Illegitimate Son

Illegitimate preferable a widow & divided

As to the question whether the second appellant is a divided or an undivided brother of the late zamíndár, we are unable to support the construction placed by the Subordinate Judge on exhibit D. It is in these terms:—

"After the demise of our father, who was the zamíndár of the said Kollenkondan, in the month of Audi of Andu 1030, you, the eldest son, became entitled as usual to the said zamín and the immovable properties attached thereto; and, after keeping these apart, a division was already effected with regard to the remaining ancestral movable properties, viz., jewels, vessels, cash, cattle and

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grain, &c., in the presence of arbitrators. According to the succession among brothers, Thirumalai Vandaya Tevar and Subramania Tevar got a moiety; yourself and myself divided equally the other moiety. For maintenance, you gave Olugu seed kottas 7 of nunjah and chains 7 of punjah, and Rs. 10-8-0 out of the teerwah (collected) on palmyra trees; you shall give the said Thirumalai Vandaya Tevar and Subramania Tevar Olugu seed kottas 12 of nunjah, chains 12 of punjah, and Rs. 10-8-0 out of the teerwah (collected) on palmyra. While thus holding enjoyment, I complained that no provision was made for the payment of my share in the value of the house, and an agreement was entered into this day in the presence of arbitrators as follows:—According to the award passed by the arbitrators in respect of the expenses of the building of the said house, the amount agreed to by me is Rs. 700. I got this sum of Rs. 700 assigned to one Vembaian in satisfaction of his decree in Registration Suit No. 30 on the file of the Principal Sadr Amin's Court of Tinnevelly, and as you have agreed to pay the same I shall have no claim in future either to the house, our ancestral property in which you are living, or to the movable properties. There shall be connection only by relationship, but there shall be no pecuniary connection between us.

"To this effect this agreement was executed with my free will and consent."

It seems to us to be clear that the zamin, and the immovable properties attached to it, were excluded from partition as property which, according to custom, devolved on the late zamíndár as the eldest son, and that a division was effected between the brothers only in regard to other ancestral properties. The Subordinate Judge has apparently overlooked the rule of Hindú Law that a brother may be divided in interest in regard to some property and at the same time a coparcener in regard to other property. He has laid stress, however, on the clause at the end of the document, viz., "I shall have no claim in future either to the house, our ancestral property, in which you are living, or to the movable properties; there shall be connection (hereafter between us) by relationship only, but there shall be no pecuniary transactions," and concluded that it operated as a release of the right of succession now claimed by the second appellant. This conclusion is at variance with the well-known rule of interpretation that general word

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like those before us are to be construed with reference to the object-matter of the instrument in which they occur, and that they are not to be extended to matters which were not in the contemplation of the parties. It is not denied that, at the date of this instrument, the late zamíndár had a legitimate son by his wife Rakkammal, and that the right which since accrued on his death and that of the zamíndár could not have then been in contemplation. Again, the instrument recited that all partible ancestral property, exclusive of the zamíndári, which devolved solely on the eldest son, had been divided and that some land had been given for maintenance, but that there had been a dispute in regard to the omission to provide a house for the brother. It then went on to set forth the arrangements made in settlement of that dispute according to the decision of certain arbitrators, and contained a clause which released specially all claim to the house in which the zamíndár was living and then contained the general words. In these circumstances, those words can only be referred to the coparcener's right in partible property described in the instrument as adjusted by division or otherwise, but not to property expressly excluded as not partible. The conclusion we come to is that exhibit D neither imports division in regard to the zamíndári which is the property in suit, nor operates as a release of the second appellant's right of succession to it, if any.

The next contention for each party is that the evidence adduced by him or by them ought to have been accepted by the Subordinate Judge as trustworthy. Several witnesses called by the appellants deposed that Angammal married Subbaiya Servai and lived with him for upwards of 10 or 15 years, that the respondent and his brothers and sisters were the children of that marriage, and that Angammal since separated from her husband and lived with the late zamíndár as his concubine for about 15 or 20 years. On the other hand, the respondent's witnesses deposed that the zamíndár married Angammal as his second wife about 30 years ago in the mode prescribed by the custom of the caste for a lawful marriage, that all her children were born to him, and that they and she always lived under the protection of the zamíndár as part of his family and in his house. Apart from this conflict of evidence, there are other difficulties in accepting the case for either party as true in its entirety. We agree with the Subordinate Judge that the oral evidence adduced by the appellants

|| Concubine living in paramour

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is altogether worthless. Angammal's alleged husband, Subbaiya Servai, deposed that, when he was a child of 4 or 5 years of age, Angammal's father and mother tied a tali (token of marriage) in his name; that Angammal had then attained maturity; that the late zamíndár had kept her from that time; that the respondent was born to him, and that the witness was then 10 years old and had no sexual intercourse with Angammal at any time. He does not support the story told by the other witnesses, viz., that Angammal and himself lived together as husband and wife when the respondent and his brothers and sisters were born. His story is also improbable in itself, first, because it was admittedly not usual among Maravars, of whom the late zamíndár was one, to marry a girl who had attained her maturity to a child 4 or 5 years old, and secondly, for the reason that his own parents and relations would have ordinarily considered as revolting the idea of marrying her to their child when it was known that she was to become the zamíndár's mistress forthwith. Again, the story told by the witnesses appears to be questionable when it is considered in connection with the age of Angammal, with the number of children she has had, and in particular with the conduct of the late zamíndár towards them, to which we shall refer presently. As to the oral evidence adduced by the respondent, the Subordinate Judge has accepted it so far as it is corroborated by the conduct of the parties concerned, and refused credit to it so far as it tends to show that there was a legal marriage between the late zamíndár and Angammal, because it could not be reconciled with such conduct. In the deposition made by the late zamíndár in November 1881 in Original Suit 205 of 1881, he stated upon solemn affirmation: "I did not *marry* Angammal. She is living in her own house" (exhibit I). Again, in March 1873, he described Angammal and the respondent as "my concubine and her son" (exhibit C). This document is an instrument of gift which states that six pangus of land were granted by the zamíndár to the concubine and her son, the respondent, for "maintenance," and that the pattá was issued in the name of the latter. In the view that the respondent was regarded by him as his concubine's son, the necessity for this grant is intelligible, but in the view that he was the legitimate son and heir to the zamíndári, the provision was wholly uncalled for. Moreover, in the instrument of mortgage which was executed by Angammal and the respondent in March

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1873, the executants described themselves as "the daughter of Nagaiyan Servai and her son, Subramania Servai" (exhibit V). In a lease executed by the respondent and others in July 1880, the former styled himself as "Subramania Tevar, son of Angam-l, Maravar," (exhibit II). It appears from exhibit A that in August 1883 the respondent was 25 years of age according to the late zamíndár, and it is not unreasonable to account for his conduct in describing himself as the son of his mother by concluding that the contention that he was an illegitimate son is well founded. It is also in evidence that the lands granted to the respondent for his maintenance and that of his mother are still in his possession. The first time when the zamíndár said that the respondent was his "eldest son and heir" was in August 1883, when he addressed the petition, exhibit A, to the Collector during his last illness, and in December next the respondent described himself as the son of the late zamíndár. It is also true that in March 1883 the late zamíndár referred to the respondent as his son in exhibit B. In connection with this change in the zamíndár's conduct, it is suggested that the legitimate son he had by his wife, Rakkammal, died before the zamíndár about January 1883, and that, when he was suffering from an attack of paralysis and enfeebled by protracted illness, Angammal gained ascendency over him and prevailed on him to favor her son, the respondent. It is also suggested for the appellants that from 1869 the second appellant protested against his brother bringing Angammal into the palace, and denounced his connection with her as immoral, and therefore the late zamíndár was inimical to him. The plaint stated that by Rakkammal, the first appellant's co-wife, the late zamíndár had a male child named Muthusámi, and that both the mother and the child died, the former about 14 years and the latter about a year before suit. Exhibits E, III and IV show that from 1871 there was enmity between the late zamíndár and his brother. In this state of mind, enfeebled as it was by protracted illness and affliction and influenced by the respondent and his mother, it was not unnatural that the late zamíndár should have desired that his illegitimate son should succeed him in preference to his brother who was obnoxious to him. On the other hand, it was suggested for the respondent that, so long as Rakkammal lived, she had an ascendency over the zamíndár and contrived to induce him to treat Angammal and her children with injustice, and that it was after her death the zamíndár became

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inclined to do them justice. We are unable to accept this suggestion for several reasons. There is no evidence to indicate that the late zamíndár ever treated them with injustice, and the provision made by him for them shows that, on the contrary, he treated them with kindness. Again, Rakkammal died, according to the plaint, in 1870, or 14 years before suit, and most of the documents in which Angammal was described as a concubine are subsequent to 1870. It was urged that exhibits III and IV are no legal evidence against the respondent, inasmuch as the second appellant did not offer himself as a witness and swear to the truth of their contents. Their contents are certainly no evidence, but they are evidence however to the extent that the second appellant made a complaint as mentioned therein in 1871. The conduct of the late zamíndár, of the respondent and of his mother, prior to the death of Muthusámi, Rakkammal's son, is not consistent with a belief on their part that Angammal was the late zamíndár's wife or that the respondent was his legitimate son. It is conceded that Nagaiya Servai was a watchman on the estate of the late zamíndár, and it is not probable that the latter would have married his watchman's daughter. But it was said by the learned counsel for the respondent that several of his witnesses were the relations of the late zamíndár, and that some were men of great respectability. Of the witnesses who deposed that they saw Angammal married to the late zamíndár, the second witness, Karuppan Servai, is Angammal's paternal uncle, and he is engaged in litigation with the second appellant. The fourth witness, Pichali Servai, is the father of Angammal's cousin. At all events, these two witnesses are in a position to be biassed in respondent's favor. The first witness, Ponnappa Tevan, stated that he was the late zamíndár's aunt's son; the fifth and sixth witnesses deposed that they were his sons-in-law, and the third and eighth witnesses deposed that they were his agents. In a suit like this, in which the rival claimants are connected with the late zamíndár, relations often ordinarily take one side or the other according to their predilection or prejudice, and it is unsafe to place implicit reliance on them unless their evidence is supported, at least not contradicted, by the conduct of the parties concerned and of the last holder of the estate. As to the ninth witness, who is the sub-divisional zamíndár of Ramnad, he no doubt believed that the respondent was the late zamíndár's son, but he was not in a position to have known whether he was legitimate or illegitimate. We see no sufficient

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reason to doubt that the Subordinate Judge has properly held that the respondent was only the illegitimate son of the late zamíndár.

The next question arising for decision is, whether the illegitimate son of a Sudra is heir to his impartible estate in preference to his undivided brother or widow, daughter or daughter's son. The Subordinate Judge considers that he is, but in this opinion we are unable to concur. According to the decisions of a Division Bench of this Court in *Krishnayyan* v. *Muttusámi*(1) and in *Ranoji* v. *Kandoji*,(2) an illegitimate son is not a coparcener with his father's undivided brother or with the sons of such brother, and can neither inherit to them nor demand from them a partition of ancestral property. In both those cases, it was not doubted that the illegitimate son inherits the separate estate of his putative father on failure of a legitimate son, son's son, son's grandson, widow, daughter and daughter's son. Nor was it doubted that he is a co-sharer in such separate property with his legitimate brother and a co-heir with his father's widow, daughter or daughter's son. There is considerable authority, as observed by the Subordinate Judge, in support of those propositions of law, but the question which was considered in those cases was whether to any and what extent the coparcenary law modified the special rule laid down in regard to illegitimate children among Sudras in s. XII, chap. 1 of the Mitakshara. It is clear that the text of Yagnyavalcya and the comments upon it in s. XII, chap. I, refer to the estate of a separated householder. As observed in the case of *Ranoji* v. *Kandoji*,(2) there is no special provision on the subject, and the Courts of Justice have to find a rule of decision by analogy. For this purpose, the illegitimate son may be compared, as to his position in the family, first, with a legitimate son with whom he participates for half a share, secondly, with a daughter and a daughter's son with whom he takes an equal share, thirdly, with an adopted son who, in competition with a legitimate son, takes but an inferior share, and fourthly, with the father's coparcener. Again, in coming to a decision, his legal status under the special rule of Yagnyavalcya may be considered in connection with his ordinary status among all classes of Hindús, and with the legal basis on which the right conceded to him originally rested and still rests.

(1) I.L.R., 7 Mad., 407. (2) I.L.R., 8 Mad., 557.

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As compared with the legitimate son, it will not be disputed that the analogy fails in several material points—(1), a legitimate brother takes an equal share in the father's separate estate, whilst an illegitimate brother participates but for half a share; (2), the kinship of an "Aurasa" extends to the entire joint Hindú family, whereas that of an illegitimate son is confined to his father and mother and their branch of a joint family; (3), the former has a concurrent and co-ordinate right in ancestral property from the time of his birth with his father and father's coparceners, whereas the latter can only take a share at his father's pleasure, and the father cannot, before partition, give coparcenary property of his own authority and otherwise than with the consent of his coparceners; (4), the legitimate son excludes the daughter and the daughter's son, whereas the illegitimate son is an equal sharer with them. The only points in which the analogy apparently holds good are in regard to sonship and to his being a co-sharer with the legitimate son in his father's separate estate. As to the sonship, it is imperfect for want of legitimacy which implies a legal marriage. The nature of the inequality created by this imperfection is indicated by the author of the Dáyabhága in chap. IX, s. 31, wherein he explains the ground on which Yagnyavalcya considers the illegitimate son to be equal to the daughter's son, and observes that the one, though born of an unmarried woman, is the *son of the owner*, and the other, though sprung from a married woman, is only a daughter's son. Thus, the absence of legal marriage between the father and the mother is considered to produce the same effect as severance from the coparcenary family by reason of sex. As to his position as the partaker of a portion of the father's estate with the legitimate son, it was usual, even at the time of the Mitakshara, to allocate portions of the estate in lieu of maintenance for daughters and mothers. Therefore, there can be no doubt that in the case of a competition between a legitimate son and an illegitimate son, the former must be accepted as a preferable heir to an impartible estate.

As compared with a daughter's son, the position of the illegitimate son is that of an equal sharer and a member of the family of the maternal grandfather, and whether he ought to be accepted as a preferable heir to an impartible estate must be determined with reference to other considerations.

As compared with the adopted son, the illegitimate son's position is certainly inferior. The adopted son has a co-ordinate

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interest with his father in ancestral property. He can claim partition from his father. He represents his father as against the father's coparceners. He excludes the widow, the daughter and the daughter's son. In ancient law, he was one of the twelve descriptions of sons, whereas the illegitimate son, as the son of a female slave, had no place among them—see Mit. chap. I, s. XI. If the adopted son takes a smaller share in competition with the legitimate son, it is because he is a mere substitute provided by a fiction of law, whilst in the case of the "Aurasa" there is actual blood relationship consecrated by legal marriage. In default of a legitimate son, the fiction operated as a special rule of law to give the adopted son the same status in the family as against every one of its members. On the other hand, save as to taking an inferior share, there is no analogy between him and the illegitimate son.

Again, as compared with the father's coparcener, the analogy equally fails. The father's coparcener has the same rights as the father had in ancestral estate and the former was not *bound* to consent to the gift by the latter of any part of the ancestral estate to the illegitimate son. It was pointed out in the case of *Ranoji* v. *Kandoji*(1) that the ancestral property descending through the father to the legitimate son may well be subjected to the individual obligations of the father, whilst his own coparceners may stand on a different footing. As compared with the illegitimate son in the higher classes, it is clear that the illegitimate son of a Sudra is always entitled to maintenance as a member of his father's family by reason of his sonship though through an unmarried woman. Yagnyavalcya's text purported to provide a special rule applicable to Sudras as an exception to the general rule, but the rule has reference to the estate of a separated householder. The special rule was therefore considered in *Ranoji* v. *Kandoji*(1) to allocate a portion of the property of a separated father in lieu of maintenance, and it was held that in cases which did not fall under the special text the general rule must prevail.

Having regard to the basis on which the right of the illegitimate son rests, this view does not seem improbable. It was explained in *Krishnayyan* v. *Muttusámi*(2) that an illegitimate son was originally in the position of a slave's son. It was pointed out what the precise position of a continuous concubine was among the fifteen descriptions of slaves enumerated by Narada, and how,

(1) I.L.R., 8 Mad., 557. (2) I.L.R., 7 Mad., 407.

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under a text of Catyayana, the begetting of a son on a female slave first created an obligation to enfranchise the mother and her son, and eventually passed into a manumission by operation of law owing to the importance attached in early times to a son however begotten. Though relationship as son removed the taint of being born of a slave, still the position of the illegitimate son in the joint family, until slavery was abolished by Act V of 1843, was that of a freedman, and in that sense inferior to that of the other members.

We do not therefore see reason to overrule those decisions; and following them, we must hold that the father's undivided brother is a preferable heir to his illegitimate son who ranks as a co-heir with the father's daughter and daughter's son, both of whom are excluded by the father's coparcener. In *Kulanthai Natchear* v. *Ramamani* (*vide* judgment in Regular Appeal No. 86 of 1865), it was held by the High Court that even the widow would exclude the illegitimate son. Having regard to the fact that relationship based on a legal marriage is a ground of preference, and that originally the emancipated slave and her son, though free after the birth of the son, would have ordinarily held an inferior position to that of the regular members of the family, we consider that the illegitimate son was properly postponed to the widow. Our attention was drawn at the hearing of the appeal to two cases, viz., *Sadu* v. *Báiza*(1) and *Jogendro Bhuputi* v. *Nittyanund Man Singh*(2). They may, however, be distinguished from the case before us on the ground that there was no competition in those cases between the illegitimate son and the father's undivided brother. Nor was the ruling of this Court on the subject before the learned Judges who decided those cases. With all deference to them, we do not see our way to adopting the view that the case of an adopted son is analogous to that of an illegitimate son. Following the decisions of this Court, we reverse the decree of the Subordinate Judge and dismiss the respondent's suit with costs, on the ground that he cannot exclude his father's coparcener or widow from succession to the impartible estate in dispute.

(1) I.L.R., 4 Bom., 37. (2) I.L.R., 11 Cal., 702.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1887. April 4, 6.

ÁNDI AND OTHERS (DEFENDANTS), APPELLANTS,

and

THATHA AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code, s. 43—Declaration of title to continue to enjoy separate possession of land—Suit for partition.

The plaintiffs having obtained a declaration of title to continue to enjoy separate possession of certain lands sued the former defendants again for partition of the same lands:

Held, that the suit was unnecessary and should be dismissed.

Per cur. The claim and the remedy mentioned in section 43 of the Code of Civil Procedure have reference to the cause of action litigated in the previous suit.

SECOND appeal against the decree of J. W. Reid, District Judge of Coimbatore, in Appeal Suit No. 86 of 1885, modifying the decree of W. E. T. Clarke, Subordinate Judge, Nílgiris, in Original Suit No. 45 of 1884.

This was a suit for partition of the plaintiffs' share in certain specified lands and for damages. In 1875, the present defendants sued to eject the plaintiffs from specific portions the lands now in question, but the suit was dismissed. Subsequently, in 1882, the present plaintiffs instituted a suit with regard to the same land against the present defendants and obtained a decree declaring that they were entitled to the specific portion in their possession which were described by them, the Court holding that the actual area in their enjoyment and its proportion to the entire area were not matters to be adjudicated on in that suit. The present suit was brought for partition of the lands, and for damages for obstruction to their title; and the plaint alleged that the defendants had been requested by the plaintiffs but had refused to divide the lands according to the shares decreed in their favor in the suit of 1882.

The Subordinate Judge passed a decree in favor of the plaintiffs, but the District Judge modified it on appeal and passed a

* Second Appeal No. 872 of 1886.

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decree "that the defendants have partitioned off to them the part corresponding to the parts marked in Mr. Fraser's plan in burnt sienna (as to which it was in evidence that the plaintiffs had been long in possession), and that the suit for damages be dismissed."

The defendants preferred this second appeal.

Mr. *Wedderburn* for appellants argued that no cause of action was disclosed, and that in any case the suit was barred by section 43 of the Code of Civil Procedure; the plaintiffs obtained substantially no relief beyond what they had obtained in the previous suit, and no obstruction had been offered to their demarcating the area in their possession.

Mr. *Grant* for respondents argued that the plaintiffs had not in fact gained any relief from the former suit; and further objected that the decree for damages should have been allowed to stand.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.).

JUDGMENT.—The parties to this second appeal are Badagas, on the Nílgiri hills, and it arises out of a suit for partition instituted by the respondents against the appellants. The plaint prayed for partition of the plaintiffs' 5, 2, and 3 equal shares in the plaint lands known as Ekkadahalli, Sarvahalli, and Annahalli, and for damages to the extent of Rs. 100. This litigation was commenced in continuation of two previous suits, Original Suits, No. 53 of 1875 and No. 82 of 1882. The first-mentioned suit was brought by the appellants to eject the respondents from specific portions of the three fields named above on the ground that they were demarcated as included in the pattá standing in the names of the former, and that the latter dispossessed them otherwise than in due course of law about eleven months previous to that suit. The Judicial Commissioner found that there was no dispossession as alleged, that the land in dispute had been in the respondents' possession for many years previous to the institution of that suit, that the appellants had no title, and that the respondents' pedigree (which went to show that they were co-sharers with the appellants) was supported by reliable evidence. Upon these findings, the High Court upheld the decree of the Court of first instance which dismissed that suit with costs. It will be observed that the land then in litigation consisted of specific portions of the

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three fields. The respondents then instituted Original Suit No. 82 of 1882 to have it declared that they were entitled to separate enjoyment of 5, 2, and 3 shares in the three fields, and stated that they had been for many years in exclusive possession of 3·45 acres which they said represented those shares. The Court of first instance made a declaration accordingly, adding that such separate possession and enjoyment might be ascertained in execution proceedings. The District Court considered in appeal that that suit was in the nature of a suit for the partition of the respondents' shares. But on second appeal, the High Court held that it was only a suit for a declaratory decree and in that view cancelled the direction contained in the decree of the District Court that the exact area of the portions in the respondents' possession be ascertained in execution, and passed an amended decree, declaring that the respondents were entitled to the specific portions in their possession which were described by them to be 3·45 acres and to represent their 5, 2, and 3 shares in the three fields named in the plaint. In its judgment, the High Court observed that "this was not a suit for partition, but was a suit for a declaration that the land in the respondents' possession has been enjoyed by them for many years in right of inheritance, and that they are entitled to enjoy it in such right by prescriptive title, whatever may be its area, whatever may be its proportion to the entire area." It will be observed that the grounds of decision were that the suit was one for a declaratory decree, and that the declaration to which the respondents were entitled was of title to continue in enjoyment in right of inheritance by reason of the prescriptive title which they had acquired, and that the actual area in their enjoyment and its proportion to the entire area were not matters to be adjudicated upon in that suit. Thereupon the present suit was instituted. The plaint prayed for a partition of the respondents' 5, 2, and 3 equal shares in the three fields mentioned above and for declaration of the areas of the said shares in the said three pieces of land and for Rs. 100, damages for obstruction to their title and to partition, and for the costs of the suit. The Subordinate Judge decreed the claim with costs, but on appeal the District Judge set aside the decree of the Subordinate Judge, so far as it awarded damages, and directed the appellants to pay the respondents' costs on the relief awarded and the respondents to pay the appellants their costs on the amount of damages.

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Both parties object to this decree. It is argued for the appellants that the plaint discloses no cause of action and it is alleged for the respondents that damages should have been decreed.

The ground of action mentioned in paragraph 8 of the plaint is that the defendants have been requested by the plaintiffs to divide the lands according to the shares decreed in their favor but that the defendants have refused to do so. The contention, therefore, that the plaint discloses no cause of action cannot be supported. The right asserted is an incident of an alleged coparcenary, and it was not adjudicated upon in any previous suit. If there were a subsisting coparcenary in regard to the lands mentioned in the plaint and if the respondents were entitled to the shares specified by them, they would be entitled to a decree for partition. As to the objection that the suit is barred by section 43 of the Code of Civil Procedure, it must be observed that the cause of action disclosed by the plaint is distinct from the cause of action in the suit of 1882, and that it has been held that the claim and the remedy mentioned in section 43 have reference to the cause of action litigated in the previous suit, *Pathuma* v. *Ayissa*(1).

As to the merits, the Judge observes that the claim to half shares in the three fields in dispute must be taken as made in ignorance. The averment in the plaint that certain shares were decreed to the respondents in the suit of 1882 is opposed to the judgment of the High Court in that suit pronounced on Second Appeal which declared that the area then mentioned and the shares which it was said to represent were mere matters of description; the Judge therefore properly disallowed the claim to any excess area which was not already in their possession. Nor is the decree of the Judge open to objection, so far as it directs that the plaintiffs have partitioned off to them the portions corresponding to the parts marked in Mr. Fraser's plan in burnt sienna. It simply ascertains the precise area and the position of the land already in the respondents' possession in right of inheritance by prescriptive enjoyment, and thereby avoids future litigation on the ground that the area and the site were not defined by the final decree in the suit of 1882. It is contended, however, that the respondents obtained substantially no further relief beyond what they had in the previous suit and that no obstruction was offered to their

(1) Second Appeal No. 699 of 1883.

demarcating the area in their possession and defining it. The Counsel for the respondents is unable to meet this objection. We must, therefore, hold that this litigation was practically unnecessary. On this ground we decree that the respondents do bear their own costs and pay the appellants' costs throughout, and, with this modification, confirm the decree of the Lower Appellate Court. As to the memorandum of objections, it must be dismissed. The damages claimed were in the nature of a fine claimed for vexatious litigation, and the Judge was right in holding that such claim must be disallowed.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1887. Feb. 14, April 19.

LAKSHMANA AND ANOTHER (DEFENDANTS), APPELLANTS,

and

RÁMACHANDRA (PLAINTIFF), RESPONDENT.*

Landlord and tenant—Forfeiture—Waste—Planting a mango tope on dry land.

In the absence of local custom, tenants are not entitled to convert land under cultivation into a mango grove. Tenants from year to year are not at liberty to change the usual course of husbandry without the consent of the landlord.

SECOND appeal against the decree of J. Kelsall, District Judge of Vizagapatam, in Appeal Suit No. 259 of 1885, reversing the decree of V. A. Narasimha, District Múnsif of Párvatipúr, in Original Suit No. 5 of 1884.

This was a suit to eject the defendants from certain lands of which they were tenants from year to year, on the ground that they had committed waste by planting mango trees on some dry land which formed part of their holding.

The District Múnsif dismissed the suit. His decree was reversed on appeal by the District Judge, who observed :—"The land is dry land, but the plaintiff hopes at some future time to convert it into wet. Whether it will be practicable for him to do so is beside the question. He leased the land to defendants for cultivation and

* Second Appeal No. 647 of 1886.

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has a right to be protected against the defendants so dealing with the land as to unfit it for cultivation now and for the future."

The decree of the District Court directed the defendants to remove the young trees planted, and generally before the end of the current fasli to restore the land to the condition in which it was when leased to them, and "in default of their so doing I direct that from that date they be ejected from the land."

The defendants preferred this second appeal.

Mr. *Michell* for appellants.

Planting mango trees is not waste; and in any case since it was only on the dry land that the mango trees were planted, the forfeiture was incurred, if at all, only in respect of the dry land which bears a distinct and separate rent from that paid in respect of the wet land.

The Acting Advocate-General (Hon. *J. H. Spring Branson*) for the respondent cited *Bholai* v. *The Rajah of Bansi*(1).

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.).

JUDGMENT.—The respondent is renter of the zamíndárí of Merangi under the management of the Court of Wards, and the appellants are raiyats on that estate. Their holding consists partly of wet and partly of dry land assessed at Rs. 83-11-6 and Rs. 10, respectively. In September 1883, they planted a mango tope on a portion of the dry land which was usually cultivated with a dry crop and thereby rendered it unfit for dry cultivation. Thereupon the renter sued to eject them, and the contest was whether they were liable to be ejected on the ground that they planted the mango tope otherwise than with the permission of their landlord. It is found by the Judge that they were only tenants from year to year, that the land converted into mango garden would, if under dry cultivation, ordinarily yield an eight-anna crop, and that there was no special custom in the village in justification of their acts. He came to the conclusion that the appellants were not at liberty so to deal with the land as to render it unfit for cultivation now and for the future, and directed them to remove the young trees planted, fill up the pits dug and generally before the end of the fasli to restore the land to the condition in which it was when it was

(1) I.L.R., 4 All., 174.

LAKSHMANA v. RÁMA-CHANDRA.

leased to them, and in default of their doing so, decreed their ejectment. From this decree the renter has preferred no second appeal and it is not necessary to consider whether the decree is right in ordering a conditional ejectment. To that extent the decree is in the appellants' favor, and we are not prepared to attach weight to the contention that the Judge had no power to grant prospective relief, nor do we consider that in the absence of a local custom, tenants are entitled to convert the land under cultivation into a mango grove without the consent of their landlord and thereby change the nature of the property. As tenants from year to year, the appellants were under the obligation to restore the land in the condition in which it was when it was leased to them, and they were not at liberty to change the usual course of husbandry except with the consent of their landlord. Having regard to the form in which the decree is made, we do not consider them to be entitled to notice after committing waste. The decision of the Judge is right, and we dismiss this second appeal with costs. But in view to giving the appellants sufficient time to comply with the direction contained in the decree, we order that the current fasli mentioned in the decree of the Lower Appellate Court be taken to be the fasli current at the date of this decree.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

QUEEN-EMPRESS

against

JOGAYYA.*

1887. July 8.

Penal Code—Act XLV of 1860, *s.* 504—*Intent to provoke a breach of the peace.*

A abused B to such an extent as to reduce B to a state of abject terror:

Held, that A having given to B such provocation as would under ordinary circumstances have caused a breach of the peace was guilty of an offence under s. 504 of the Penal Code.

THIS case was reported for the orders of the High Court under

* Criminal Revision Case No. 102 of 1887.

EMPRESS v. JOGAYYA.

s. 438 of the Code of Criminal Procedure, by J. Thomson, Acting Sessions Judge of Ganjam.

The accused was convicted by the Second-class Magistrate of Chicacole, under s. 504 of the Penal Code. He appealed to the Principal Assistant Magistrate of Ganjam, who acquitted him, observing that the complainant had been reduced to a state of abject terror by the abusive language of the accused, whose insults were accordingly unlikely to cause him to break the public peace or commit any other offence.

The Sessions Judge submitted the case with the observation that, in order to substantiate a charge under s. 504 of the Penal Code, it was not in his opinion necessary that the "provocation given" should have been accepted by the other party.

Counsel were not instructed.

The Court (Collins, C.J. and Parker, J.) made the following

ORDER :—The accused was convicted of intentionally insulting and thereby giving provocation to the complainant, with the intention, or knowing it to be likely, that such provocation would cause the complainant to break the public peace.

On appeal, this judgment was reversed on the ground that the complainant was in such an abject state of terror that it was impossible to suppose the provocation was likely to cause him to break the public peace.

We agree with the Sessions Judge that the law makes punishable the insulting provocation which, under ordinary circumstances, would cause a breach of the peace to be committed, and that the offender is not protected from the consequences of his acts because the person insulted became too terrified to accept the provocation in the manner intended.

We set aside the acquittal and direct that the appeal be reheard.

APPELLATE CIVIL.

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

SUBRAMANYAN (DEFENDANT No. 1), APPELLANT,

and

KALI AND OTHERS (PLAINTIFFS AND DEFENDANT No. 2), RESPONDENTS.*

1887. January 27. July 12.

Malabar Law—Suit against karnavan and senior female member of a tarwad—Evidence of intention to sue defendants as representatives of the tarwad.

The karnavan and senior female member of a Malabar tarwad executed a hypothecation bond, on which a suit was brought against them asking for the sale of the tarwad property. The defendants had represented the tarwad in other suits, but were not in this case expressly sued in representative capacity. The plaintiff obtained a decree:

Held, that the decree was binding on the tarwad.

SECOND appeal against the decree of H. M. Winterbotham, Acting District Judge of South Malabar, in Appeal Suit No. 977 of 1885, modifying the decree of P. Govinda Menon, District Múnsif of Chowghat in Original Suit No. 336 of 1885.

The plaintiffs, who are members of a Malabar tarwad, sued to set aside the sale of certain land in execution of a mortgage decree obtained in Original Suit No. 460 of 1881 by defendant No. 1 against defendants Nos. 2 and 3, being respectively karnavan and the senior female member of the plaintiff's tarwad. It was admitted that the land sold was the property of the plaintiff's tarwad. But it was denied by the plaintiffs that the decree in question had been obtained against the proper representatives of the tarwad as such, so as to bind the junior members.

Defendant No. 2 did not appear.

The District Múnsif dismissed the suit, but his decree was, so far as concerned the property involved in this second appeal, reversed by the District Judge on the ground that the decree in question had not been passed against the defendant as representing the tarwad.

Defendant No. 1 preferred this second appeal.

Sankaran Náyar for appellant cited *Kannachi* v. *Nárâyana* (I.L.R., 8 Mad., 491), and relied on evidence, showing that

* Second Appeal No. 499 of 1886.

SUBRAMANYAN v. KALI.

defendants Nos. 2 and 3, who had executed the mortgage sued on in Original Suit No. 460 of 1881, had generally represented the tarwad in suits.

Gopala Náyar for respondents argued that the mortgage-decree was not passed against the judgment-debtors in any representative capacity.

The Court (Muttusámi Ayyar and Parker, JJ.) made the following

ORDER:—"It appears from the decree in Original Suit No. 460 of 1881 that the plaint prayed for the sale of tarwad property. This is evidence of an intention on the part of the appellant to sue the defendants in that case as representatives of the tarwad. In *Kannachi* v. *Nárâyana*(1) there was only a decree for rent against two members of the tarwad. Nor did it appear from the proceedings in that suit that the plaintiffs sought to obtain more than a personal decree. Though defendants Nos. 2 and 3 in the case before us joined in the execution of the hypothecation bond on which Original Suit No. 460 of 1881 was brought, it does not necessarily imply that they were not intended to be sued in their representative capacity. It is true that the decree is not in terms against the representatives of the tarwad, but the proceedings show that the appellant intended to hold the tarwad responsible for the debt through its karnavan and the senior female.

"We shall therefore ask the Judge to return a finding on the second issue, viz., whether the decree debt in Original Suit No. 460 of 1881 was contracted for purposes binding on the tarwad."

The issue having been found in the affirmative, the Court on rehearing this second appeal set aside the decree of the District Judge so far as it reversed that of District Múnsif which was accordingly restored.

(1) I.L.R., 8 Mad., 491.

APPELLATE CIVIL.

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

1886. Dec. 20. 1887. April 21.

ACHUTA (PLAINTIFF), APPELLANT,

and

MAMMAVU AND NINE OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, ss. 335, 623—Limitation Act—Act XV of 1877, sch. II, art. 11—Order disallowing claim in execution proceedings—Review of judgment—Malabar law—Personal decree against karnavan.

Where a review of judgment was applied for on the ground of the subsequent publication of the report of a High Court decision on a point of law which arose in the case but which had not been urged at the previous hearing, it was considered that the applicant was not to blame for his omission to bring the decision to the notice of the Court at the first hearing, and the application for review of judgment was granted.

A sued for possession of certain shops belonging to a Malabar tarwad, which had been attached in execution of a personal decree passed against a karnavân in a suit on a private debt. In the execution proceedings, an objection petition was put in stating that the shops were sridhanam and was rejected; and the order of rejection was not appealed against for one year. Respondents Nos. 1 to 4, the husbands of the persons who put in the objection petition, were in possession and were now sued for possession. The plaintiff was assignee of the purchaser at the execution sale:

Held, that upon the facts found the plaintiff acquired nothing under the Court sale.

Per cur. An order rejecting a claim petition under section 335 of the Civil Procedure Code, not being appealed against within one year acquires the force of a decree. *Veláyuthan* v. *Laksmana*, I.L.R., 8 Mad., 506, followed.

SECOND appeal against the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in Appeal Suit No. 342 of 1884, reversing the decree of B. D'Rozario, Acting District Múnsif of Cannanore, in Original Suit No. 462 of 1883.

This was a suit for possession of five shops, together with arrears of rent.

In Original Suit No. 473 of 1876 on the file of the District Múnsif of Cannanore, the present plaintiff obtained, on 20th October 1880, a personal decree against Puckroo Cutty, in execution of which he attached the shops in question, being the property of the Ayamandagath tarwad of which the judgment-debtor was karnavan. Objections were made to the attachment by the wives

* Second Appeal No. 506 of 1885.

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of defendants Nos. 1 to 5 on the ground that the shops had been given away as sridhanam (exhibit L), but the objections were disallowed and the shops were sold in execution of the decree to Anantha Kamati, whose interest was afterwards assigned to the present plaintiff, possession not having been given under the execution sale. Defendants Nos. 6 to 10 were in possession as tenants of defendants Nos. 1 to 5.

The order rejecting the claim petition under section 335 of the Code of Civil Procedure, Act VIII of 1859 (re-enacted in section 335 of the Code of Civil Procedure of 1882) which was filed in this suit as exhibit L, was not appealed against within the period of a year.

The District Múnsif decreed in favor of the plaintiff, but his decree was reversed by the Subordinate Judge on the ground that the decree in the previous suit was not passed against Puckroo Cutty as karnavan, and that the decree debt was not a tarwad debt.

The plaintiff preferred this second appeal which came on for hearing before Hutchins and Parker, JJ., on 21st October 1885 and was dismissed on the ground that the appellant claimed under a merely personal decree.

The appellant filed on the 17th December 1885 a petition for review of the judgment of Hutchins and Parker, JJ., on the ground that the case was governed by the decision of the High Court in *Veláyuthan* v. *Laksmana*, I.L.R., 8 Mad., 506, of which the report had not been published until a month after the hearing of the second appeal. The review petition was admitted by Parker, J., on 6th March 1886 and now came on for hearing before Muttusámi Ayyar and Parker, JJ., Hutchins, J., having meanwhile resigned.

Mr. *Wedderburn* and *Srinivasa Rau* for appellant.

The order rejecting the claim petition (exhibit L) not having been appealed against within a year acquired the force of a decree under the ruling of the High Court in *Veláyuthan* v. *Laksmana*, I.L.R., 8 Mad., 506. The then petitioners would accordingly be estopped from denying the title of the execution purchaser, and the respondents who claimed through them are subject to the same estoppel.

Mr. *K. Brown* and *Sankara Menon* for respondents objected that the subsequent publication of a decision by the High Court was not a sufficient reason for granting a review of judgment and

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cited *Jonmenjoy Mullick* v. *Dassmoney Dassee* (I.L.R., 8 Cal., 700), but this objection was overruled.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Muttusámi Ayyar and Parker, JJ.).

JUDGMENT.—The property in dispute in this case consists of five rooms, which are used as shops by respondents Nos. 5—8 who claim to hold them under respondents Nos. 1—5, and which were similarly used also by defendant No. 7, since deceased. It is conceded that the shops originally belonged to a family in North Malabar called the Ayamandagath tarwad. In Original Suit No. 473 of 1876, on the file of the District Múnsif of Cannanore, the appellant, Achuta Mallen, obtained a money decree against one Puckroo Cutty on the 20th October 1880, and, in execution of it, he attached the shops and some other property. Objections were made to the attachment by the wives of respondents Nos. 1 to 4, and defendant No. 3 since deceased, on the ground that the shops were given away as sridhanam or dower to the former; but their claim was disallowed by the District Múnsif upon investigation, and the shops were thereafter sold in execution. One Anantha Kamati purchased them for Rs. 500 on 25th October 1880, and upon his death his sons transferred their interest to the appellant. On Anantha Kamati proceeding to take possession by right of purchase, he was obstructed by respondents Nos. 1 to 5, and upon his application under section 335 of the Code of Civil Procedure, the District Múnsif referred him to a regular suit in September 1882. As the assignee of the purchaser in execution of the degree in Original Suit No. 473 of 1876, he instituted the present suit, his case being that the decree debt was incurred for tarwad purposes, that the execution-debtor, Puckroo Cutty, represented his tarwad, and that by virtue of the Court sale and of the transfer from the representatives of the purchaser he was entitled to possession. Respondents Nos. 1 to 4 and defendant No. 3 contended that the shops were given to them as sridhanam on the occasion of their marriage to the females of Puckroo Cutty's tarwad, that the decree in Original Suit No. 473 of 1876 and the Court sale did not bind them, that Puckroo Cutty was not the karnavan of the tarwad at the time of the Court sale, and that the decree debt was not contracted for tarwad purposes. It was found by the Subordinate Judge that the decree debt was not a tarwad

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debt, and that the decree was not passed against Puckroo Cutty as the karnavan of his tarwad. He held also that the shops were given as sridhanam to several females of the tarwad, that they were occupied by their tenants (defendants Nos. 6 to 10), and that rent was collected for them by their husbands (respondents Nos. 1 to 4). On these and other grounds the Subordinate Judge dismissed the suit with costs in appeal, and a second appeal was preferred from this decision; but no objection was taken at the hearing of the second appeal in reference to the order (exhibit L) disallowing the claim preferred by the ladies, on whose behalf the respondents profess to hold the shops. The second appeal was dismissed on the ground that the appellant claimed under a personal decree against a karnavan, and that he could not make out a title except against the parties to the decree while the respondents were in possession, and it was found that they had a good title to hold the shops either in their right or in right of their wives.

Thereupon the appellant applied for review of judgment on the ground that the respondents did not contest the above order (exhibit L) within one year, and that by their omission to do so, the order acquired the force of a decree as ruled in *Velá-yuthan* v. *Laksmana*(1). As it appeared that that decision was not published till a month after the hearing of the second appeal, it was considered that the appellant was not to blame for his omission to bring the decision to the notice of the Court when the second appeal was argued, and the application for review of judgment was granted.

The second appeal comes on therefore for disposal again, and it is urged in its support that the shops in dispute are tarwad property, and that the claimants whose objections were disallowed are the wives of respondents Nos. 1—4 and defendant No. 3, and that the respondents themselves have no independent title. It is urged on the other hand for respondents that the objection now taken was not taken at the hearing of the second appeal, and that there was no sufficient ground for granting a review of judgment.

It appears from exhibit L and the written statements on the record, that the right asserted in June 1880 was that arising from a gift of the shops to the wives of respondents Nos. 1—4 and

(1) I.L.R., 8 Mad., 506.

defendant No. 3, whereas the transaction relied upon in the suit was a gift as sridhanam to those respondents themselves made on the occasion of their marriage.

The finding of the Subordinate Judge is that respondents Nos. 5 to 8 and defendant No. 7 are in occupation and respondents Nos. 1—5 collect the rent due to their wives and that the title to which their possession and management are referable is that asserted and disallowed in June 1880. There can be no doubt that, as was held in *B. Krishna Rau* v. *Lakshmana Shanbhogue*(1), when a summary declaration of want of title in the objector is made in answer to a claim made to property under attachment, and when it is not set aside by a regular suit within one year it becomes equivalent to a final adjudication against his right, and the right ceases on the expiration of one year to be available as a ground either of attack or defence. But the parties in whom legal possession vests and who are really interested are, according to the facts found, *not* the respondents Nos. 1—4 or respondents Nos. 5 to 8, but the wives of the former; they are not parties to the suit before us, and if it were necessary to consider this objection to the decree, we might deem it fit to order a new trial after making them parties to the suit.

But upon the facts found by the Lower Appellate Court, the appellant acquired nothing by the Court sale. It is found that the decree debt was not a tarwad debt and that the decree itself was not passed against Puckroo Cutty in his capacity of karnavan and the shops which on appellant's own showing belong to the tarwad could not pass to him by the Court sale. Unless the appellant proved his own title we do not consider that he is entitled to succeed, though it may be that the respondents are in possession without title, and may be liable to be evicted at the suit of the true owner. This was one of the grounds on which the former decision in second appeal proceeded, and we consider that the decision so far as it rests on it is not open to question. Though the respondents cannot plead the title of their wives in favor of the claim, they are not in a worse possession than trespassers, and it is open to them as parties in actual possession to insist that it should not be disturbed until and unless the appellant proves his title.

On this ground we are of opinion that this second appeal must fail and we dismiss it with costs.

(1) I.L.R., 4 Mad., p. 308.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1887. January 11. April 25.

TIMMA AND OTHERS (DEFENDANTS), APPELLANTS,

and

DARAMMA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Aliyasantána law—Partition—Evidence—Admissibility as to pedigree in a document that has been set aside by the Court.

In a suit for division of the property of an extinct divided branch of the family of the parties who were governed by the Aliyasantána law, a written agreement which had been set aside by the Court as against the defendants was offered in evidence by the plaintiff to prove that the parties were of equal grade of relationship, in which case it was admitted that partition was enforceable:

Held, that the written agreement was admissible as evidence of pedigree and that the plaintiff was entitled to the decree sought for.

SECOND appeal against the decree of C. Venkoba Charyár, Subordinate Judge of South Canara, in Appeal Suit No. 147 of 1885, confirming the decree of U. Subba Ráu, District Múnsif of Karkal, in Original Suit No. 120 of 1884.

This was a suit by the plaintiffs to recover a moiety of certain property belonging to one Puvani Surgi, deceased, the last member of a divided branch of the family of the plaintiffs and defendants. The parties were governed by the Aliyasantána law.

In order to prove the relationship of the parties, the plaintiffs relied partly on exhibit J, that document being a certified copy of a kararnama entered into by the plaintiff and an ancestor of defendant No. 1 on 7th August 1877, which had been set aside as against the defendants in a previous suit.

Both the Lower Courts decreed in favor of the plaintiffs, and the defendant preferred this second appeal.

Náráyana Ráu for appellants admitted that a division can be enforced under the Aliyasantána law if the reversioners stand in equal grade of relationship, but argued that in other cases a division is not enforceable and contended that the contents of exhibit J were not admissible as evidence as to the relationship of the parties.

* Second Appeal No. 276 of 1886.

Gópála Ráu for respondents argued that the document was admissible in evidence though invalid as an agreement.

The Subordinate Judge found (on an issue remitted to him by the High Court) that the parties were reversioners of equal grade to the Surgis.

On the receipt of the finding, the Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT:—We must accept the finding.

Though the kararnama J was set aside on other grounds, we see no reason why the relationship therein set forth should not be considered; and though the evidence is partly hearsay, such evidence is admissible on questions of pedigree.

This second appeal fails and we dismiss it with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1886. July 22, 29. Nov. 10.

NÁRÁYANA (DEFENDANT), APPELLANT,

and

MUNI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code, s. 584—Powers of High Court on second appeal—Rent Recovery Act—Madras Act VIII of 1865, ss. 3, 4 and 7—Contents of pattá—Date of tender of pattá.

A landlord within three days of the end of the fasli tendered to a tenant by way of pattá a document containing a statement of account of rent payable in respect of the current fasli:

Held, that the document tendered was a good pattá, and that under local custom a valid tender of pattá may be made at the end of the fasli.

On second appeal by a landlord against a decree of a District Judge, who stated in his judgment that "though the tenant admitted the execution of the muchalká, it was not shown that he dispensed with the pattá;" no objection was taken in the memorandum of appeal that the muchalká, which contained a statement that no pattá was necessary, had been neglected or misconstrued. The High Court ordered that the Judge be asked to take the postscript into his consideration and submit a revised finding.

SECOND appeals against the decrees of H. T. Knox, Acting District Judge of North Arcot, in Appeal Suits Nos. 112 to 122

* Second Appeals Nos. 1006 to 1015 and 1035 of 1885.

NÁRÁYANA v. MUNI.

of 1885, confirming the decrees of J. Andrew, Acting Head Assistant Collector of North Arcot, in Summary Suits Nos. 92 to 101 and 103 of 1884.

These were summary suits by the landlord, under Madras Rent Recovery Act, s. 9, to enforce the acceptance of a pattá, and by the tenants under s. 49 of that Act for the release of property distrained for arrears of rent.

In Summary Suit No. 94 by the tenants, the execution of the muchalká was admitted, and there was a question whether the tender of a pattá was dispensed with. The Lower Court answered this question in the negative, although, a postscript to the muchalká stated, that a pattá was not necessary: and decrees were accordingly passed in favor of the plaintiffs.

In Summary Suits Nos. 96 and 98 by the tenants, it was found by the Lower Courts that no muchalkás had been executed and no proper pattás tendered: and decrees were accordingly passed in favor of the plaintiffs.

In Summary Suits Nos. 92, 93, 95, 97, 99—101 by the tenants, and Summary Suit No. 103 by the landlord, the tenant's case was that the documents tendered as pattás were not in accordance with the provisions of s. 4 of the Madras Rent Recovery Act, on the ground that they were only statements of an account of rent to be paid, and further that the tender had been made too late, viz., nearly at the end of the fasli in question. The Lower Courts recorded findings in accordance with these contentions and passed decrees in favor of the tenants.

The landlord preferred these second appeals.

Mr. *Subramanyam* for appellant. The documents tendered as pattás were lawful pattás, though they were, as the District Judge said, "statements of account of rent payable." Further the tender was lawful, though the fasli in question was about to expire in three days, under a local custom followed for many years by the parties to the suit, by which pattás were tendered only at the close of the fasli when the amount payable by the tenant is ascertained.

Mr. *Párthasardhi Ayyangár* for respondents argued that neither the pattá nor the tender was valid according to the provisions of Act VIII of 1865, ss. 3, 4 and 7, and further with regard to Summary Suit No. 94 that the High Court could not on second appeal go behind the finding of fact that it was not shown that the tenant dispensed with the pattá.

NÁRÁYANA v. MUNI.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J, and Muttusámi Ayyar, J.).

JUDGMENT.—Of these Summary Suits, Nos. 92 to 101 were instituted by certain tenants against their landlord for release of property distrained for arrears of rent under Act VIII of 1865 and Summary Suit No. 103 by a landlord for enforcing the acceptance of a pattá by a tenant. Their case was that the distraint was illegal, and that the landlord failed to comply with the provisions of s. 7 of that Act. This section provides that no legal proceedings taken to enforce the terms of a tenancy shall be sustainable unless pattás and muchalkás have been exchanged, or unless it be proved that the party attempting to enforce the contract had tendered such a puttá or muchalká as the other party was bound to accept, or unless both parties shall have agreed to dispense with pattás and muchalkás. In none of the cases before us have pattá and muchalká been exchanged. The Head Assistant Collector has also found that it was not proved that pattás were tendered, and decreed the claim. On appeal the Judge confirmed the decree but not on the ground mentioned by the Head Assistant Collector.

In Summary Suits Nos. 96 and 98, to which Second Appeals Nos. 1010 and 1012 relate, the District Judge has found that the muchalkás alleged to have been executed by the tenants, had not really been executed by them. It is also found that no proper pattá has been tendered and refused. We accept the finding and dismiss Second Appeals Nos. 1010 and 1012 with costs.

In Summary Suit No. 94, from which the Second Appeal No. 1008 arises, the Judge observed that though the tenant admitted the execution of the muchalká, it was not shown that he dispensed with the pattá. In coming to this finding he has overlooked the postscript in the muchalká, in which it is stated that no pattá is necessary. The District Judge will be asked to take this fact into his consideration and to submit a revised finding.

In the other cases, the District Judge has held that though certain documents were tendered as pattás and refused, they were not pattás but statements of account and that they do not satisfy the requirements of s. 4 of Act VIII of 1865. This section mentions among the particulars which a pattá ought to contain, the amount and nature of the rent payable and the *period at which*

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payments are to be made. Adverting to the words, the period at which payments are to be made, the Judge observes, "the section contemplates a document which will prevent *disputes in the future*, whereas the documents produced as pattás are not intended to regulate or declare the relations of the parties, but only to enable the landlord to recover by summary process, a debt long overdue. Though the tenant might have waived this objection and accepted the document as a pattá, it cannot be said that the tenant was bound on the 27th June to accept as a pattá a document declaring what he ought to have paid months before." It was held by a majority of Judges of this Court that, where pattás were required to be tendered, the tender must be made before the expiration of the fasli for which rent was claimed in the suit: *Gopalasawmy Mudeily* v. *Mukkee Gopalier*(1).

Again, it was held in *Seshádri Áyyangár* v. *Sandanam*(2) that at what precise time these written agreements should be entered into, the Act has not expressly enacted or declared, but that they should be made and exchanged as soon as conveniently may be after the creation and during the existence of the tenancy. The practice of exchanging pattás and muchalkás after the annual settlement is made is observed in several places in the Presidency, and in the case of considerable number of tenants having occupancy rights, the pattá is not the original contract which creates the tenancy and its terms but only a written memorial of the settlement made or to be made for the year on those terms.

The distribution of the amount of rent in instalments in which rent was payable according to usage is not fatal. In cases in which tenants had paid before the annual settlement several instalments on the previous year's demand, the distribution is necessary, as in the case of Government raiyats, to show the amounts for which the landlord was entitled to take credit and the surplus, if any, which should be set off against instalments still due. The construction then placed on section 4, viz., that the pattá may be lawfully tendered before the expiration of the fasli is reasonable regard being had to the usage generally obtaining in places where the amount of rent is ascertained and an annual settlement is made in the course of the fasli. We are, therefore, of opinion that pattás tendered before the expiration of the fasli year for

(1) 7 M.H.C.R., 312. (2) I.L.R., 1 Mad., 146.

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which rent is claimed are lawfully tendered, and set aside the decrees of the Lower Courts in Appeal Suits 112, 113, 115, 117 and 119 to 121 (Summary Suits 92, 93, 95, 97, 99 to 101) and direct that the suits be dismissed with costs, and we reverse the decrees of the Lower Courts in Appeal Suit 122 (Summary Suit 103) and allow plaintiff's claim with costs throughout.

APPELLATE CIVIL.

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

RAMUNNI (PLAINTIFF), APPELLANT,

and

SHANKU (DEFENDANT), RESPONDENT.*

1884. Dec. 16.

Civil Procedure Code, s. 244—Execution proceedings—Revaluation of improvements allowed for in decree.

A mortgagor obtained a decree for redemption on payment of the mortgage amount, together with a further sum assessed as the value of improvements made by the mortgagee. When the decree-holder applied for the execution of the decree it was contended on behalf of the mortgagee that the improvements ought to be revalued as they were at the time of execution of more value than at the date of the decree:

Held, that the mortgagee was entitled to a revaluation in the execution proceedings.

THIS was an appeal against an order of F. H. Wilkinson, District Judge of South Malabar, dated 15th January 1884, rejecting an appeal from an order passed by the District Múnsif of Patambi in Civil Miscellaneous Petition No. 114 of 1883.

In a suit on a mortgage, the Court passed a decree for redemption on payment of principal and interest, together with a sum fixed as the value of certain improvements made by the mortgagee. The value of the improvements increased between the passing and the execution of the decree. The mortgagee accordingly filed a petition in the execution proceedings for a revaluation of the improvements, but his petition was rejected by both the Lower Courts. He accordingly appealed to the High Court.

* Appeal against Appellate Order No. 17 of 1884.

RAMUNNI v. SHANKU.

Sankaran Náyar for appellant.

Respondent did not appear.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (Turner, C.J., and Brandt, J.).

JUDGMENT.—A mortgagee in possession is liable for waste, and if waste is proved, the mortgagor is entitled to have an account taken and the value of the damage deducted from the mortgage debt: *Weatherington* v. *Bankes*(1).

The circumstance that the rights of the parties have been ascertained by a decree does not deprive the mortgagor of his equity if the waste is committed subsequently to the decree. Inasmuch as the mortgagee may be entitled to a deduction which he could ordinarily establish by separate suit, the provisions of section 244 of the Civil Procedure Code appear to us to enable him to require the Court executing the decree to take account of the altered circumstances when application is made for the execution of the decree. This appears to give effect to the policy of the law which is adverse to the institution of a fresh suit; the orders of the Courts below are therefore set aside and the case remanded, costs to abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

1885. Aug. 31.

MAHOMED (PLAINTIFF), APPELLANT,

and

LAKSHMIPATI (DEFENDANT), RESPONDENT.*

Civil Procedure Code, s. 11—Rent Recovery Act—Act VIII of 1865, Madras, ss. 39, 40, 78—Remedy of tenant aggrieved by notice of attachment.

A tenant having received a notice of attachment under s. 39 of the Rent Recovery Act sued in a District Múnsif's Court to have the notice cancelled, no specific damage being alleged:

Held, that the suit did not lie.

SECOND appeal against the decree of T. Weir, Acting District Judge of Madura, in Appeal Suit No. 485 of 1884, reversing the

(1) Sel. Ch. Ca. 31.

* Second Appeal No. 430 of 1885.

MAHOMED v. LAKSHMIPATI.

decree of S. Krishnasámi Ayyar, District Múnsif of Dindigul, in Original Suit No. 479 of 1883.

This was a suit brought by the plaintiff against his landlord alleging that a notice sent to him by the defendant, intimating his intention to sell certain land specified in the plaint as if there were arrears of rent due from the plaintiff, was invalid in law, in that no change of pattá and muchalká or agreement to dispense with such exchange had been made between them; and praying that the notice be cancelled. No specific damage was alleged.

The District Múnsif decreed as prayed, but his decree was reversed on appeal by the District Judge on the ground that it was passed without jurisdiction.

The plaintiff preferred this second appeal.

Rama Ráu for appellant argued that s. 40 of the Rent Recovery Act does not oust the jurisdiction of the ordinary Civil Courts, and that the District Múnsif had jurisdiction to entertain and try the suit under s. 11 of the Code of Civil Procedure. Reference was also made to s. 78 of the Rent Recovery Act in support of this view.

Subramanya Ayyar for respondent argued that s. 78 of the Rent Recovery Act did not apply, the suit being neither to recover money paid nor to obtain damages; and that that Act specially barred the jurisdiction claimed by the District Múnsif under s. 11 of the Code of Civil Procedure; and further, that the suit was barred by limitation.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Hutchins and Parker, JJ.).

JUDGMENT.—The appellant brought this suit in the Múnsif's Court and the relief which he sought was that a notice, intimating his landlord's intention to sell some of his land for arrears of rent, might be cancelled. His case was that there had been no such acceptance, tender, or waiver of a pattá as warranted the landlord's taking proceedings under Act VIII of 1865, and further that the rent claimed was excessive.

The Múnsif granted the relief prayed for with costs. On appeal, the District Judge held that the Múnsif had acted without jurisdiction and dismissed the suit. The contention in this Court is that the Múnsif had jurisdiction and that s. 40, Act VIII of

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1865, does not preclude the Civil Courts from taking cognizance of such a suit.

There is course, no doubt, that a person, aggrieved by any proceedings taken under colour of Act VIII, is at liberty to file his suit for damages either before the Collector (s. 49) or in the ordinary tribunals (s. 78), but the present suit is not one for damages, and the right to resort to the ordinary tribunals is at least limited by the general principle that there must be a cause of action shown, an injurious act producing damage.

Here there is no cause of action alleged. All that is stated is that the landlord sent a notice under s. 39 that he intended to move the Collector to sell certain land unless certain arrears claimed were paid within a month. Section 40 allows a month's grace within which the alleged defaulter may either pay the money or show cause before the Collector why the sale should not be held. In a certain sense, therefore, the notice gives a cause of action before the Collector, for it enables the defaulter to come into the Collector's Court, and indeed requires him to do so within a month, if he has any objection to make. But it gives no cause of action before the ordinary Courts. The Courts are strictly judicial, but the Collector combines judicial and executive functions, being both bound to sell if no objection is raised and the proceedings appear regular, and bound to adjudicate on such objections as may be raised.

Section 40 says that the appeal, *i.e.*, the showing cause against the intention to sell, must be made before the Collector and within a month. It does not say, nor is there anything in the Act to imply, that it may also be made before the ordinary Courts of justice. If it can be made in a Múnsif's Court, it must be under the ordinary law and upon a proper *cause of action shown*. A mere notice does not afford such a cause of action, but if it did, there being no other article in the Limitation Act applicable, the suit might be instituted at any time within six years under the general article 118.

The decree of the Lower Appellate Court is right, and we dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1887. April 25.

SUNDARA AND OTHERS (DEFENDANTS 1—3), APPELLANTS,

and

SUBBÁ AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Valuation of suit—Jurisdiction of District Múnsifs—Suit for declaration of title to paid offices—Withdrawal of claim to some of the offices—Office still claimed involving the right to the others.

In a suit to declare title to four paid offices in a temple, the plaintiffs asked that the issues with regard to three of them should not be tried, but on cross-examination asserted right to them:

Held, that the plaintiffs were not shown to have relinquished their claim on the three offices for the purposes of the suit.

On findings that the fourth office carried with it the right to the other three and that united value of the four offices exceeded the jurisdiction of the District Múnsif:

Held, that the District Múnsif had no jurisdiction to entertain the suit and that the plaint should be returned for presentation in the proper Court.

SECOND appeal from the decree of S. Gopalácháryár, Acting Subordinate Judge of Madura (East), in Appeal Suit No. 300 of 1884, confirming the decree of P. S. Gurumúrthi Ayyar, District Múnsif of Tirumangalam, in Original Suit No. 34 of 1882.

This was a suit for a declaration of the plaintiffs' title to certain offices in the temple of Thiruparangundram, viz., the Stánikum, Archaka, Nirvákum and Parichárakа offices. Issues were framed with regard to each of these offices, but the plaintiffs requested that those relating to the last three should not be tried; plaintiff No. 2 said, however, in cross-examination, that he did not limit his suit to the Stanikum office alone.

The District Múnsif passed a decree declaring the plaintiffs' title to the Stanikum and his decree was confirmed by the Subordinate Judge who made the following observations with regard to this office:—

"The Stanika is something like a superintendent of the temple, and is responsible to higher authorities for the due perform-

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ance by the other officers of their duties and for certain acts to be performed by himself. No lands are attached to that office in particular, but there are certain emoluments, honors and responsibilities attached to it specifically, and although the Stanikum office is a distinct one from the other three offices, Archaka, Parichâraka and Nirvâkum, and one holding the latter need not necessarily and does not often hold the former, it has so happened in this temple that, while there are individual officers for the other duties, the Stanikas strictly so called have also had a right to the other offices."

The defendants preferred this second appeal.

Rámá Ráu, Subramanya Ayyar and *Rámasámi Ayyangár* for appellants argued that the suit was beyond the pecuniary limits of the District Múnsif's jurisdiction, because the emoluments attached to all the offices claimed in the plaint should be considered in deciding the question of jurisdiction and not those attached to Stanikum office only.

Bháshyam Ayyangár and *Rangáchâryár* for respondents *contrà*, on the ground that the declaration had been only asked and granted in respect of the Stanikum office alone.

The Court (Collins, C.J., and Parker, J.) made the following

ORDER:—We can find nothing on the record to show that plaintiffs relinquished their claim to share in the other three offices besides Stanikum, as far as this suit is concerned. There is nothing in writing to show it, and we cannot infer it from a mere request that certain issues need not be tried in the face of the denial of second plaintiff in his cross-examination that he had ever consented to limit the suit to the Stanikum office alone.

If the right to the Stanikum office carries with it the right to the other three in this temple, they must all be valued for the purposes of jurisdiction.

We will ask the Subordinate Judge to return a finding on the issue "what is the value of the suit for purposes of jurisdiction?"

In accordance with the above order, the Subordinate Judge recorded a finding that if the emoluments attached to the Stanikum office alone are to be considered, the valuation is Rs. 70-13-4, and if those appertaining to all four offices are to form the basis for calculation, the valuation exceeds Rs. 2,500, the pecuniary jurisdiction of the District Múnsif.

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This second appeal coming on for rehearing, the Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT:—We must hold that the District Múnsif had no jurisdiction on the ground that the plaint stated that the right to the Stanikum included and carried with it the right to the other three offices. The decrees of the Courts below must be reversed and the plaint returned for presentation in the proper Court. The respondents must pay all costs hitherto incurred.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

LAKSHMANAN AND ANOTHER (PETITIONERS)

and

PERYASÁMI (RESPONDENT).*

1887. April 21.

Civil Procedure Code, s. 599—Limitation Act—Act XV of 1877, s. 12, sch. II, art. 177—Period of limitation for admission of an appeal to Privy Council.

On a petition for leave to appeal to the Privy Council presented on the 8th April, it appeared that the period of six months from the date of the decree to be appealed against had expired on the 23rd of March if the time occupied by the petitioner in getting a copy of the decree was to be computed in that period:

Held, that the petition was barred by limitation.

Per cur. It is not at all clear that the word "ordinarily" in s. 599 of the Code of Civil Procedure does not refer to the circumstance referred to in the second paragraph of that section, viz., when the last day happens to be one on which the Court is closed.

THIS was a petition under s. 599 of the Code of Civil Procedure for liberty to appeal to the Privy Council.

Subramanya Ayyar and *Rangáchâryár* for petitioner.

Respondent was not represented.

The facts of the case and the arguments adduced on this petition appear sufficiently for the purpose of this report from the judgment of the Court (Kernan and Muttusámi Ayyar, JJ.).

JUDGMENT.—This is an application under s. 599, Civil Procedure Code, for liberty to appeal to the Privy Council. The question is, whether the application is in time within that section and art. 177, Limitation Act of 1877.

* Civil Mis. Petition No. 254 of 1886.

LAKSHMANAN v. PERYASÁMI.

The dates are—

Decree pronounced, 23rd September 1885.
Copy applied for by applicant, 11th December 1885.
Stamps called for by officer, 21st January 1886.
Stamps deposited, 25th January 1886.
Copy ready for applicant, 26th January 1886.

The six months' time under s. 599 and art. 177 expired on 23rd March 1886, which was not a day in vacation. This petition was presented on the 8th of April 1886. It was contended that under section 12 of the Limitation Act of 1887, the time occupied by applicant in obtaining a copy of the decree should not be counted in the six months. We are unable to agree to this, as s. 12 only applies to appeals and to applications to appeal as a pauper or for review.

Then it was contended by the applicant that this petition is really an appeal to this Court. But this is clearly not so; the appeal is to be to the Privy Council. It is an application for leave to appeal, and therefore in the schedule to the Limitation Act, it is provided for under the head "applications."

It was again contended that by section 599, it is provided that the application should ordinarily be within six months, and that therefore an exception is thereby allowed in a fit case.

It is not at all clear that the word "ordinarily" does not refer to the circumstance in the second paragraph of that section, viz., when the last day happens to be one on which the Court is closed which would not apply here. But if an exception may be allowed under that term ordinarily, we do not see what circumstances are here to create an exception. The copy of the decree was ready on the 26th of January and the applicant had until the 23rd of March to present his application for leave to appeal.

We are therefore obliged to dismiss this petition and with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

GIYANA SAMBANDHA PANDARA SANNADHI (PLAINTIFF), APPELLANT,

and

KANDASÁMI TAMBIRAN (DEFENDANT), RESPONDENT.*

1886. February 11. 1887. April 6.

Hindú Law—Religious institution—Succession in religious houses and among ascetics—Civil Procedure Code, ss. 44, 146, 147, 539—Suits in respect of religious and charitable trusts—Joinder of claim for movable and immovable property—Form of decree not indicated in the plaint but indicated by the issues—Limitation Act, 1877—Act XV of 1877, s. 10—Act V of 1843—Spiritual slavery of a pupil to his Guru.

This was a suit brought in 1881 with no written consent of the Advocate-General by the head of an Ádhinam for declarations that a Mutt was subject to his control: that he was entitled to appoint a manager: that the present head of the Mutt was not duly appointed and his nomination by his predecessor was invalid; and for delivery of possession of the movable and immovable properties of the Mutt to a nominee of the plaintiff. The claim extended also to religious establishments at Benares and elsewhere connected with the Mutt. The Mutt was founded by a member of the Ádhinam. Many previous heads of the Mutt had agreed to be "slaves" of the head of the Ádhinam, but for over 60 years the head of the Ádhinam had exercised no management over the endowments belonging to the Mutt; and in a suit (compromised) of the year 1854 the present pretentions of the head of the Ádhinam had been denied *in toto*.

The defendant had succeeded in 1880 to the management of the Mutt under the will of his predecessor, dated the same year, and was not a disciple of the Ádhinam.

Held, (1) that the Mutt is affiliated to the Ádhinam, but the head of the Ádhinam is not entitled to appoint to the office of head of the Mutt and is not entitled to an order for delivery of the property of the Mutt to himself or to his appointee;

(2) that on the evidence as to the usage in the establishments in question, the head of the Mutt is entitled to appoint his successor, but his election is limited to members of the Ádhinam; and the head of the Ádhinam is entitled to enforce this rule though he is bound to invest a disciple properly nominated by the head of the Mutt;

(3) that the defendant not being a disciple of the Ádhinam, his appointment is invalid and the head of the Ádhinam is entitled to see that a competent member of the Ádhinam was appointed in his stead;

(4) that the plaintiff is entitled to declarations based on the two last-mentioned findings since they were comprised in the issues framed under ss. 146

* Appeal No. 13 of 1885.

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and 147 of the Code of Civil Procedure, although the appropriate form in which the decree should be passed was not indicated with precision in the plaint itself;

(5) that the suit was barred by limitation in respect of the personal claim to manage the endowments as to which no claim had been put forward for 60 years.

(6) that the suit was not barred by limitation in respect of the claim to set aside the appointment of the defendant (who entered into possession in 1880 under a will, dated in the same year), and to see that a competent member of the Ádhinam be appointed, in spite of the total denial of the claims of the head of the Ádhinam in 1854;

(7) that the consent of the Advocate-General to the suit is not required; the suit having been instituted under the Civil Procedure Code of 1877 and the cause of action not being an alleged breach of trust;

(8) that there is nothing irregular in seeking to recover movable and immovable property in the same suit if the cause of action is the same in respect of both;

(9) that the agreement of the head of the Mutt to become the "slave" of his *guru* could have no legal operation since 1843, and that the adverse possession of the defendant from that year is fatal to any claim of the plaintiff under such agreement.

APPEAL against the decree of M. Cross, Subordinate Judge of Kumbakonam in Original Suit No. 38 of 1881.

The plaintiff was Pandara Sannadhi, and as such the representative for the time being of a religious institution called the Ádhinam at Dharmapuram; and the defendant claimed to be Tambiran of a Mutt at Tiruppananadal.

The case set up by the plaintiff was (i) that the Tiruppanandal Mutt belonged to his Ádhinam; (ii) that the appointment of Tambiran of that Mutt rested with him; (iii) that only Tambirans of his Ádhinam were eligible to be appointed; (iv) that the defendant's succession to that appointment, under the will of his predecessor, was illegal and invalid.

The plaint which disclosed the above case was filed in October 1881, no consent to the institution of the suit having been obtained under s. 539 of the Code of Civil Procedure. The prayer of the plaint, of which the last clause related to both movable and immovable property, was for declarations that (i) the Mutts of Tiruppanandal and Benares are subject to the control of the plaintiff and his successors at Dharmapuram; (ii) the plaintiff and his successors are entitled to appoint and send Tambirans to manage the Mutts in question; (iii) the succession of the defendant was unlawful in that he was not a Tambiran of the Ádhinam at Dharmapuram and was not appointed by the plaintiff and the will of the late Tambiran in his favor was invalid; (iv) the defendant should

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deliver to the plaintiff, or a Tambiran appointed by him the properties of which he was in possession as Tambiran of the Mutt.

The defendant, Komarasámi Tambiran (now represented on the record by the respondent), set up the following defence to the suit in his written statement:—

"The Mutts at Tiruppanandal and Benares and the properties belonging thereto are wholly independent of the Dharmapuram Mutt. The Tambirans thereof have acquired and managed properties on their own account in various parts of India; some in their own names and some for specific charities. They have never accounted to the Pandara Sannadhi of the Dharmapuram Mutt in respect of the properties so acquired.

"The order of succession in the case of the Tiruppanandal Mutt is as follows:—

"The Tambiran of the Tiruppanandal Mutt for the time being usually nominates a Tambiran to act as second or junior Tambiran who takes part in the management of the property during the life-time of the senior Tambiran and succeeds on the death of the senior to his position. Upon the death of Ganapathi Tambiran in November 1853, the then Pandara Sannadhi of the Dharmapuram Mutt, attempted to get possession of the property of the Tiruppanandal Mutt and claimed the right to nominate the successor. Ramalinga Tambiran, who had been nominated second Tambiran and successor by an instrument in writing, dated November 5, 1853, signed by Ganapathi Tambiran, asserted his right to the said Mutt and the properties belonging to it. The then Pandara Sannadhi of the Dharmapuram Mutt proposed to nominate one Ulaganadha Tambiran to be the senior Tambiran in succession to Ganapathi Tambiran, which claim was resisted by the said Ramalinga Tambiran.

"Prior to the death of the said Ramalinga Tambiran he made two appointments of junior Tambiran as successor in 1864 and again in 1867; the said Ramalinga Tambiran by instruments in writing signed by him nominated one Subramanya Tambiran, the second Tambiran and his successor after his death.

"The said Subramanya Tambiran died in theyear 1874, and on the 6th June 1880 by an instrument in writing signed by him, the said Ramalinga Tambiran nominated the defendant to be second Tambiran and his successor. Upon the death of the said Ramalinga Tambiran in 1880, the defendant accordingly became

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the head of the said Tiruppanandal Mutt and took possession of all the properties of the said Mutt; and the immovable properties belonging to the said Mutt in the district of Tanjore have been registered in his name."

The Dharmapuram Adhinam is an ancient religious institution governed for many generations by a succession of Pandara Sannadhis. About 300 years ago, a disciple of this Ádhinam founded a Mutt at Benares, and at the beginning of the eighteenth century, Tillanayaka, another disciple of the Ádhinam founded a Mutt at Tiruppanandal. Tillanayaka was at the time Tambiran or Manager of the Mutt at Benares, his predecessors in which office are mentioned in paragraph 9 of the judgment: in the capacity of Tambiran of his new Mutt at Tiruppanandal, he was succeeded by the persons, whose names are given in paragraph 10 of the judgment. The persons who have occupied the office of Pandara Sannadhi of the Ádhinam at Dharmapuram, since the foundation of the Tiruppanandal Mutt, are enumerated in paragraph 31 of the judgment.

The manner of succession to the office of Tambiran of the Tiruppanandal Mutt was one of the main points at issue with special reference to the will or deed of appointment made by Ramalinga, the last incumbent of that office, in favor of the defendant, and impugned in the plaint. That such deeds of appointment were usual was held by the High Court to be proved by the evidence considered in paragraphs 20 and 21 of their judgment: but the case for the plaintiff was that only Tambirans of his Ádhinam were eligible, and that in any case the appointment was subject to confirmation by the head of the Ádhinam. The question was raised about the time of Ramalinga's succession, and in 1853 he executed an agreement (filed as exhibit H), in which he admitted his subordination to a nominee of the head of the Ádhinam, and the subordination of his Mutt generally to the Ádhinam. This exhibit H is recited in paragraph 48 of the judgment. In the following year the head of the Ádhinam brought a suit (Original Suit No. 3 of 1854) against Ramalinga to establish his right of appointment to the office of Tambiran of the Mutt, &c., but that suit was compromised by the document filed in the present suit as exhibit H19, which is set out in paragraph 49 of the judgment. Sometime after this compromise Ramalinga attempted without success in a suit which was decided by the Privy Council, *sub nom. Kashi*

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Bashi Ramling Swamee v. *Chitumbernath Koomar Swamee* (20 W.R., 217), to get possession of the Benares Mutt on the grounds that it was subordinate to his Mutt, and that its Tambiran was merely his agent; but his claim was rejected partly on the presumption that the newer Mutt at Tiruppanandal was subordinate to the older establishment at Benares. Ramalinga died in September 1880 and the present suit was instituted on the 15th October 1881. The Subordinate Judge held that the Mutts at Tiruppanandal and Benares were independent institutions, and that the head of the Ádhinam at Dharmapuram was neither their owner nor entitled to interfere with their management or with the succession to it and accordingly dismissed the suit.

The plaintiff preferred this appeal against the decree of the Subordinate Judge on the grounds set out at length in paragraph 4 of the judgment. The documents indicated in the grounds of appeal consisted for the most part of reports and letters (see paragraph 77 of the judgment), on which the High Court recorded the findings that there existed between the establishments in question no relation of principal and agent, but only the general relation described in paragraphs 32 and 70 of the judgment. Of the other documents relied on by the appellant—the nature of exhibits H and H19 has been already shown; exhibit R18 is recited and in part set out in paragraph 22 of the judgment and was relied on as an early (1836) assumption on the part of the Pandara Sannadhi of the Ádhinam to appoint the Tambiran of the Mutt.

Mr. *J. H. Spring Branson*, Mr. *Norton*, *Rámá Ráu*, *Rámásami Ayyangár* and *Thiruvenkatachárýár* for the appellant argued that the finding of the Subordinate Judge was not justified by the evidence.

The Acting Advocate-General (Hon. Mr. *Shephard*), *Subramanya Ayyar*, *Bháshyam Ayyangár*, *Kalánarámayyar* and *Pattabhi Rámá Ayyar* for the respondent argued that even if the finding of the Subordinate Judge was erroneous on the evidence, the suit was bad for want of sanction under s. 539 of the Code of Civil Procedure and for misjoinder of causes of action under s. 44 of the Code of Civil Procedure, and also that the suit was barred by limitation.

The further arguments adduced on this appeal appear sufficiently for the purposes of this report, from the judgment of the Court; of which, for convenience of reference, the following synopsis is given:—

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Paragraphs 1–3 state the case, the issues and the grounds of appeal.

Paragraphs 5–8 explain the order of succession in a spiritual family and the constitution of religious houses among Hindús, which subject is reverted to in paragraphs 30, 91 and 93 and the manner of initiation, &c., in the religious houses in question.

Paragraphs 9–67 deal with the history of the Ádhinam and Mutt, the connection between which is summarised in paragraph 32. Paragraph 14 deals with the first period of the history of the Mutt from 1722 to 1798: paragraphs 15–32 with the second period from 1798–1841; paragraphs 33–67 with the third period from 1841.

From paragraph 68 the effect of the evidence is considered with reference to each ground of claim. Paragraph 84 records a finding that the first ground of claim cannot be supported, as the relation of principal and agent has not been shown to exist between Dharmapuram and Tiruppanandal. Paragraph 93 records the following finding as to the usage with regard to succession to management at Tiruppanandal:—

"We hold the managing Tambiran at Tiruppanandal is entitled to select his junior and successor, but subject to the condition that the selection should be made from the disciples of the Ádhinam at Dharmapuram, that the Pandara Sannadhi is to invest the person appointed only when that condition is complied with, and that as the head of an affiliated Ádhinam he is entitled to insist that the character of the Tiruppanandal Mutt as a disciple Mutt or centre of control is maintained in its integrity according to ancient and recognised usage."

Paragraphs 94 and 95 discuss the relief to which the plaintiff was entitled on the above findings.

Paragraphs 96–98 discuss the effect of the deed of compromise, exhibit H19.

Paragraph 99 deals with the question of limitation, also dealt with in paragraph 73; and paragraphs 101 and 102 with the objections that the suit was instituted without the consent of the Advocate-General, and that other causes of action were joined in a suit for the recovery of immovable property. Paragraph 103 relates to an objection that some of the plaint properties were acquired by the Tambirans of Tiruppanandal on their own account, as to which a special issue is directed to be tried.

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JUDGMENT.—1. This is an appeal from the decree of the Subordinate Judge of Kumbakonam, who dismissed the appellant's suit in regard to two Mutts, one situated at Tiruppanandal and the other at Benares. The suit was commenced on the 15th October 1881 by the plaintiff, now appellant, as the representative for the time being of the religious institution called the Ádhinam at Dharmapuram in the district of Tanjore. According to the appellant, the properties in suit are the endowments founded in support of the Mutts and various charities performed at Benares, Rameswaram and Chidambaram and in a few other places, and in the charge and under the management of the Tambirans or representatives of the Mutt called the Benares Mutt at Tiruppanandal in the same district. The last lawful manager of this Mutt was one Ramalinga Tambiran, and upon his death in September 1880 a dispute arose in regard to the right of succession to management, and it has led to this litigation. In his plaint the appellant prayed for a declaration that the Mutts at Tiruppanandal and Benares are subject to his control and that of his successors at Dharmapuram, that they are entitled to appoint and send Tambirans to manage them, that the respondent's succession was unlawful, as he was not a Tambiran attached to the Ádhinam at Dharmapuram and as he was not appointed by the appellant, and that the will executed by Ramalinga Tambiran in respondent's favor had no legal force. He prayed also for a direction that the respondent do deliver the properties in suit either to him or to a Tambiran whom *he* may appoint as Ramalinga's successor.

2. The appellant's case was (i) that the Mutts at Benares and Tiruppanandal and their endowments, together with the charities and their endowments administered by the heads of those Mutts, belonged to the Ádhinam at Dharmapuram, and that the Pandara Sannadhi or the head of the Ádhinam was their owner; (ii) that he was entitled to appoint Tambirans for those Mutts according to usage; (iii) that none but a Tambiran of the Dharmapuram Ádhinam was eligible for such appointment; (iv) that the respondent's succession was contrary to the usage of the institutions, and that the will left in his favor by Ramalinga Tambiran was invalid. It was not denied that the respondent was the Tambiran of the Ádhinam at Tiruvavadutorai at the date of his appointment, but it was contended that, notwithstanding that circumstance, his appointment was perfectly lawful. He pleaded that the Mutts in

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dispute were independent institutions in no way subject to the appellant's control, that the Ádhinam at Dharmapuram had no right whatever in connection with them, that, according to usage, each Tambiran at Tiruppanandal appointed another Tambiran as his junior during his life and as his successor after his death, that the succession to management was regulated only by such appointment, that Ramalinga Tambiran appointed him by will as his junior and successor, and that his appointment and succession were in accordance with the recognized usage of the institution.

3. He raised also several other objections to the claim set up by the appellant. They were—1st, that the appellant was not competent to maintain this suit; 2ndly, that it was barred by limitation; 3rdly, that parts of the properties in dispute belonged to Ramalinga Tambiran; 4thly, that a portion was not in the respondent's possession as alleged in the plaint; and, 5thly, that the appellant was not entitled to the relief claimed by him in whole or in part. The several questions arising for decision in this suit are indicated by the following issues framed by the Subordinate Court:—

i. Whether the plaintiff is entitled to maintain this suit as the Pandara Sannadhi of the Dharmapuram Mutt?

ii. Whether the Tiruppanandal and the Benares Mutts are or are not subordinate and appurtenant to the Dharmapuram Mutt, and whether the Pandara Sannadhis of Dharmapuram have any interest in or control over the property of the Tiruppanandal and Benares Mutts and of the Mutts belonging thereto or connected therewith?

iii. Whether, as admitted by the defendant, he having received kashayam from the Tiruvavadutorai Mutt, he became a Tambiran of that Mutt and could not validly be appointed to the Tiruppanandal and Benares Mutts without his becoming a Tambiran of Dharmapuram Mutt by receiving mantra kashayam from the Dharmapuram Mutt?

iv. Whether the right of appointing Tambirans for the Benares and Tiruppanandal Mutts does or does not belong to the Dharmapuram Pandara Sannadhi for the time being?

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v. Whether the appointment of the defendant by Ramalinga Tambiran was valid?

vi. Whether, if the appointment of the defendant was not valid, the plaintiff is entitled to any relief in this suit?

vii. Whether the plaintiff is entitled to recover the property sued for or any part of it?

viii. Whether the plaintiff is entitled to the declaration asked for in the plaint?

ix. Whether the property not admitted nor mentioned in the defendant's written statement is in his possession?

x. Whether the suit is barred by limitation?

xi. Whether the plaintiff is entitled to any, and what relief?

4. The late Subordinate Judge of Kumbakonam, who tried the suit, held that the Mutts at Tiruppanandal and Benares were independent institutions, and that the head of the Ádhinam at Dharmapuram was neither their owner nor entitled to interfere with their management or with the succession to it, and upon that ground he dismissed it with costs without proceeding to consider the other issues framed for decision. From this decree the plaintiff has appealed, and his grounds of objection are—

i. That the decree is contrary to law and the weight of evidence;

ii. That due legal effect has not been given to the endowment deeds produced by the appellant, whilst undue weight has been attached to those produced by the respondent;

iii. That the numerous letters and voluminous correspondence on which the appellant relied to prove the subordination of the Tambirans of Tiruppanandal to the Pandara Sannadhi at Dharmapuram have not properly been considered;

iv. That exhibits R18 and H19 have been misconstrued, and that exhibits J, E15, M9, N9, and S4, and the documents filed in connection with exhibit S4, have not been noticed by the Subordinate Judge;

v. That there is no satisfactory evidence to support the finding that the agreement, filed as exhibit H, was obtained by coercion and that it could not be and was not set aside by any Magistrate;

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vi. That the exhibits mentioned in paragraphs 43, 46, 47, 48, 50, 52, 53, 54, 55, 65, 67, 71, 72, 73, 76, 80, 81, 82, 86, 93, 94 and 98 of the original judgment have been improperly admitted as evidence against the appellant, and that undue legal effect has been given to them;

vii. That the exhibits produced to show that the appellant's predecessor appointed Ganapati Tambiran have not been noticed by the Subordinate Judge; and

viii. That the procedure prescribed by s. 204 of the Code of Civil Procedure has not been followed.

5. The Subordinate Judge has dealt with the appellant's claim on the merits and considered it unnecessary to decide the other questions at issue, and it is therefore desirable to see if his decision can be supported. The parties to this appeal are ascetics or hermits who profess to have renounced all family ties and all desire for wealth and women, and devoted themselves to religious study, contemplation and service in view to secure immunity from future births (to which, according to their faith, they believe they are liable,) and spiritual happiness. The class to which they belong has existed as a part of the social system obtaining among the Hindús from a very early period. In his Smruti, Yájñavalkya recognized this class, and adverting to it, the author of the Mitákshará has propounded a special rule which, in the absence of special usage, governs the succession to persons devoted to religion(1). The rule is that when a layman becomes an ascetic, devotes himself to religion, and abjures secular relations of life in the mode prescribed by usage, he passes from his natural into a spiritual family. He ceases to be a member of the former and becomes a member of the latter. As his heirs in his natural family are certain relations in the lines of descent and ascent, and, on their failure, certain collateral relations, so by analogy his heirs in his spiritual family are his preceptor, his disciple and his spiritual brother and associate in holiness. The author of the Mitakshara says, "the heirs to the property of a hermit, of an ascetic and of a student in theology are in order the preceptor, a virtuous pupil and a spiritual brother belonging to the same hermitage, and, on their failure, any one associated in holiness." In paragraph 4 he

(1) Mitákshará, chap. II, s. 8. Stoke's Hindú Law Books, p. 450.

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explains what is meant by a virtuous pupil, and in paragraph 5 he states that a spiritual brother associate in holiness is one who is engaged as a brotherly companion, and who is also an associate in holiness as belonging to the same hermitage. Though the term preceptor is not explained by him, it is generally understood to refer to the person who admits him to the order of ascetics and initiates him in its cardinal doctrine.

6. Having referred to the notion of a spiritual family as embodied in the Mitákshará law and to the special rule of succession applicable to the individual property of an ascetic, it is desirable to explain what is meant by a Mutt and by an Ádhinam and by the terms Tambiran and Pandara Sannadhi.

If an ascetic or a hermit is a Brahman, he is called a Yati or Sanniyasi; if a Sudra, he is called a Paradesi, and if the Sudra is attached to an Ádhinam, he is called a Tambiran, and if he is at the head of the Ádhinam, he is called the Pandara Sannadhi. For the purposes of this appeal, it is necessary to refer to two Ádhinams, the one at Dharmapuram, of which the appellant is the Pandara Sannadhi, and the other at Tiruvavadutorai, of which the respondent was a Tambiran prior to his appointment by Ramalinga to Tiruppanandal. The term "Ádhinam" signifies the seat of the chief ascetic at the head of a religious association or brotherhood or a holy crowd, and takes its name from the village in which it is situated. The origin of these associations, their constitution and development form part of the history of the establishment and spread of the Brahminical systems of religious doctrine among the Sudra communities in Southern India. Originally, the ascetic, who renounced the world and devoted himself to religion, confined his attention to the study of theology, to imparting religious instruction to his disciples, and to complying with the ordinances prescribed for the guidance of his order. He then owned no property, except his cloths, sandals, religious books and the idol he kept for his personal worship and a few other articles of trifling value which were absolutely necessary(1). He had no fixed residence and moved from village to village, accepting such lodgings and food as were provided for him by pious laymen who were in their turn enjoined by the Shastras to honor and support him. This is the mode in which Brahman Sanniyasis live

(1) Mitákshará, chap. II, s. 8, para. 8. Stoke's Hindú Law Books, p. 450.

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even at the present time. In several villages pious laymen erected buildings for the residence of hermits when they visited their villages, and these were called Mutts. In its original and narrow sense, then, the term Mutt signified the residence of an ascetic or Sanniyasi or Paradesi.

But when the Buddhists assailed the Brahminical religion and when Sankarachariyar, the founder of the Advaita or non-dualistic school of philosophy, ultimately prevailed against them, he established some Mutts in order to maintain and strengthen the doctrine and the system of religious philosophy he taught, Sanniyasis being placed at the head of those institutions. After Sankarachariyar, the founders of the Vaishnava, Madhva and other schools of religious philosophy in this Presidency established Mutts for a similar purpose. In former times these institutions exercised considerable influence over the laymen in their neighbourhood, they became centres of classical and religious learning and materially aided in promoting religious knowledge and in encouraging religious and other charities. The ascetics who presided over them were held, owing to their position as religious preceptors and often also in consequence of their own learning and piety, in great reverence by Hindú princes and noblemen, who from time to time made large presents to them and endowed the Mutts under their control with grants of land. Thus, a class of endowed Mutts came into existence in the nature of monastic institutions, presided over by ascetics or Sanniyasis who had renounced the world. Thus, the ascetic who originally owned little or no property, came to own the Matam under his charge and its endowment, in trust for the maintenance of the Mutt, for his own support, for that of his disciples, and for the performance of religious and other charities in connection with it, according to usage. When the Brahminical creed and system of religious doctrine were adopted by Sudras in the Tamil districts, the order of ascetics and the practice of instituting Mutts as centres of religious study, instruction and charity, came into prevalence amongst them. Pious and learned ascetics among them, actuated by a desire to disseminate religious knowledge and promote religious charity, established Mutts in Tinnevelly, Madura, Trichinopoly, Tanjore and elsewhere. Among others, Giyana Sambandha Pandara Sannadhi established the original Mutt, which has since developed itself into the Ádhinam now at Dharmapuram. The

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distinction between an Ádhinam and a Mutt as an endowed institution consists in the latter being an isolated institution, whilst the former is the central institution from which the chief ascetic exercises control and supervision over a group of endowed institutions and religious trusts committed to his management and subject to his jurisdiction as the responsible trustee. It will be remembered that the ascetic is prevented by the usage of his order from owning or managing property for personal enjoyment. The administration of a Matam endowment presided over by an ascetic was an exception to the rule recognized on the ground that such administration was in furtherance of the cause of religion. But among Sudras the administration of temple endowments, of endowments instituted for special services in Hindú temples, and of endowments founded for the support of religious and other charities either in particular places or on particular occasions, was also considered to fall under the exception. After Giyana Sambandha Pandara Sannadhi established the original Matam at Dharmapuram, several temples and their endowments and other endowments of the descriptions mentioned above came under the management of his successors. The endowments to be administered and the institutions to be managed in Tinnevelly and in Tanjore were so many and so far from each other, that it was long since found necessary to establish a subordinate Ádhinam at Sivasilum in Tinnevelly and to place a junior Pandara Sannadhi at its head. The junior exercised co-ordinate powers, but he was always subject to the supervision and control of the senior at Dharmapuram. The Ádhinam at Tiruvavadutorai was founded by a separate ascetic, and it has also a junior or subordinate Ádhinam in the district of Tinnevelly. The endowments subject to its jurisdiction and control are of the same description and character, consist of Matam endowments, temple endowments, katlais or endowments for special services in particular temples, and other endowments in the nature of religious and charitable trusts.

It is necessary to describe next the procedure followed in the Ádhinam at Dharmapuram in attaching Tambirans to it in order to form an idea of the mode in which the religious association is constituted. When a layman desires to become an ascetic, he is required to undergo a probation. On the commencement of the probation, he usually wears a red cloth called yattrai kashayam. After the probationer makes some progress in religious study, he

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is taught a form of prayer called the samayam. At a later stage he is taught another form of prayer called the visesham. The duration of the probation depends on the discretion of the Pandara Sannadhi, and so long as the probation continues, the probationer is at liberty to change his mind and to return to his family. On the Pandara Sannadhi being satisfied with the probationer, the former summons the latter on an appointed day to the room in his Mutt which is set apart for the worship of his titular deity called Chokkalingam. There, in the presence of the idol, the probationer is formally asked if he gives up his family and his desire for women and land; and if he gives an answer in the affirmative, the answer is accepted as a solemn renunciation of the world. The Pandara Sannadhi then teaches him the mula mantram, or the distinctive doctrine of his order and of the Ádhinam, invests him with a consecrated cloth and gives for his personal worship an idol made of sandal powder. The teaching of the mula mantram, or the distinctive text, is called upadesam or initiation. The cloth which is given on the occasion as the visible symbol of initiation is called mantra kashayam, or consecrated red cloth. The image of sandal powder which is given for worship is called the Partiva Puja. According to the appellant a ceremony is then performed. It is called the Dattam or gift. At this ceremony, the Tambiran or disciple solemnly makes a gift of his body, soul and wealth to the Pandara Sannadhi. It is in evident allusion to this ceremony that Tambirans speak of themselves and other Tambirans as the slaves of the Pandara Sannadhi. After his ordination, the Tambiran remains in the principal Matam and continues his religious study until he becomes a learned ascetic. He is expected also to study the history of the Ádhinam, to visit its subordinate Mutts, to undertake pilgrimages and to advance to the best of his power the cause of religion and charity. The collective body of Tambirans, with the senior and junior Pandara Sannadhis attached to an Ádhinam, constitute together the holy crowd or association of that particular Ádhinam. From amongst them, the Pandara Sannadhi usually selects persons to administer local endowments and charities under his supervision and control, and when a selection is made he gives the nominee a special kashayam, or a superior red cloth, as a mark of distinction. It is alleged for the appellant that in the case of Tambirans appointed to the Mutts in Nepaul, at Benares, Tiruppanandal and

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Achiram in Travancore, all of which are claimed in this suit as belonging to the Ádhinam at Dharmapuram, special marks of distinction are conferred upon the nominee, such as some clothes and ornaments, &c., called sundaravadam, arukatti and a crystal lingam for worship called Odayavar Puja. Before Tambirans are deputed to important Mutts and charities, they are also taught a further form of prayer called dikshakurai, probably in view to raise their religious sanctity in the estimation of laymen.

7. Though a similar procedure is followed in the Ádhinam at Tiruvavadutorai, there is considerable oral evidence to the effect that it differs in several minor particulars. Several witnesses say that the mula mantram, or the text taught at that institution, is not the same. It appears also that at Tiruvavadutorai a ceremony called Nirvana Diksha is performed, and it is not part of the procedure at Dharmapuram. In the former, the Tambiran makes a gift of his body, soul and wealth, *not* to the Pandara Sannadhi, but to God, and the titular deities worshipped in the two Ádhinams are not the same. The external observances of the Tambirans also differ though in unimportant particulars.

8. In connection with the mode in which Tambirans are ordained at Dharmapuram, our attention is drawn to the fact that none but the Pandara Sannadhi is at liberty to admit a layman as Tambiran. Though the respondent denied it and contended that every Tambiran was entitled to take a disciple, there is considerable oral evidence in support of the appellant's assertion. It is corroborated by the circumstance that a ceremony called Achariya Abhishekam is performed only in the case of Tambirans who are raised to the position of a senior or junior Pandara Sannadhi. It consists in anointing and bathing him as an achariya or preceptor, and consecrating him as such with the recitation of religious texts prescribed for the occasion. The belief with which it is performed is that unless a Tambiran is solemnly consecrated as a preceptor, he is not competent to initiate laymen in forms of prayer conducive to their spiritual happiness and to ordain laymen as Tambirans with efficacy. Having regard to the character of these associations as organized religious communities acting under the guidance of a chief ascetic in disseminating the religious doctrine of his school and Ádhinam, the usage which is spoken to by the witnesses is not improbable. Again, there are several letters in evidence which show that probationers attached to the Mutt at Benares were sent

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by former Tambirans at Tiruppanandal, with a request that the Pandara Sannadhi for the time being might be pleased to ordain them as Tambirans, and that the Pandara Sannadhi ordained some and did not ordain others. The weight of evidence appears to us to be in favor of a special usage by which the Tambirans of the appellant's Ádhinam are ordained only by the Pandara Sannadhi at Dharmapuram.

9. It is conceded by the parties to this suit that the Ádhinams at Dharmapuram and Tiruvavadutorai came into existence several centuries ago, and long prior to the institution of the Mutts at Benares and Tiruppanandal, which form the subject of the present litigation.

It appears that about 300 years ago, when one Masilamani Desigar was the Pandara Sannadhi at Dharmapuram, a Tambiran of his Ádhinam called Gurupara Tambiran established the Mutt at Benares. This individual is reputed to have been an ascetic of great learning and merit, to have gone to Benares on pilgrimage, and acquired an extensive reputation in Northern India as a pious devotee. The case suggested by the appellant's oral evidence is that during his stay at Benares, Gurupara obtained considerable wealth, and on his return to the South, he placed his earnings at the feet of his preceptor, the then Pandara Sannadhi at Dharmapuram, in compliance with the religious obligation arising from the ceremony of gift or Dattam already mentioned, and according to which the property acquired by a disciple of the Ádhinam belongs to the Ádhinam itself, that the Pandara Sannadhi declined to accept the offer, but told Gurupara to take back the property to Benares, where it was acquired, to found a Mutt there, and to apply the property to religious purposes and charities. Thus, on the appellant's own showing, the Mutt at Benares was established by Gurupara with the aid of property acquired by him. That Gurupara was a disciple of the Dharmapuram Ádhinam is not disputed. Though the appellant's witnesses profess to infer from what is reputed to have passed between Gurupara and his Pandara Sannadhi a surrender of his earnings by the former and a retransfer by the latter, the fact is clear that the Mutt at Benares was not founded with the aid of funds supplied from the endowment of the Ádhinam at Dharmapuram.

As Benares is considered by Hindús to be a sacred city both in Northern and Southern India, and as the existence of a Mutt there

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for the purpose of executing religious and charitable trusts under the supervision of an ascetic devoted to religion was regarded as a great facility by those who desired to institute new charities in the sacred city, either for their own spiritual benefit or for that of their deceased ancestors, the Mutt founded by Gurupara gradually rose in importance and endowed wealth. The evidence shows that in the course of its history, the Mutt at Benares came to own several subordinate Mutts, both in Northern and Southern India, and among the rest, we may refer to the Mutts at Morangi in Nepaul and at Achiram in Travancore, at Chidambaram, Rameswaram, Kumbakonam, and Trichinopoly. It shows also that it was the practice of its Tambirans to visit Hindú princes and noblemen, to inspire them with esteem and respect for their learning and piety, and then to induce them to found and endow charities at Benares, and to commit the endowments to their management and superintendence and that of their successors in the Mutt. The subjoined table indicates the course of succession at Benares until the early part of the last century, when one Tillanayaka Tambiran established the Mutt at Tiruppanandal (see exhibit 17).

1
Kumara Gurupara Tambiran (the founder).
|
2
Chokkanadha Tambiran.
|
3
Arunachala Tambiran.
|
4
Ambalavana Tambiran.
|
5
Sadayappa Tambiran.
|
6
Tillanayaka Tambiran.

Seeing that there had been six cases of succession at Benares before the Mutt at Tiruppanandal came into existence, there was but one Mutt for the administration of the Benares charities for a period of 150 to 180 years, 25 to 30 years being taken to represent each generation on the average. Beyond the fact that these Tambirans were Dharmapuram men, and that there was an inscription on the Benares Mutt that it was the Dharmapuram Mutt, the

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evidence affords no information as to the usage which regulated the succession. The first and the sixth Tambirans were admittedly Dharmapuram men, and in advertence to the ordinary mode in which the succession in a spiritual family is kept up, it would be reasonable to infer in the absence of evidence to the contrary, that the intermediate ascetics were also Dharmapuram men. As to the inscription, it is by no means conclusive in regard to the question of subordination or agency at issue. A disciple founding a Mutt would ordinarily designate it after the Ádhinam to which he belongs; but it would be unsafe to infer from it without more that it was subordinate to the Pandara Sannadhi at Dharmapuram in regard to management and selection of successors. The name of the founder, Gurupara, appears also in the inscription, and the words are—"Kumaraswami Mutt of the Dharmapuram Ádhinam in the Kaidara Ghutt" (Benares). There is on this point the evidence of several witnesses for the appellant who saw the inscription (2, 4, 8, 9, 33, 34, 36, 48 and 55), and the witnesses 6 and 14 examined on commission at Tinnevelly, and there is no reason to think that it is not *bonâ fide*.

10. In the time of Tillanayaka Tambiran, he conceived the idea of establishing a Mutt at Tiruppanandal in aid of the Benares charities. He probably believed that there were several pious rajas, zemindárs and rich men in Southern India, who might be induced to substitute permanent endowments for contributions in money made from time to time, and to institute and endow new charities, and that the Tambiran at Tiruppanandal might better realize the income of the endowments which might be situated in the south. As appears from exhibit 1273, the Matam at Tiruppanandal was founded as a banking house or agency, in view to making collections from existing endowments, to receiving fresh offerings or contributions in money, and to accepting and managing new endowments which might be created in aid of new charities instituted at Benares. It is also in evidence that the Tambiran at Tiruppanandal issued hundis on the Mutt at Benares, and cashed hundis issued from Benares and charged a discount, creating thereby an extra source of income for the two Mutts. The appellant's averment was that Siva Giyana Desigar was the tenth Pandara Sannadhi at Dharmapuram, and that by his order Tillanayaka went to Tiruppanandal and established the Mutt there. The oral evidence on this point is that Tillanayaka is reputed

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to have founded the Mutt under the orders of the Pandara Sannadhi. Seeing that the spiritual relation between them was that of a preceptor and disciple, it is by no means improbable that the institution was established in consultation with the Pandaram at Dharmapuram, but there is not a particle of evidence to show that any contribution was made from the funds of the Ádhinam either towards the erection of the Mutt or towards endowing it. The presumption is that Tillanayaka, who came from Benares and who was then the Tambiran in charge of the Mutt there, built the Mutt at Tiruppanandal and purchased property for its benefit with the moneys he brought from Benares. The subjoined table indicates the course of succession at Tiruppanandal from the time of Tillanayaka to that of Ramalingam, who died in 1880:—

1
Tillanayaka Tambiran (the founder, 1720–56).
|
2
Kumara Gurupara Tambiran (1756–91).
|
3
Chitambaranadha Tambiran (1792–98).
|
4
Sadayappa Tambiran (1798–1836).
|
5
Ganapati Tambiran (1836–38).
|
6
Ramalinga Tambiran (1838–41).
|
7
Chokkalinga Tambiran (1841–52).
|
8
Ganapati Tambiran (1852–53).
|
9
Ramalinga Tambiran (1853–80).

11. The appellant asserted in his plaint, 1st, that he was the owner of the properties in suit; 2ndly, that the right of appointing Tambirans to Tiruppanandal and Benares was vested in him; and, 3rdly, that no one but a disciple of his Ádhinam was eligible for such appointment. We shall now give a brief account of the management of each Tambiran, and note the leading facts which

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throw light on each ground of claim. As already observed, Tillanayaka was the first Tambiran at Tiruppanandal, and he was in management from 1720 to 1756. He built the Mutt, purchased lands and took mortgages from various persons in his own name. These transactions are evidenced by exhibits 45 to 79, and they extend from 1740 to 1754, nearly Rs. 17,000 being invested by him in land during this period. Each document contains a clause that the land sold or mortgaged shall be enjoyed by the alienee and "his successors in the line of disciples." It appears that several villages were granted to him as endowments for charities instituted at Benares in his time. He obtained one village from the Rani of Tanjore in 1720 (exhibit A), two villages from the Zamíndár of Ramnad in 1735 (exhibit E51), three villages from the rulers of the Nayak Dynasty in 1725 (exhibit 782), and one from the Zamíndár of Torayur, in the district of Trichinopoly about the same time (exhibit 1392). The grantee named in all these documents was Tillanayaka Tambiran and *not* the Pandara Sannadhi at Dharmapuram. In exhibits A and E51 he is described as "a disciple of Dharmapuram," and "a disciple of the Pandara Sannadhi at Dharmapuram." In exhibit 782, however, he is described as "the head of the Ádhinam dispensing Benares charities." It is stated further in exhibit E51 that the villages are to be enjoyed by the grantee and "his successors in the line of disciples." It is clear then that Tillanayaka had funds in his possession wherewith he was able to build the Mutt at Tiruppanandal and to invest about Rs. 17,000 in landed property, and that he procured grants of seven villages for the support of charities instituted at Benares and entrusted to his management. As regards the property purchased or taken in mortgage by him, his intention was that it should descend to his successors in the line of disciples. As to the charities and their endowments, exhibit E51 stated in express terms that the succession to management was to be in the line of disciples, and though the other documents are silent on this point, the fact that the donors knew that the person to whose care they entrusted the charities and the endowments which they permanently instituted was an ascetic in the charge of a Mutt gives rise to the presumption that they intended that the right of management should descend in accordance with the law of succession applicable to it. It is no doubt true that in some of the endowment deeds, the grantee is described

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as a disciple of the Ádhinam at Dharmapuram, but there is nothing in those documents to indicate that they are more than words of description. In this connection, however, we should draw attention to exhibit W52, which relates to a money grant of 3,000 pagodas as a permanent endowment for the performance of a charity newly founded at Benares as described therein. The document purports to be a joint undertaking or agreement executed in 1725 by the then Pandara Sannadhi of the Ádhinam at Dharmapuram, by Tillanayaka Tambiran as manager of Kasi (Benares) charities, and by Kumarasami Tambiran of Benares in favor of the donor Chinna Muttu Chetti of Madras. The material portion of the document is this—"We, the Pandara Sannadhi of Dharmapuram, Tillanayaka Tambiran and his successors in the management of his Mutt and Kasi (Benares) charities, the subsequent karthas (owners) of the Ádhinam and Kumarasami Tambiran, *agent* of the Benares charities, bind ourselves to conduct the charity mentioned herein without detriment to it so long as the sun and moon shall endure."

There can be no doubt that upon the true construction of this document, the Pandara Sannadhi was a joint trustee with reference to this money endowment. Having regard to the fact that the undertaking was given by the Tambiran who was actually to execute the trust at Benares *as agent*, by Tillanayaka as the manager of the Mutt at Tiruppanandal and of the Benares charities, and by the Pandara Sannadhi as the head of the Ádhinam, it is not unreasonable to infer that the Pandara Sannadhi and his successors were regarded by the donor as controlling rather than managing trustees. This document is further evidence of an admission on the part of the appellant's and respondent's predecessors to the effect that in Tillanayaka's time the Mutt at Tiruppanandal was the principal Mutt; that the Mutt at Benares was regarded as a mere agency, and that each of the trustees at Dharmapuram and Tiruppanandal had his own line of successors. It shows also that at that time there were cordial relations between the Pandaram at Dharmapuram and the Tambirans at Tiruppanandal and Benares, and co-operation on their part when required in guaranteeing due administration of particular charities.

12. The second Tambiran at Tiruppanandal was Kumara Gurupara Tambiran, who succeeded Tillanayaka about 1756. He was probably the Benares agent named in exhibit W52 as he was also described in some documents as Kumarasami, but there is no

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evidence to show the specific ground on which his succession rested except exhibit 17, to which we shall presently refer. Like his predecessor he invested money in land and made purchases in his own name without any reference or allusion to the Pandara Sannadhi for the time being, and induced rajas and zamíndárs to add to the charities and their endowments at Benares under his management or superintendence. Exhibits 80 to 104 show what purchases and mortgages were made or taken by him, and they extended from 1755 to 1789, aggregating in value nearly Rs. 4,600 or Rs. 5,000. They also contained a clause which provided for the enjoyment of the property purchased by the purchaser and his successors in the line of disciples. In connection with the new charities established at Benares and in other places, he obtained four villages from the Rajah of Tanjore under exhibits B and C, three villages from the Zamíndár of Sivaganga (exhibits Y43 and A47, and three villages from the Zamíndár of Kalastri and the Jághírdár of Mogarlapalayam in 1759 and 1763 under exhibits 778 and 781. He obtained also another village from the Zamíndár of Kalastri for the support of a charity at Ramesvaram under exhibit 780 in the year 1785. The grantee named in all of them was Kumara Gurupara Tambiran, but in exhibit Y46 he was described as the disciple of Muttukumara Desigar, the Pandara Sannadhi of Dharmapuram at that time. In exhibits Z46 and A47, he and his successor were described as the disciples of Siva Giyana Sambandha Desigar or Giyana Sambandha Desigar of Darmapuram. Exhibits 780, 781, Y46, provided that the succession to management was to be in "the line of disciples." In exhibits 780 and 781, the grantee was described as "self-dependent," and although considerable stress was laid on the expression at the hearing of this appeal on behalf of the respondent as being indicative of independence, it appears to us that the words were only terms of courtesy used in reference to pious ascetics who are considered to have subdued their passions and worldly desire and to have become on that ground self-dependent or self-controlled. During the period of the second Tambiran also there were money grants made as endowments of new Benares charities of the values of 1,800 and 2,400 pagodas by two wealthy men in the town of Madras. They are evidenced by exhibits X52 and Y52, which were jointly executed in 1778 and in 1788 by the then Pandara Sannadhi at Dharmapuram, by Kumara Gurupara Tambiran as

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Manager of Benares charities, and by Kasi (Benares) Kandappa Tambiran to guarantee to the donors due administration of the endowments instituted by them. In terms they are similar to exhibit W52. They show that the donor associated the three persons and their successors as joint trustees, that the Tambiran at Benares was regarded as an agent, whilst the Tambiran at Tiruppanandal was looked upon as the manager of Benares charities, that each of the responsible trustees was considered to have a distinct line of successors, and that the probable intention was to make the local Tambiran at Benares who was to execute the trust, the Tambiran at Tiruppanandal who was recognized as the manager and superintendent, and the Pandara Sannadhi to whom both owed allegiance as their preceptor and spiritual superior responsible for the efficient performance of the charities to which the money grants related.

13. Kumara Gurupara Tambiran died about 1790 and he was succeeded by one Chitambaranadha Tambiran. It is not clear what became of Kandappa Tambiran at Benares, who joined in the execution of exhibits X52 and Y52. Chitambaranadha was in management at Tiruppanandal but for eight years and died in 1798. During this period two new charities were founded and were endowed with grants of 1,200 and 1,600 pagodas. These charities were instituted in the towns of Kumbakonam and Chidambaram in the districts of Tanjore and South Arcot, and documents guaranteeing their due performance were executed jointly by the Tambiran at Tiruppanandal and by the Pandara Sannadhi at Dharmapuram in 1791 and 1794 (exhibits Z52 and A53). In both, the Pandara Sannadhi is described to have joined in their execution, and in the execution of exhibit A53 alone Sadayappa Tambiran, the then Tambiran of the Benares Mutt, joined. It is not stated in terms in these documents that Chitambaranadhan was a Dharmapuram man; but it is by no means probable that the Pandaram at Dharmapuram would have joined in giving an undertaking if he had not been his disciple or a Tambiran of his Ádhinam. Exhibit E53 suggests the inference that he was the first disciple who succeeded Kumaraguru Tambiran. Chitambaranadhan died in 1798, and he was succeeded by Sadayappa, who was the Tambiran in immediate charge of the Mutt at Benares.

14. Thus from 1722 to 1798, which we term as the first period of

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the history of management at Tiruppanandal, there were three cases of succession, and in two the successor was the Tambiran in charge of the Mutt at Benares, who was regarded as the agent or junior of the Tambiran at Tiruppanandal. The same was probably the case also as to Chitambaranadhan's succession, although there is no conclusive evidence in regard to it. In exhibit 17, however, the sixth Tambiran, Ganapati, stated in 1838, when there was no dispute as to succession, that each Tambiran appointed his successor, both prior and subsequent to the establishment of the Mutt at Tiruppanandal. It appears further that the Tambirans at that station built the Mutt, purchased lands for its support and obtained grants of villages for charities instituted at Benares, Chidambaram, Ramesvaram and Kumbakonam and in other places and committed to their management. The course of succession indicated as well by the endowment-deeds as by the sale-deeds was the line of disciples. It appears further that they were all Dharmápuram men. The procedure of the Ádhinam already mentioned, and according to which no one but the Pandara Sannadhi can appoint a Tambiran, affords *primâ facie* ground for the inference that the Tambirans at Benares and Tiruppanandal must have been originally supplied by the Pandara Sannadhi or procured from Dharmapuram, though their subsequent elevation to the headship of the Mutts was the result of selection made by their predecessors.

15. We pass on to the second period in the history of management at Tiruppanandal extending from the time of Sadayappa, the fourth Tambiran, to that of Ramalinga, the sixth Tambiran. During this period from 1798 to 1841, we observe traces of an organized procedure in regard to management and succession. Like his predecessors, Sadayappa purchased lands for the Mutt for nearly Rs. 4,600 under exhibits 105 to 151, and like them he also added to the charities and endowments administered from Tiruppanandal. Exhibits 774, 775, 776, 777, D53 and E53 show that six new charities were instituted at Benares, Ramesvaram and Kumbakonam, endowed with grants of villages by the Raja of Karvetnagar in the district of North Arcot. Sadayappa was the grantee named in them all; in exhibits 774-7, he was described as the superintendent or dispenser of Benares charities; and in exhibit D53, he was described as the third disciple of Tillanayaka Pandaram, a disciple of the Dharmapuram Pandara Sannadhi; and in exhibit E53, he was described as the second

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disciple (in the order of succession) of Kumara Gurupara Tambiran. Exhibits 778 and 106 to 151 indicate that the succession contemplated by the donor and by the Tambiran was a succession in the line of disciples. Again exhibit 786, which purports to be a copy of the order issued by the Collector of Tanjore in 1802, shows that the village of Virakkan was proved to have been granted as the endowment of a charity instituted at Benares. Whilst grants of land show that Sadayappa was the real grantee, the two money grants made in 1798 were made on account of Benares charities on the joint undertaking of the Pandara Sannadhi, of the Tambiran at Tiruppanandal, who was described as the manager of Kasi (Benares) charities and of the Tambiran at Benares, that they will be duly administered.

16. Here we should also draw attention to a few documents which throw light on the nature of the endowment at Achiram in Travancore territory. Though it is not included among the properties now in litigation, documents relating to it and the correspondence which took place between the Tambiran there and the Pandara Sannadhi were referred to at the hearing in elucidation of the main question at issue. Although the original grants have not been produced, still exhibits D to G, dated 1802 and 1837, which purport to be copies of accounts of measurement prepared by the Travancore Government, describe the endowment as made partly for the Mahesvara or Guru Puja in the Mutt at Dharmapuram, and partly in support of Benares charities and as standing in the name of the Pandara Sannadhi at Dharmapuram. In this connection we may also refer to two letters addressed to him by the Tambiran at Achiram. In exhibit B35, dated March 1833, he applied to Dharmapuram for an order that the title-deeds which were at Sivasilum with the junior Pandara Sannadhi should be transmitted to him for production before the Dewan who, it appears, was then holding some inquiry in regard to grants made free of assessment. The title-deeds are mentioned as "those in our favor relating to the sarvamanyam (rent-free lands) of Sivagiyanapuram as well as *to other lands here belonging to the Ádhinam.*" The second letter, exhibit C35, we refer to is the one dated May 1833, in which he protested against an order from Dharmapuram that he should first submit his accounts to a Karbar Tambiran and then forward them to Dharmapuram. In this, Chokkalingam, the local Tambiran, who became the Tambiran of Tiruppanandal

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in 1842, said as follows: "You were not pleased to direct when I was appointed that I should act in accordance with the views of the Karbar Tambiran, and it was not usual to do so in the days of my predecessors. I shall submit my accounts direct to your Sannidanam and obey your orders only, but I will not submit them to the Karbar or any other Tambiran or act under his orders." Though we are not prepared to hold that as evidence of title the survey account prepared by the Travancore Government is more satisfactory than the survey accounts prepared by the British Government, yet this portion of the evidence taken together with the letters conveys the impression that the original grantee of the endowment at Achiram was perhaps the Pandara Sannadhi at Dharmapuram, that the grant was obviously made in part for the benefit of the Mutt at Dharmapuram and in part for the support of a Benares charity, that the local Tambiran submitted accounts to Dharmapuram and acted in subordination to the Pandara Sannadhi, and that orders were issued to him both from Dharmapuram and from Tiruppanandal. It is not, however, necessary to determine for the purposes of this appeal the relation of the Pandara Sannadhi in regard to so much of the endowments at Achiram as is administered from Tiruppanandal in aid of Benares charities, but it is sufficient to say that whatever may be that relation, it does not necessarily extend to the properties in suit.

17. We pass on to some letters which throw light on the relation between the Mutts at Tiruppanandal and at Benares. It will be remembered that they were in their origin two branches which had a common trunk, and that though the original Mutt was at Benares, yet the institution at Tiruppanandal was regarded as the principal or leading branch, and that at Benares as a subordinate branch both in the time of Tillanayaka Tambiran and Kumara Gurupara Tambiran. It is probable that the same relation continued in the time of Chitambaranadhan, for he appears to have been *raised* from Benares to Tiruppanandal. Though Benares was the seat of the original Mutt and the place where the charity was actually executed, yet Tiruppanandal was recognized since its foundation as the principal Matam, probably because the senior Tambiran who was usually regarded as the chief and responsible manager and as better fitted to exercise supervision, fixed it as his seat and as the centre of control. It is in evidence that about 1802 one Kumarasami reported to the representative of a zamindár, who

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had instituted one of the Benares charities, that he was appointed to the Mutt at Benares by the former Tambiran by will, and that he made no allusion to the Tambiran at Tiruppanandal. It appears, however, that about 1820 Sadayappa accompanied Sorboji, Maharajah of Tanjore, who went to Benares on pilgrimage and then re-established his authority as the responsible and chief manager. When he returned to Tiruppanandal, he left the Mutt at Benares under the management of a senior and a junior Tambiran named Aiyarappa and Ramalinga, and ever since Sadayappa treated them as if they were his subordinates and bound to carry out his instructions. In December 1825 he called attention to certain complaints made to the Raja of Tanjore, and issued orders that the charities should be conducted as usual, that the grievance brought to notice should at once be redressed, and that the matter should be reported to Tiruppanandal (exhibit 934). In another letter written in the same month, he censured Ramalinga in terms of severity, calling him "the most stupid of the stupid" (exhibit 922). In April 1827 he states that he had instructed Aiyarappa to proceed to Morangi in Nepaul, and to arrange for providing the Tambiran there with an assistant and for the efficient management of the charities in that place, and to leave Ramalinga in charge of the Mutt at Benares during his absence (exhibit 937). In June 1828 he censured the Tambirans at Benares for contracting debts and called for detailed information regarding them (exhibit 936). Ramalinga complained to Sadayappa against the character and management of Aiyarappa in several letters. Exhibit 921 is a letter addressed to Sadayappa by Alagia Tiruchitambala Tambiran, the manager of the Mutt at Morangi in Nepaul, and the latter asked the former to send a senior Tambiran and also a junior to manage a subordinate Mutt in a place called Vijayapur. He asked further for an advance of Rs. 2,000 to enable him to liquidate certain debts contracted for the benefit of the Mutt under him and promised to repay the loan in two years. The foregoing evidence leads to the inference that during Sadayappa's time, the Tambirans of the Mutt at Benares and Morangi recognized him as their superior and acted in subordination to him and under his supervision and control.

18. As to the relation between Tiruppanandal and Dharmapuram, it should be steadily borne in mind that the Pandara Sannadhi was the spiritual superior of Sadayappa as one of the

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Tambirans of the Dharmapuram Ádhinam. But the contention for the appellant is that there is the relation of master and servant or of principal and agent between them with reference to the administration of the Mutt at Tiruppanandal and its charities. The following are the facts which appear in evidence during Sadayappa's time :—

(i) In April 1823 Ganapati, the junior Tambiran at Tiruppanandal, paid Rs. 175 to the junior Pandara Sannadhi in Tinnevelly, to enable him to meet the expenses of Guru Puja in his Mutt (exhibit E4). (ii) In September 1823 Ganapati, Sadayappa's junior, said to the Pandara Sannadhi at Dharmapuram in a letter, " I, your irrevocable slave, will do your bidding and nothing else." (iii) With reference to a village called Sethur, the letter states that it may not improve *our* income, but the village will become ours (exhibit F4). (iv) In another letter written in reply to an application made from Trichinopoly for an expression of opinion or for some favor, Ganapati said, "The Pandara Sannadhi is the master and possesses the power of establishing and disestablishing things. Send all the letters you wrote to us to him. If we express an opinion, he may take offence." (v) Exhibits G52, H52, K52 and L52 show that the Tambiran at Tiruppanandal bought materials and repaired the Eastern and Western temples at Dharmapuram at his own expense. (vi) Similarly, the letters filed as exhibits J4 and K4 prove that the kitchen at Dharmapuram was repaired under the orders of the Tambiran at Tiruppanandal. (vii) Exhibits G4 and H4 show that on one occasion Sadayappa sent some articles for use during a Guru Puja at Dharmapuram, and that on another occasión, when the junior Pandara Sannadhi was at Tiruppanandal, he arranged for his performing Guru Puja on a scale suitable to his high position as religious preceptor or Achariyar. It was suggested that these contributions and declarations indicate subordination. The allusion to Ganapati's position as an irrevocable slave has evident reference to the ceremony of Dattam or gift, according to which every Tambiran becomes, by reason of his ordination, a slave of his Pandara Sannadhi in a spiritual sense. Guru Puja is the anniversary of the Pandara Sannadhi's Guru or preceptor, and it is an occasion when all his disciples are considered to be under a spiritual obligation to make contributions according to their means. The relation between preceptor and disciple

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is in a spiritual sense analagous to that of father and son, and it may well be that the repair of the Eastern and Western temples and of the kitchen at the cost of the disciple was regarded as an act of filial piety or liberality. The declaration that the Pandara Sannadhi is the master and can do and undo things at his pleasure, is an extravagant mode of expressing his importance as the chief preceptor or head of the association of Tambirans. The allusion to the village of Sethur and the remark that if an opinion is expressed, the Pandara Sannadhi may take offence, may possibly refer to some act connected with management, but the letters are not sufficiently specific to enable us to see what particular matter the writer had then before his mind. However this may be, the weight due to those acts must be determined with reference to other acts done by Sadayappa in connection with his management at Tiruppanandal.

Amongst these, we shall first mention the transactions evidenced by exhibits 582 and 583, which bear date June 1829. The first was a lease of some Ádhinam land granted by the then Pandara Sannadhi to Sadayappa, and the second was a conditional sale of Ádhinam property executed by way of mortgage. The last-mentioned document provides that " you (Sadayappa) should enjoy the purchase so long as the sun and moon last and in the line of your disciples." It must be noted here that this mode of dealing with each other is not compatible with the present contention that the Pandara Sannadhi is the owner of everything at Tiruppanandal or the sole responsible trustee, and that the Tambirans at Tiruppanandal are merely his agents, subordinates or servants.

19. Another matter which deserves to be noticed is the association of a junior with the senior Tambiran in management at Tiruppanandal.. Judging from the papers before us, Ganapati was the first junior Tambiran at Tiruppanandal, and prior to Sadayappa's succession, the Tambiran at Tiruppanandal was on his death succeeded by the agent or junior in charge of the Benares Mutt. Probably the necessity for the services of a junior at Tiruppanandal was felt, because it would, on the one hand, give an opportunity to the senior to see whether the junior might be relied upon as a competent successor, whilst it would enable the junior to acquire experience before he became the head of the Mutt. It will also be borne in mind that in Sadayappa's time, Tiruppanandal

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Mutt was not practically an isolated institution with some endowment, but an important centre of control exercised over several subordinate Mutts in Southern India, over the Mutt at Benares, and over the Mutts at Morangi in Nepaul and Achiram in Travancore. The evidence does not show that the Pandara Sannadhi had anything to do with this modification of procedure at Tiruppanandal in regard to the agency for management.

20. We may here refer to the procedure introduced in regard to succession. From the time of Sadayappa we find that each Tambiran at Tiruppanandal left a will nominating his successor. Sadayappa made three wills (exhibits 1 to 3), one on the 19th March 1818, another on the 8th September 1820, and the third on the 2nd February 1829. By every one of these he appointed his junior Ganapati as his successor and professed to do so in the exercise of a right vested in him. These documents contain elaborate recitals of exclusive ownership and of an unqualified power to appoint a successor. As all the wills made from 1816 and on which reliance is placed for the respondent have been made nearly in the same terms, we deem it desirable to set out here Sadayappa's will in his own words.

No. I.

"MAY GOD VISWESWARAR HELP.

1818, *March* 9, *Iswara*, *Masi* 28.

Will executed by me, Benares Charity Sadayappa Tambiran, contemplating God Visweswarar of Benares and in the full possession of my faculties.

Ganapati Tambiran, who is second to me, has been appointed as my successor after my death. The said Ganapati Tambiran alone is to enjoy with full rights of ownership the sarvamaniam and shrotriem villages (granted by the rajas, noblemen and Brahmans of the different countries for the support of the various charities conducted under my direction in the territories extending from Benares and Nepaul to Cape Comorin, including temples, choultries, matams, water-sheds, flower-gardens, flights of steps constructed in rivers, &c.); and further he is to enjoy the miras villages which are held on payment of kist to the Circar, and the various buildings and all the appurtenances belonging to the said lands. He is further entitled to all the sale-deeds, gift-deeds, debt-bonds, &c., standing in my

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name, and to all the receipts, accounts, ready moneys, &c. He is to enjoy as owner, in the succession of disciples according to custom. He is to manage all affairs and conduct the charities without any prejudice to them. The respect shown to me by the different rajas and noblemen should be shown to him; and the Tambirans at Benares, Morangi, Rameswaram, and Cape Comorin should conduct themselves as usual towards him as they have been conducting themselves towards me. Besides Ganapati Tambiran, no one in the Sanniasi Asramam (ascetic order of life) or in the Grahasta Asramam (married order of life) has any connection.

Viswalingam Thunai (may Viswalingam help).

(Signed) Benares charity, SADAYAPPA TAMBIRAN.

(„) Temple Cash Accountant, Chinnappa. I know.

(„) Thiruppanandal Miras, Sadayappa Mudeliar. I know.

(„) Benares Charity Agent, Sankaran Aiyar. I know."

It is difficult not to be impressed on a perusal of the will with the belief that the testator had not the remotest idea of any property or right of appointment vesting in the Pandara Sannadhi, though we are not in a position to say whether the deprecatory clause at the close of the will was inserted merely by way of emphasizing his exclusive right, or, as a matter of precaution, in anticipation of a possible effort on the part of a future ambitious Pandara Sannadhi to interfere with his independence. We must however add that up to this time all the Tambirans at Tiruppanandal had been Dharmapuram men, and to this extent, the usage is in favor of the appellant. These recitals acquire a special weight from their having been repeated at each succession during the period under consideration, and from their having then called forth no opposition nor comment from the Pandara Sannadhis, who lived at no considerable distance from Tiruppanandal, and who had by virtue of their position ample means of obtaining information as to what occurred at that place. It is also noteworthy that, notwithstanding such unqualified assertion of independence, the relation between Sadayappa and his Pandara Sannadhi was very cordial, and that as will appear from exhibits R18 and W47, which were produced by the appellant and are certainly

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evidence at all events against him, the Ádhinam was considered to have lost by Sadayappa's death a liberal friend and disciple, whom it was not easy to replace.

21. Pursuant to the will made by Sadayappa, his junior Ganapati Tambiran succeeded him, and Ganapati's management extended only from February 1836 to June 1838. The only addition which he made to the Matam endowment was a small purchase made for Rs. 24, and it does not appear that any new charity was instituted in his time. It is the practice of the Revenue Department to keep a register of assessed lands in each Collectorate for adminstrative purposes, and as each landholder died, to alter the registry by inserting in the register the name of his successor. Exhibits 13, 14, 15, 16, 18, 19 and 20 relate to this proceeding, and show that the register was directed to be altered to Ganapati's name on the ground that Sadayappa was his senior, and that the junior was entitled to succeed the senior according to custom. It became also usual from Ganapati's time to report the death and accession of each Tambiran at Tiruppanandal to the Raja of Tanjore and to some of the zamíndárs as the descendants of those who originally instituted part of the Benares charities, and to receive from them letters of condolence and congratulation. These letters of congratulation noted the succession of the writers, and expressed a hope that the charities would be efficiently administered as before, and they were usually accompanied with the present of a cloth or some other token of courtesy. Exhibits 387 and 403 are such letters from the Zamíndárs of Kalastri and Karvetnagar recognizing Ganapati's succession. In Ganapati's time, there was a complaint made to the Collector in regard to the distinction claimed between Matam and charity lands, and in reply to an inquiry, Ganapati submitted a representation, which has been filed as exhibit 17. It stated by whom the Mutts at Benares and Tiruppanandal were founded, the course of succession, the usage in regard to it, and how lands were acquired by Ganapati's predecessors for the Mutt at Tiruppanandal and for Benares and other charities. It stated also that each Tambiran appointed his successor and contained no allusion to any private property belonging to the Tambiran as contradistinguished from that of the Mutt. It does not note the fact that all the Tambirans at Tiruppanandal were Dharmapuram men. To this omission, however, we do not attach weight, for it was not necessary to state it with

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reference to the inquiry then made. The relation between Benares and Tiruppanandal was the same in Ganapati's time as in that of his predecessor. In April 1837, Aiyarappa and Ramalinga, the senior and junior Tambirans at Benares, wrote to Ganapati that they would act under his orders in the same way in which they acted under those of Sadayappa (exhibit 1271). In this letter they also tacitly, if not expressly, recognized the practice of appointing a junior during the life of the senior and of naming him as his successor, and said, if you direct either of us to come over there, we shall do so and perform such service as you may direct us to render.

Exhibit Q19, dated the 27th August 1838, is a letter which was written by the senior Tambiran in charge of the Mutt at Benares to the Pandara Sannadhi at Dharmapuram. It shows that Ramalinga, the junior Tambiran at Benares, joined Ganapati and served as his junior at Tiruppanandal, that it was however Ganapati's intention at first to appoint Aiyarappa, the senior Tambiran at Benares, as his junior and successor, and send back Ramalinga to Benares as senior Tambiran of the Mutt at that station, and that Aiyarappa was told to proceed from Benares to Tiruppanandal; that before he did so, Ganapati became seriously ill and died after appointing Ramalinga, who was on the spot as his successor by his will, marked as exhibit 4, which is in terms similar to the will left by Sadayappa Tambiran. It shows also that it was the Tambiran at Benares, from whom Ganapati sought advice, and that it was from thence that he selected his junior. Ramalinga's succession is the first in which the junior Tambiran at Benares succeeded to the Mutt at Tiruppanandal in supersession of his senior.

22. Before we pass on to Ramalinga's management, it is desirable to refer to two letters, exhibits R18 and W47, to which both parties called our attention at the hearing of this appeal. It is by no means clear how those letters are evidence of reputation, or that their writers had special means of knowledge in regard to the usage of the Mutt at Tiruppanandal. Accepting them, however, as evidence on the ground that neither party objected to them in the Court below, we are not prepared to attach much weight to them. Exhibit R18 seems rather to suggest to the Pandara Sannadhi, from the standpoint of a partisan professing to be attached to him, how the Tiruppanandal Mutt and its charities might be subordi-

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nated to the Ádhinam at Dharmapuram, and what proceedings ought to be taken by the Pandara Sannadhi in order to effect that object, than to describe *bonâ fide* the reputed prior usage of the two institutions in relation to each other. After premising that Sadayappa was a sincere friend of the Ádhinam, that the charities of the Mutt at Tiruppanandal form a very important branch of the Ádhinam, that Ganapati Tambiran was old, and that one Ulaganadha Tambiran was most faithful to his Guru (preceptor) and most interested in the Adhinam at Dharmapuram, it suggests that the Pandara Sannadhi should appoint Ulaganadha as Ganapati's junior "without showing much concern, but without giving rise to discontent in others." It suggests further that Ganapati Tambiran should be sent for and consulted and spoken to as to the necessity for the appointment, and states that "if Ganapati should not agree to your wishes, the fate of the charities will be similar to that of Devastanams (temples)." It next alludes to Sadayappa's will in favor of Ganapati, but adds that the Government will not recognise its validity. It then says that if all the Tambirans appointed by the Pandara Sannadhi to the several charities pertaining to their office conduct the charities well, they have only a right to continue in management to the end of their life, and that the Pandara Sannadhi has supreme power over all the charities. It goes on to advise the Pandara Sannadhi not to have any concern about past events or any misgivings regarding the writer. It then subjoins a copy of an arzi (petition) to be addressed to the Accountant-General.

"The arzi of Pandara Sannadhi of Dharmapuram Ádhinam, to the Accountant-General, Madras.

"Several rajas and rich gentlemen have left cash and sarvamaniam villages out of the proceeds whereof the affairs of chattrams built by them for feeding pilgrims at Benares, Ramesvaram, Chidambaram, Kumbakonam, Srirangam, and other places, and other charities there, are to be duly conducted. For the improvement of these funds and for the due performance of the said charities with the income thereof according to the scales fixed by them, Tambirans used to be appointed by the Pandara Sannadhis otherwise called Acharias, my predecessors in this Ádhinam. In pursuance of the above custom, Sadayappa Tambiran and Ganapati Tambiran were appointed as senior and junior

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Tambirans, respectively, for the management of the said charities; and for the last fifty years the said charities were conducted very satisfactorily. Now as the said Sadayappa Tambiran is dead, I have appointed Ganapati Tambiran, his assistant, to the vacant place as senior Tambiran, and Ulaganadha Tambiran as his assistant. I request, therefore, that the Company's bonds in the name of the said Sadayappa Tambiran be now transferred to the name of Ganapati Tambiran, and the interest thereon be paid as hitherto to the new nominee."

The letter then concludes with an expression of devotion to the Ádhinam, and with the assurance that the writer's influence at Madras will be used in its favor.

Reading this letter and the draft petition in the light thrown upon them by the account already given of the prior usage as disclosed by the documentary evidence and the very peculiar statements which the former document contains, they appear to us to denote rather the right which the Pandara Sannadhi should, in the opinion of the writer, assert and contrive to acquire over Tiruppanandal without being overscrupulous as to what he said, than the relation which had actually subsisted between the two institutions prior to 1838. Exhibit W47 is in the same strain, though the bold suggestions it contains are not so elaborate as in the other. They are of value, however, as indicating the period when it was thought for the first time that the Pandara Sannadhi should, in the interest of his Ádhinam, claim the right of appointing junior Tambirans, and assert a custom whereby the Pandara Sannadhis at Dharmapuram might be said to possess the power of appointing managing Tambirans at Benares and Tiruppanandal. There is no documentary evidence to show that the Pandara Sannadhi had any voice when Sadayappa selected Ganapati as his junior at Tiruppanandal before 1818, or Aiyarappa and Ramalinga as managing Tambirans at Benares about the year 1825, or when Ganapati directed Ramalinga to act as his junior in 1837 and ultimately appointed him as his successor. In this connection the counsel for the appellant referred to some oral evidence. As to Ganapati's appointment, he referred to the appellant's 53rd witness (Sadaya Pillai) and to witness Chokkalinga Pillai who was examined on commission, but neither had any personal knowledge as to Ganapati's appointment as junior. As to Ramalinga's nomination as Ganapati's junior,

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the 53rd witness stated that Kandappa Desigar, the Pandara Sannadhi at Dharmapuram, appointed him, but that he was not an eye-witness of the fact. "When he was nominated," the witness said, "I went with others to receive him at the granary, and it was therefore I said that he was appointed at Dharmapuram. Ramalinga Tambiran was junior Tambiran for one year." This witness is a disciple of the Pandara Sannadhi at Dharmapuram. Witness Chokkalinga Pillai deposed as follows :—"Ganapati Tambiran, who was the junior Tambiran of Sadayappa, was a Tambiran of Dharmapuram Ádhinam. At first there was no one who served as junior Tambiran under Ganapati. The Dharmapuram Pandara Sannadhi sent for Ramalinga Tambiran from Benares, and asked him to go to and stop at Tiruppanandal. It was Talagnayar Pandara Sannadhi that did so." Ganapati, the witness added, sent for Ramalinga Tambiran to make him stay at Tiruppanandal as junior Tambiran. Talagnayar Pandara Sannadhi sent for Ganapati and Ramalingam to Dharmapuram, he gave arukattu and sundaravadam in the presence of (the Ádhinam idol) Chokkalingasawmy, gave cloth and a palanquin, appointed him as junior Tambiran and sent him to Tiruppanandal. This witness was for forty years in service at Dharmapuram. He adds, however, that for ten years he was employed as the Maniyam of Talimaruthur village granted by the Zamindár of Ramnad to a former Tambiran at Tiruppanandal in connection with a Benares charity, that he was the subordinate of Ramalinga II, and that it was only to him that he used to send accounts, &c. Another witness, a Brahmin living at Dharmapuram (the 63rd witness for the appellant), deposed that Ganapati and Ramalinga were Dharmapuram Tambirans, and that the Pandara Sannadhi appointed Ramalinga as Ganapati's junior. He said he went there because Brahmins living at Dharmapuram were sent for. Another witness, Alagia Tiruchitambala Kavirayar, a native of Alvar Tirunagari in the district of Tinnevelly, stated that he saw Talagnyana Desigar appoint Ramalinga as Ganapati's junior (exhibit B. 1529). This witness professes to be descended from Kumara Gurupara Tambiran, who founded the Mutt at Benares. At the commencement of the argument, the learned counsel for the appellant observed that he did not intend to rely upon the oral evidence but intended to rest his contention, mainly on documentary evidence, and we think in a case like this, in which the property in dispute is considerable in value, and in which witnesses who are in a position to have had special means of knowledge are either servants or disciples of the rival claimants and the Ádhinam to which they respectively belong, much weight cannot be attached to mere oral evidence. He referred however to the witnesses already mentioned during the hearing; but we do not consider it safe to rely upon their evidence, except so far as they are corroborated by documentary evidence. Their statement that Sadayappa, Ganapati and Ramalingam were Dharmapuram men is so corroborated; but their evidence to the effect that the Pandara Sannadhi appointed Ramalingam as Ganapati's junior is inconsistent with Ganapati's will (exhibit 4), with exhibit Q19 produced by the appellant, with the muchalká or agreement (exhibit 10) taken by Ganapati from Ramalinga and with the Collector's takid or order (exhibit 21). These show that Ramalinga was formally appointed by Ganapati as junior only on the 25th April 1838, and that he previously intended to send him back to Benares, and that he professed to make the appointment in the exercise of an exclusive right vesting in him. The oral evidence is that the Pandara Sannadhi appointed Ramalinga in the presence of Ganapati and before he began to serve at Tiruppanandal, and we do not consider it to be at all reliable.

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This view is further strongly corroborated by exhibits 952–5, 957–61, 964 and 1271.

Exhibit 952 is a letter, dated 31st March 1836, from Ramalinga at Benares to Ganapati at Tiruppanandal. Ramalinga said in this document, "I desire much to go on a pilgrimage to Pulney and to see you. I shall conduct myself according to your orders."

Exhibit 953 is a letter, dated the 8th April 1836, from Aiyarappa and Ramalinga at Benares to Ganapati at Tiruppanandal. In this they said, "In reply to your letter of the 5th March last, we both considered and wrote that either of us who might be ordered by you to come would come. You have again written that we both should consider and write. I, Aiyarappa, will come and conduct myself according to your orders. Ramalinga will, according to custom, look after the charity affairs at Benares."

Exhibit 955 is a letter, dated the 8th May 1836, from Aiyarappa to Ganapati. It said, "In your holy letter of the 26th April, it is mentioned that if Ramalinga Tambiran intends to come, a letter with his signature should be sent. It appears that that

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Tambiran has no mind to come. If he is written to strictly that he should come, he would come. I wrote before that I would come. If a holy letter is received that I should come, I would come."

Exhibit 954 is a letter from Ramalinga to Ganapati, dated the 10th May 1836. "If Swami Avergal order that I should come, I would come."

Exhibit 957 is a letter from Ramalinga to Ganapati, dated the 25th August 1836. He says, "A day has been fixed for my starting, that is, 19th September 1836. I shall start then."

Exhibit 958 is a letter, dated the 30th September 1837, from Ganapati to Ramalinga. "You wrote that you reached Kollakundai (Karvetnagar Zemíndárí) on the 17th September, and that in four days you would go to Nimilapadi (Venkatagiri Zemíndárí)."

In exhibits 959, dated the 3rd November 1837, and 960, under date the 24th November 1837, Ganapati gave certain directions about the affairs in the villages belonging to the Tiruppanandal Mutt which Ramalinga was visiting.

In exhibits 960 and 961, dated the 24th and the 30th November 1837, Ganapati censured Ramalinga for delay and gave orders about certain villages.

Exhibit 964 is a letter written by Aiyarappa at Benares to Ramalinga at Tiruppanandal on the 29th September 1839. It suggests that a junior should not be appointed without actual trial and says, "Though you were doing business at Benares for the space of 15 years, you were sent for there and Ganapati Swami kept you with him for a year and wrote about you to this place and on deep consideration made up his mind."

Exhibit 1271 is a letter, dated April 1837, from Aiyarappa and Ramalinga, acknowledging that Sadayappa appointed them to management at Benares and that they acted under his orders, and promising to act in subordination to Ganapati.

Exhibit G30 is a letter written to the Pandara Sannadhi at Dharmapuram by Aiyarappa at Benares in September 1841. It says, "Ganapati did not like to have Chokkalinga for his junior, but sent for Ramalinga from Benares."

With these letters before us, it is not possible to treat either the oral evidence or exhibits R18 and W24 relied upon for the

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appellant, as showing that the Pandara Sannadhi at Dharmapuram appointed Ramalinga as Ganapati's junior, or the prior managing Tambirans either at Benares or Tiruppanandal as *bonâ fide*, though they were all no doubt Dharmapuram men.

23. We pass on to Ramalinga's management, which extended from June 1838 to May 1841. In his turn Ramalinga added to the property of the Mutt at Tiruppanandal by new purchases, and exhibits 153 to 159 show that the purchases aggregated in value about Rs. 4,000, and that they were made in his name and to be enjoyed after him in the line of disciples. As to endowments for new charities, exhibit 1391 shows that a choultry, a tank, and a tope at Karuppur near Kumbakonam were bestowed in gift upon Sadayappa Tambiran by the Maharaja of Tanjore in 1832, that they since remained under Sadayappa's management and that of his successors at Tiruppanandal, that Ramalinga instituted certain legal proceedings in connection with that property, and that Ramalinga's successor, Chokkalinga, continued them and obtained a decree.

24. It appears further from letters which passed during Ramalinga's management and that of his successor, exhibit Q4, dated March 1841, R4 dated April 1841, S18 dated 1841, and X7 dated 1850, that a certain charity was instituted at Benares by the Zamíndár of Ettiyapuram at the instance of Kandappa Desigar, the Pandara Sannadhi at Dharmapuram, but that this charity was managed together with other Benares charities by the Tambirans at Tiruppanandal. They further show that this charity was maintained by the zamíndár by periodical remittances, that those remittances were made, and that all correspondence in regard to them and to other matters relating to the charity passed through the Pandara Sannadhi at Dharmapuram. In exhibit X7, which is a letter from Tiruppanandal in reference to this charity to Dharmapuram, it is stated, "as the charity was founded by Kandappa Desigar Sathya Guru, long ago, who had been there, if it (the remittance in arrear) cannot be collected by your holiness, his successor, your holiness may know that it cannot be got at all." It is clear then that this charity was founded at the instance of the Pandara Sannadhi at Dharmapuram, and that its management by the Tambiran at Tiruppanandal was presumably due to an arrangement made between the two institutions as a matter of convenience. But the charity has not been

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permanently endowed, and it is not therefore necessary to dwell upon this part of the case further.

25. As to the ground of Ramalinga's succession, Ganapati's will (exhibit 4) shows that he appointed Ramalinga as his successor, in the same manner that Sadayappa appointed Ganapati. This document describes Ramalinga as "my junior" in the same way in which Sadayappa's will described Ganapati as his junior. In exhibit 10, Ramalinga said that he was *directed by Ganapati* to serve as his junior, and undertook to follow the arrangements made by *him* in regard to the management of properties appertaining to, or under the control of, Tiruppanandal.

Exhibit 21 shows that the Collector of Tanjore ordered the miras to be transferred to Ramalinga's name on the ground that Ganapati appointed him, and that Ramalinga was second to Ganapati.

Exhibits 348, 388 and 420 show that the Raja of Tanjore and the Zamíndárs of Karvetnagar and Venkatagiri recognized Ramalinga's succession as the representative of the founder of some of the important Benares and other charities managed from Tiruppanandal. In exhibit 348 Ganapati is described as Ramalinga's "senior Tambiran," in exhibit 388 Ganapati is referred to as Ramalinga's "elder brother," and in exhibit 420 he is mentioned as "Ramalinga's senior."

26. As to the appointment of a junior to Ramalinga, exhibits 964, 965, 11 and G30 relate to it.

Exhibit 964 is a letter from Aiyarappa Tambiran at Benares to Ramalinga at Tiruppanandal on the 29th September 1839. It premises that Ramalinga intended to take as his junior Chokkalinga, who was then the Tambíran of the Mutt at Achiram, and suggests that he should be tried for some time before he is appointed.

Exhibit 965 is another letter written by Aiyarappa at Benares to Ramalinga at Tiruppanandal on the 16th October 1839. Adverting to the information that Chokkalinga had already come to Tiruppanandal, the letter states, "if it appears to you that he is a worthy man, arrange for some person for the Achiram Mutt; do not elevate Chokkalingam at once; keep him under you for some time and then make up your mind. You can then see what he is and decide. With respect to this matter, act as carefully as you ought."

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Exhibit G30, dated the 25th September 1841, which is produced by the appellant in evidence, throws light on what the Pandara Sannadhi at Dharmapuram did on this occasion. It is a letter which was written to him by Aiyarappa Tambiran in charge of the Mutt at Benares, and states, "the late Ganapati Tambiran, though he knew Chokkalinga Tambiran, was not willing to have him as his assistant and sent for Ramalinga Tambiran from here. Ramalinga wrote to me to say that he wanted to send for Chokkalinga and have him at Tiruppanandal. Your Sannidanam wrote to me that you did not like that Ramalinga should have with him Chokkalinga. I not only wrote to Ramalinga to act according to your Sannidanam's wishes, but also wrote to Chokkalinga to go back to Achiram or come over to Benares, where we might consider what might be done. In spite of this he stayed at Tiruppanandal. In a letter subsequently sent by your Sannidanam, you stated that, as there was no one at Tiruppanandal to assist Ramalinga, charities were not conducted properly, that you could think of no other but Chokkalingam, and asked me to write to Ramalinga to have Chokkalinga there. I wrote to Ramalinga Tambiran to that effect and intimated the same to you by a letter. In spite of my letter Ramalinga was hesitating till he died."

Exhibit 11 shows that Ramalinga took an agreement from Chokkalinga on the 4th May 1841, and it is to the following effect: "As I am directed to be your assistant in looking after your state and charity affairs, I shall conduct myself according to your orders. * * * Further, I shall go to Benares and other places wherever I am ordered to go." Exhibit 5 shows that Ramalinga appointed by his will Chokkalinga as his successor, and Ramalinga died in the same month. It appears then reasonable to conclude that the Pandara Sannadhi at Dharmapuram did not possess or exercise any right of appointment in connection with Tiruppanandal until Ramalinga's time. The contention that he had such right is negatived not only by the documentary evidence mentioned above, but also indicated by his own conduct. If he had such right, and if Ramalinga was a mere servant, why seek to influence Ramalinga through Aiyarappa with respect to the selection of Chokkalinga as junior. This procedure at Dharmapuram indicates a belief at that time that the right of appointing a junior was vested in Ramalinga, and that the Pandara Sannadhi could only seek to influence Ramalinga through another,

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when he wanted to have at Tiruppanandal one who would serve the Ádhinam at Dharmapuram.

27. We may next refer here to exhibits N4 and O4.

Exhibit O4, dated the 3rd November 1840, advises of the remittance of Rs. 10 from Tiruppanandal to Dharmapuram, and requests that Abishekam and Nevediyam to the Ádhinam deity Chokkanadhaswami and "Mahesvara Puja" may be performed on the anniversary of the death of Kumara Gurupara Tambiran, who founded the Mutt at Benares. It next gives information as to the damage done to the crops on Tiruppanandal lands by floods, and concludes thus: "I fear there would be great loss (in this season). It has to be seen what would be the grace of Giyana Sambanda Swami in this respect." The terms Abishekam and Nevediyam refer to particulars of divine worship. Giyana Sambanda Swami (or Pandara Sannadhi as he is termed in the plaint) is the name of the founder of the Ádhinam at Dharmapuram, and Chokkanadha Swami is that of the titular deity or image worshipped at that station.

The selection by Ramalinga of Dharmapuram for the annual ceremony to be performed for the benefit of his spiritual ancestor, Kumara Gurupara, and the invocation of the grace of the founder of the Ádhinam to avert loss apprehended from flood, warrants the inference that Dharmapuram was regarded by the Tambiran of Tiruppanandal as his Gurupitam (the seat of his religious preceptor) and the founder of the Ádhinam as his original Guru or spiritual ancestor. The allusion to the damage done to crops by floods might have an appropriate place in a communication either from a friend, or a subordinate, or a disciple, and we cannot attach any probative value to it as indicative of subordination in regard to management of endowments.

Exhibit N4, which bears date 4th October 1840, shows that the revenue authorities required the production of grants relating to sarvamaniam (rent free) and shotriam (assessed with a light quit-rent) lands held on account of Benares charities, that Ramalinga produced them, and that he mentioned this circumstance in his letter. It refers also to a letter received from Dharmapuram as an order. This document is referred to as indicating the status of a subordinate in regard to endowments. That the Tambirans at Tiruppanandal were in a spiritual sense the subordinates of the Pandara Sannadhis at Dharmapuram, there is no doubt. There

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was the relation of preceptor and disciple. Its spiritual import, as denoted by the ceremony of Dattam or gift, to which we have already adverted, is that the tambiran (disciple) is his guru's slave. The footing on which they ordinarily correspond with one another is, according to the usage of the country, that of a slave and his master in a spiritual sense, and it is no matter for surprise, then, that in many letters produced in this case, terms of abject submission and adulation often take the place of expression of courtesy combined with self-respect, which should characterize communications between friend and friend and even master and servant. By virtue of the relation of preceptor and disciple, which, according both to law and usage, is analogous to that of father and son, the correspondence between them might appropriately refer to matters which affect really the exclusive property of one as affecting both and as of common interest. Inquiries and replies in regard to such matters are common as tokens of mutual regard, and might be found to characterize their correspondence, neither party contemplating however any adverse claim at the time. Having regard to these peculiarities suggested by the status of Tambirans and Pandara Sannadhis, we consider it unsafe to take mere words of subordination or occasional inquiries and replies in regard to matters affecting the charities at Tiruppanandal as safe tests of subordination. We consider it necessary to consider them together with other unequivocal acts and declarations and to determine their weight as a whole. Taking this course, we are not prepared to say that the inquiry and reply in regard to the production before revenue officers of title deeds relating to Benares charities indicate the existence of a legal right of control on the part of Dharmapuram.

28. We shall here notice a few letters, which show that Kandappa Desigar, who was the Pandara Sannadhi at Dharmapuram at this time, tried to influence the appointment of the junior made at Tiruppanandal, and took advantage of opportunities which presented themselves, to initiate such interference. We observed already that Ramalinga was the first Benares Tambiran who succeeded to Tiruppanandal in supersession of his senior Aiyarappa.

Exhibit Q19 shows that Aiyarappa felt his supersession. It also shows that Ramalinga, soon after his elevation, forgot that he had been Aiyarappa's junior for fifteen years at Benares and asserted that he was Aiyarappa's master. Aiyarappa considered

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that he was insulted, and that Ramalinga's conduct was incompatible with the spiritual relation that subsisted between them as senior and junior tambirans or brothers. He complained to their common spiritual superior, the Pandara Sannadhi at Dharmapuram, adding that "he did not like to do duty at Benares according to Ramalinga's directions, and enclosing Rs. 5 as a present to be placed at the feet of his guru (a token of reverence paid by a disciple to his guru), asked the then Pandara Sannadhi for instructions. Up to this period the Benares Tambiran and the Tambiran at Tiruppanandal acted in concert without reference to Dharmapuram, and the Benares tradition as to independence of management prevailed. Aiyarappa's supersession by Ramalinga produced discord between them and gave an opportunity to the Pandara Sannadhi to interfere. The reply, which the latter sent to Aiyarappa's complaint, is not before us; but we observe that Aiyarappa continued to serve at Benares until Ramalinga's death, that Ramalinga consulted him as to the appointment of Chokkalingam as junior, that the communications which passed between them were characterized by the sense of the relation of senior and junior brothers, that Aiyarappa at times forgot his position as a subordinate as in telling Chokkalingam to go back to Achiram, and that Ramalinga did not openly resent it, though he pursued his own inclination. We also find that the Pandara Sannadhi wrote to Aiyarappa when he desired first that Ramalinga should not take Chokkalinga as his junior, but desired afterwards that Ramalinga should have him. These facts seem to indicate that the then Pandara Sannadhi interfered to restore harmony when the Tambirans at Tiruppanandal and Benares disagreed, and to influence the former through the latter in the selection of a successor to whom he had no objection.

29. Before we enter on Chokkalinga's career, it is desirable to summarize the course of management until Ramalinga's time. From the time of Tillanayaka to that of the succession of Sadayappa, there was but one managing tambiran as well at Benares as at Tiruppanandal. The latter was the junior and the former the senior, but both belonged to the Ádhinam at Dharmapuram. On the death of the senior, the junior succeeded, proceeded from Benares to Tiruppanandal, and exercised supervision and control from there. Exhibit 17 shows that the predecessor appointed the successor. Prior to the foundation of the Mutt at Tiruppanandal,

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the one at Benares was the centre of supervision and control, and the managing tambiran at that station was the recognized superintendent of charities and their responsible trustee. After the Mutt at Tiruppanandal was instituted, it became the ultimate centre of control, and the senior tambiran and the responsible superintendent or trustee lived there, the junior at Benares acknowledging himself to be his agent and acting in subordination to him. The peculiar feature then of this period consisted in the substitution of two centres of supervision for one, the ancient unity of control being preserved by the Benares Mutt being constituted into a subordinate centre of control, and the ancient course of succession being kept up by the appointment of the junior at Benares as the successor of the senior at Tiruppanandal. All the managing tambirans, however, both at Benares and Tiruppanandal were Dharmapuram men and belonged to that spiritual family, of which the founder of the Ádhinam at Dharmapuram was the original ancestor; but there was no other trace of affinity between the Mutt at Dharmapuram and the Mutt at Tiruppanandal and Benares.

From the time of Sadayappa to that of Ramalinga, we find that there were two managing tambirans, both at Benares and at Tiruppanandal, a senior and a junior; and the peculiar feature of this period consisted in this double agency at each centre of control, which was probably due to a considerable increase in the number and value of endowments to be superintended. The junior at Tiruppanandal succeeded the senior, and the former was first nominated by the latter as junior and then as successor by a will which premised full ownership and an unqualified power to appoint a successor. The ancient course of succession was preserved by the appointment of the junior tambiran in the centre of control. As before, both were Dharmapuram men and belonged to the same spiritual family. Judging from the evidence on record, Ganapati was the first junior at Tiruppanandal, who, on the death of his senior, succeeded him, but at the date of his succession he was also the senior tambiran both at Benares and at Tiruppanandal, Aiyarappa and Ramalinga at Benares being his juniors. In the case of the second succession during this period, viz., of Ramalinga, we notice that Aiyarappa, his senior at Benares, was superseded, but Ramalinga was nominated as junior at Tiruppanandal and then as successor.

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30. We shall now compare the succession at Tiruppanandal with that indicated by the Mitakshárá law, as applied to the property of a spiritual family. The course of succession prescribed by that law is that of the disciple, the preceptor, and the spiritual brother, who is a companion in religious study and associate in holiness, belonging to the same hermitage. As between spiritual brothers, the rule of preference is laid down in the following terms :—

> A spiritual brother and associate in holiness takes the goods of a hermit. A spiritual brother is one who is engaged as a brotherly companion [having consented to become so]. An associate in holiness is one appertaining to the same hermitage. Being a spiritual companion and belonging to the same hermitage, he is a spiritual brother associate in holiness.
>
> But, on failure of these (namely the preceptor and the rest), any one associated in holiness takes the goods, even though sons and other natural heirs exist.

Though in Smritichandrika, Madhaviya and Sarasvativilasa, the expressions "spiritual brother" and "associate in holiness" are differently explained, two conditions are mentioned in them all as indispensable, viz., that the successor must have the same preceptor or belong to the same hermitage or spiritual family, and that he must be an associate in religious study or work(1).

The succession at Tiruppanandal then must at all events in part be referred to the special constitution of the Ádhinam.

First, the succession of a disciple in its primary sense is not possible, for, as already observed, none but the senior and the junior Pandara Sannadhis of Dharmapuram are consecrated as achariyas or preceptors, and without such consecration, no one in this Ádhinam is competent to appoint and attach a tambiran to it, and the result is that every tambiran had a Pandara Sannadhi at Dharmapuram for his spiritual preceptor. Next, the succession of the preceptor was not possible, for, the usage which obtained indicates that Kumara Gurupara, though he was a Dharmapuram man, was recognized as the real founder of these mutts, from whom succession had to be traced, and from Tillanayaka's time a

(1) Smritichandrika, chap. XI, s. vii. ii ; Madhaviyal, para. 48 ; Sarasvativilasa, Foulkes' translation, s. 623.

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Dharmapuram man associated with the managing tambiran as junior in the administration of the same religious charity and service has been appointed as successor. The ground of succession, as stated in the wills and orders issued by Collectors and in letters of recognition received from the representatives of founders of charities, was the relation as junior and senior in the Mutt at Tiruppanandal or as spiritual brothers and associates in holiness. Still, they as well as the deeds of purchase speak of succession in the line of disciples of the managing tambiran at Tiruppanandal. The word disciple is a religious term and refers to a spiritual relation. Its recognized foundation is the tie between the person who initiates and the person who is initiated in the mula mantram or the fundamental text of the order of tambirans. The power to initiate in this Ádhinam being confined to Pandara Sannadhis, the relation of preceptor and disciple in the above primary sense is not possible as between the tambirans belonging to the Ádhinam. The only spiritual relation that is possible as between them is that of senior and junior brothers. Seniority, as recognized among ascetics, depends not on age, not on eminence for piety or learning, but on the duration of time during which he has been in the holy order.

It is here necessary to advert to another peculiarity in the constitution of the Ádhinam. Its founder was the original spiritual ancestor and achariya or guru or preceptor, and all his successors as Pandara Sannadhis represented the line of achariyas or preceptors. As between them and mere tambirans, the rule of seniority has no application, for, by reason of his status as guru, a Pandara Sannadhi, however young and however illiterate, whatever may be the duration of his life as ascetic, is the tambiran's spiritual superior. As between the tambirans themselves, the rule of seniority appears in a double aspect. The senior and the junior may have the same Pandara Sannadhi for their guru or preceptor, or they may have different Pandara Sannadhis belonging to successive generations for their gurus. It is usual, therefore, for a senior tambiran to speak of a junior in common parlance as his disciple when he is to succeed him as belonging to a later generation or as a junior in the Asramam. It is in this sense that the terms junior and disciple are applied at Tiruppanandal to successors. This is also expressly referred to by Chokkalinga and Ganapati II in exhibits 28, 29, 38, 389, and in 405. In this sense they call their predecessors "elder brothers" and "seniors."

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There is considerable oral evidence to show from what Pandara Sannadhis at Dharmapuram each of the managing tambirans received his mantra kashayam from the time of Ganapati, there is documentary evidence that all the managing tambirans were Dharmapuram men, that is, tambirans who received their mantra kashayam originally from some Pandara Sannadhi at Dharmapuram. The Pandara Sannadhi, however, though their religious preceptor, was never the managing trustee at Tiruppanandal. The endowment deeds in regard to some of the money grants and documents executed by Talagnayar to Sadayappa in 1829 (exhibits 582 and 583) and the course of succession that has obtained show that each had his own line of successors.

31. The subjoined table shows the course of succession in the line of Pandara Sannadhis at Dharmapuram from the time of Tillanayaka Tambiran.

1
Sivagiyana Desigar.
|
2
Muthukumara Desigar.
|
3
Talagnayana Desigar.
|
4
Kandappa Desigar.
|
5
Masilamani Desigar.
|
6
Sachidananda Desigar.
|
7
Manikkavasaka Desigar.

It should be observed here that there were a senior and a junior Pandara Sannadhi at one and the same time, and that the junior succeeded the senior unless dismissed for misconduct, and that a will was left at times by the senior Pandara Sannadhi appointing his junior as his successor. This indicates probably the source from which the course of succession at Tiruppanandal was originally derived.

32. As to the Pandara Sannadhi's connection with Tiruppanandal and Benares, we find, in the first place, that the managing tambirans at those stations were the disciples of his Ádhinam;

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secondly, that the first three Pandara Sannadhis joined the managing tambirans at Tiruppanandal in guaranteeing the due administration of money grants for some Benares charities; thirdly, that certain payments were from time to time made from Tiruppanandal for religious services and for guru puja at Dharmapuram from Sadayappa's time, while full independence in regard to the administration of endowments and of appointment in regard to succession were openly asserted at each succession at Tiruppanandal, but not challenged at Dharmapuram; fourthly, that on the death of Sadayappa, who, as a pious disciple, was liberal in his contributions to the Ádhinam and warm in his attachment to the Pandara Sannadhi, a tambiran and a layman suggested in 1836 to the then Pandara Sannadhi the desirability of asserting a power of appointment; fifthly, that no action was however taken immediately as suggested; sixthly, that when Ramalinga desired to take Chokkalinga as his junior, the Pandara Sannadhi wrote to Aiyarappa to inform Ramalinga that Chokkalinga was not worthy of being chosen by him; seventhly, that he again desired Aiyarappa to mention to Ramalinga that he (Pandara Sannadhi) considered that Chokkalinga was the fittest person available in the south; and, eighthly, that Ramalinga however appointed Chokkalinga as his successor by a will, which asserted his ownership as to endowments and power of appointment as to succession. It appears, further, that in Kandappa Desigar's time a charity was instituted by the Zamindár of Ettiyapuram, and that though it was entrusted to the management of the Pandara Sannadhi, it was in fact ever since managed with his consent and approval by the Tambirans at Tiruppanandal, and that the Pandara Sannadhi exercised no functions, even in regard to this charity, other than being the medium of communication between Tiruppanandal and Ettiyapuram. As to the endowment at Achiram, it was designed partly for the benefit of Dharmapuram and partly for that of Benares charities, and the tambiran there submitted also accounts to Dharmapuram, though he was appointed by the Tambiran at Tiruppanandal. The result of the foregoing retrospect is that until Ramalinga's time the Pandara Sannadhi did not possess or exercise the power of appointing Tambirans at Tiruppanandal or interfering in the management of those tambirans.

33. The next or third period in the history of management is that of Chokkalinga and Ganapati II, both of whom were

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employed under the Pandara Sannadhi prior to their succession at Tiruppanandal, and were in a position to be influenced in their relation to Dharmapuram more by the recollection of their former position as subordinates than by Benares traditions as to independence of management. Chokkalinga was the first of this class.

Prior to his succession at Tiruppanandal, Chokkalingam was the tambiran in charge of the Mutt at Achiram, and before he proceeded to Achiram, he was employed in the store house at Sivasilum in Tinnevelly under the junior Pandara Sannadhi. He was however taken first on trial by Ramalingam, and continued on that footing for nearly two years before he was appointed junior and successor under exhibits 5 and 11.

The ground on which Chokkalingam rested his succession was his appointment by Ramalingam as his junior and the continuance of his relation as such when the latter died. In exhibits 23 and 24, he stated, "My senior Kasivasi (residing at Benares) Ramalinga Tambiran appointed me to manage all his affairs, and whilst I was so doing, he died of illness on the 4th May 1841."

By exhibits 26 and 27, the registry in the Collector's books was transferred to the name of Chokkalingam from that of Ramalingam. They show that the relation as junior and senior was regarded by the then Sub-Collector as the basis of Chokkalingam's title. In exhibits 27 it is said, "Whereas Chokkalinga Tambiran who was nominated by him (Ramalinga Tambiran) during his lifetime is entitled to everything, and no objection or claim was made though notices inviting the same were duly published, we have signed the miras register or list."

Chokkalingam's succession was intimated to, and approved by, the representatives of some of the influential founders of charities under the management of Tiruppanandal (exhibits 389, 405, 422 and 456). In exhibits 389 and 405, Ramalingam is referred to as "your (Chokkalingam's) predecessor or elder brother," and in 404 and 422, as "your senior."

We have already adverted to Ramalinga's will (exhibit 5), which describes Chokkalingam as "my junior," and declares that "Chokkalingam alone is to be the full owner after my death of the properties, &c., belonging to me . . . . . .

34. In connection with this succession, it was contended that the Pandara Sannadhi at Dharmapuram was the person who

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appointed Chokkalinga Tambiran, and our attention was drawn to exhibits X41, M, L, G30, and H2.

Exhibit X41 is a cadjan, which purports to have been addressed by the Pandara Sannadhi at Dharmapuram to Chokkalingam. It says, "As Ramalinga Tambiran, Dharmakarta of Kasi (Benares) Mutt, died on the 24th instant (Chittrai month, 4th May), you are appointed this day the 25th instant as the dharmakarta of the said charities, and are, therefore, directed to conduct the customary charities of feeding, &c., in the sacred places of Benares, Ramesvaram, and without any deviation from the fixed scale and in accordance with the established usage." The genuineness of this document is denied for the respondent and we shall presently consider the evidence in regard to it.

Exhibit M is a letter written on the 28th May 1841 by Aiyarappa at Benares to the Pandara Sannadhi at Dharmapuram. It refers to a letter addressed by Ramalingam, informing Aiyarappa of Chokkalingam's appointment by him as junior. Ramalinga is alleged to have said that "having been very ill for the last fifteen days, he felt that his life was uncertain, *received (obtained) your (Pandara Sannadhi's) order* and reported the same to the Collector and others, and arranged for the due conduct according to usage of the Benares charity by Chokkalingam." It refers next to a letter from the Pandara Sannadhi received after Ramalingam's death, and states, "I learned from your letter that on account of the illness of Ramalingam you went with the holy crowd (disciples) to Tiruppanandal on the night of the 24th at 9 P.M., and that on the morning of Wednesday, the 25th, you gave Chokkalingam parivattam (head cloth) and did everything necessary, and that you appointed him." The letter next contains a request and says, "As Chokkalinga is a new man, as Benares is an important charity, and as he has no experience of this place, I request that *you will direct Kumarasamy Tambiran, who comes from here to be with him as assistant and do business.*"

Exhibit L, dated the 19th October 1840, was written by Aiyarappa to Masilamani Desigar, the Pandara Sannadhi at Dharmapuram. It refers to the death of Kandappa Desigar in August 1840, and throws light on the conduct of the new Pandara Sannadhi in regard to Chokkalingam's appointment by Ramalingam as junior. It states that the new Pandara Sannadhi was in favor of Chokkalingam's appointment, that "the neighbouring

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men who were attached to the Adhinam" petitioned the Pandara Sannadhi to keep Chokkalingam at Tiruppanandal, that he asked for Aiyarappa's opinion, and that Aiyarappa said, "I also consent to it, if it is to your liking, appears agreeable to Ramalingam, and is consistent with the proper conduct of the charities. I agree to your appointing such a person to the management of the other places attached to the Benares charity as to you in consultation with Ramalingam seems meet."

Exhibit G30 is a letter from Aiyarappa to the Pandara Sannadhi, dated the 25th September 1841. It stated that the liabilities of the Mutt at Benares amounted to Rs. 50,000, whilst the amount due to it was limited to Rs. 15,000, and that he sent word to Chokkalingam through Kumarasami Tambiran to arrange for discharging the debts due at Benares. It next referred to Chokkalingam's appointment by the Pandara Sannadhi with apparent reluctance. It next recited the contents of a letter addressed from Benares to Chokkalingam at Tiruppanandal, and complained of the latter's silence as an act of discourtesy. The contents as set forth therein are, "On the death of Ramalinga Tambiran his sannidhanam went there (Tiruppanandal) and made you the head of the mutt there, what did you place at the feet of sannidhanam on prostrating before him? How much did you spend in connection with the funeral ceremonies of the late tambiran? What balance was left in the treasury? You must write to me on these matters. Some tambirans are coming from here and you must take Kumarasami Tambiran, who is one of them, as your assistant." The letter then dwells on the necessity of the head of the Mutt at Tiruppanandal acting in harmony with the head of the Mutt at Benares, and on the previous usage according to which Sadayappa, Ganapati, and Ramalinga, it was said, wrote to Benares on every transaction that took place at Tiruppanandal. It concludes with a request that the Pandara Sannadhi "will, to avoid any misunderstanding between them, decide the matter, and that he will order Kumarasami to remain at Tiruppanandal and assist Chokkalingam in management." There is nothing before us to show what passed since between Aiyarappa and the Pandara Sannadhi, but Kumarasami was not taken as junior, and the misunderstanding between Tiruppanandal and Benares resulted in a quarrel. It appears next that as Ramalinga's senior, Aiyarappa urged that he was lawfully entitled

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to the Mutt at Tiruppanandal, that he appointed Kumarasmi as Ramalinga's successor, and that he addressed a petition to the Collector to that effect, and that Chokkalinga made a representation that Aiyarappa and his predecessors were appointed by the Tambirans at Tiruppanandal, and that the former acted under the orders of the latter (exhibit 600). In this document Chokkalingam stated that the tambirans in Benares, Ramesvaram, Chidambaram, Achiram, and Morangi were appointed from Tiruppanandal and acted in subordination to it. It is further in evidence that, assisted by some of his friends, Kumarasami endeavoured to effect a forcible entry into the Mutt at Tiruppanandal and create a disturbance, that the Collector of Tanjore interfered and protected Chokkalinga's peaceful possession which extended to two years, referring Aiyarappa and his nominee to a civil suit (exhibits 787 and 788). With Aiyarappa's death in July 1843 the cloud that hung over Chokkalingam's position as the Tambiran at Tiruppanandal cleared away.

These violent proceedings suggest the probable inference that the Pandara Sannadhi did not aid Aiyarappa or favor the introduction of a Benares man as Chokkalingam's junior.

35. The Pandara Sannadhi does not appear however to have interfered with Chokkalingam's management. It is not shown that either Chokkalingam or his predecessors or his successors ever accounted for their management to Dharmapuram. It was Chokkalingam that was regarded not only as the ostensible but also as the sole responsible trustee by the representatives of the founders of charities. It was to him that the Raja of Venkatagiri wrote in 1850 about the repair of his choultry at Benares (exhibit 421). Again, it was Chokkalinga who was called upon by the Collector of Tanjore in February 1852 to explain where and by whom the charities founded at Benares by the Raja of Tanjore were managed (exhibits 603 and 604). Exhibit 457 shows likewise that one Varada Pillai of Madras addressed Chokkalingam in regard to the charity at Srirangam managed from Tiruppanandal. We further find from the letters numbered 351 and 356, dated January and November 1844, that the representatives of the Raja of Tanjore considered the Tambiran at Tiruppanandal as solely responsible for the due administration of the charities at Benares and the Tambiran at Benares as his nominee and agent.

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They also show that it was Sadayappa Tambiran of Tiruppanandal, who appointed Aiyarappa to Benares.

36. Apart from the external recognition of Chokkalingam as the real trustee, his own declarations and acts indicate independence in his capacity of managing Tambiran at Tiruppanandal. Like his predecessors he made purchases in his own name, for himself and his successors in the line of disciples, and these extended from January 1842 to December 1851 (exhibits 160-175).

Exhibit 1336 shows that he hypothecated in 1851 two villages belonging to Tiruppanandal in his own name and raised thereon Rs. 9,560.

Exhibits 1392 and 1399 show that he instituted legal proceedings in his own name in regard to endowments and other properties under his control.

Exhibits 1273-6 prove that nearly Rs. 60,000 set apart in his will by one Pachayappa Mudaliar at Madras for certain charities at Benares were made over to Chokkalinga in 1851 under the order of the late Supreme Court, as a fund from the interest of which the charities indicated by the testator were to be administered by the tambirans at Tiruppanandal.

In exhibit 1273, the petition addressed by Chokkalingam to the late Supreme Court on the 24th July 1848, he stated that the business at Tiruppanandal "was carried on by a principal and a deputy tambiran, the deputy being from time to time chosen and elected by the principal; that upon the death of the principal tambiran, he is succeeded by the deputy, who proceeds to elect and choose a deputy to supply his place; that previous to the election of such deputy the principal tambiran usually takes upon trial the person whom he proposes to elect as a deputy, and keeps him for some time on trial before he appoints him to the office of deputy; that he and his predecessors have had the *sole management* of the funds bestowed by charitable individuals in Southern India, and have from time to time remitted the amount of such contributions to agents at Benares, who under his directions distributed the funds so remitted and accounted to him for the same; that such agents were always entirely under the management and control of himself and his predecessors and were liable to be removed with or without cause, and that in fact himself and his predecessors have always been, since the establishment of the

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Mutt at Tiruppanandal, *the only persons responsible* to the several charitable persons for the due application of the funds bestowed by them in aid or support of charities." Though the final order on this petition was made in 1851, it does not seem that the Pandara Sannadhi at Dharmapuram chose to come forward on this occasion and assert his ownership to or control over the Mutt at Tiruppanandal, though an advertisement was published in the local newspapers at Madras, inviting all persons who desired to claim the fund to prefer their claim.

37. As regards the tambirans concerned in the local superintendence of endowments, Chokkalingam appears to have appointed them of his own authority. About this time the Mutts at Benares, Morangi in Nepaul, Achiram in Travancore, and Ramesvaram, acted in subordination to Tiruppanandal. As to Benares, Aiyarappa died in July 1843, and Chokkalingam directed Saminadha Tambiran at Morangi to proceed to Benares and take charge of the Mutt there. Exhibit 972, September 1843, shows that Saminadha reported his arrival at Benares and entered on his duty as directed by Chokkalingam. Exhibit 356 proves that the Raja of Tanjore declined in 1844 to notice a communication from Saminadha Tambiran at Benares, because he did not say that he was appointed by Chokkalingam, and that Sadayappa appointed Aiyarappa and gave him arukattu and cloth. Exhibit 987 shows that Chitambaranadha, who was appointed to succeed Saminadha, was Chokkalingam's subordinate, and that the former brought to the notice of the latter the embarrassment caused by the creditors of the Mutt at Benares and asked Chokkalingam to come there and to make some arrangement. See also exhibits G5 and W5.

Exhibit 642, dated March 1848, shows that the Tambiran at Ramesvaram applied to Tiruppanandal for instructions as to feeding certain persons in the choultry in his charge.

Exhibit 999, dated March 1850, shows that Chokkalingam was asked to send a tambiran to serve as junior at Benares, and that Chitambaranadha proposed certain arrangements in regard to Morangi.

Exhibit 987, under date September 1848, proves that Chitambaranadha, the senior Tambiran at Benares, asked Chokkalingam at Tiruppanandal to remit Rs. 25,000 and thereby put an end to the annoyance arising from the pressure put upon him by the creditors of the mutt at that place.

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Exhibit 1000, dated May 1850, shows subordination, and that orders were asked for in regard to Benares and Morangi.

Exhibits 964 and 965 prove that in September and October 1839 Aiyarappa asked Ramalinga to send a tambiran to Achiram in the place of Chokkalingam, when the latter was taken as junior at Tiruppanandal.

38. Passing on to Chokkalingam's relation with Dharmapuram, the first thing that attracts notice is that he was a disciple of Dharmapuram. In June 1845 he called the Pandara Sannadhi his "father" (exhibit J5); and in June 1851 he said the Pandara Sannadhi was the common guru of himself and of the Tambiran at Trichinopoly (exhibit E8). In letter Y5 addressed to the junior Pandara Sannadhi at Tinnevelly in June 1847, Chokkalingam said, "You ask whether it is proper for me to charge for small articles sent from Tiruppanandal, whilst I belong to the same Ádhinam and I am treated well. This is true. Everything here is yours. Have you not taken to yourself my soul, my body, and my property when I became your slave." In exhibit W47, which we have already adverted to, Sadayappa Tambiran was praised as "the eldest darling and son of the Ádhinam." Judging of filial piety by the total amount of contributions made to Dharmapuram from Tiruppanandal, Chokkalingam demonstrated his attachment far more actively than Sadayappa did. (1) Two Katlais or special services were instituted in the eastern and western temples attached to the Ádhinam at Dharmapuram, and Rs. 3-14-0 a month was paid for daily midday service or puja in those temples, besides 1 rupee a month for Pradosha Katlai, or worship on the 12th day of every lunar fortnight. (2) There was another special morning service instituted to be performed in the month of Margali (December-January) every year. (3) Chokkalingam made frequent contributions on account of the expenses of guru puja at Dharmapuram, which is the annual ceremony performed for the spiritual benefit of the founder of the Ádhinam and that of his successors. (4) There were also remittances made from time to time from Tiruppanandal to Dharmapuram on account of what is called Maheswarapuja, which is the annual ceremony performed for the spiritual benefit of the deceased Tambirans of Tiruppanandal. Guru puja, in which the Pandara Sannadhi is the chief actor, can only be performed where the Pandara Sannadhi is, whereas Maheswarapuja

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may be performed at Tiruppanandal or preferably at Dharmapuram, which is the seat of the tambiran's guru. There is considerable oral evidence to show that the expenses of the guru puja at Dharmapuram were paid by the Tambirans at Tiruppanandal, and it is corroborated by the fact that payments were made on this account from the time of Sadayappa Tambiran. In May 1841 Chokkalingam sent Rs. 100 for Maheswarapuja to be performed on account of Ramalinga. In May 1844, he sent Rs. 200 for guru puja at Dharmapuram; Rs. 50 in August 1847; Rs. 100 in May 1848; Rs. 100 in April 1849; Rs. 30 in September 1849; and Rs. 150 in April 1842. Apart from these contributions, sundry articles were sent as presents in token or reverence for the Pandara Sannadhi or of pious devotion to the idols worshipped at Dharmapuram. We further find that the junior Pandara Sannadhi visited Tiruppanandal once in 1841 and again in 1846, that the Tambiran at Tiruppanandal not only received, entertained and honored him as a disciple should do, but also supplied to him a number of things for his use and money for the expenses of his journey to Sivasilam in Tinnevelly.

39. In addition to making these contributions, Chokkalingam showed great attachment to the Ádhinam and interfered and interested himself in matters which specially related to Dharmapuram. In 1846 and 1847 he concerted measures to secure to Dharmapuram certain annual income from the Ádhinam lands at Achiram. In October 1847 he advised how the management at Dharmapuram might be made efficient, as to what suggestion would add to the dignity of the Ádhinam when the opinion of the Pandara Sannadhi was called for by District officers in regard to some administrative arrangements, and as to several other matters which it is not necessary to enumerate here. He also reported to the Pandara Sannadhi what went on at Benares and Tiruppanandal, as if the Pandara Sannadhi took an interest in Tiruppanandal matters. His communications were in the highest degree deferential in tone, so much so that he said in exhibit J5, "It is beyond the power of my humble self to write your praise, when you, my father, have incarnated yourself simply because you had a desire to send millions of souls to heaven."

These contributions, payments, professions of attachment and the tone of abject adulation, which we have mentioned, may be referred to the spiritual relation that existed between the two

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institutions. The account now and then given of Tiruppanandal and Benares affairs might appropriately have a place in letters written by a disciple to his guru, who is either believed, or deferentially assumed, to be interested in him.

In exhibit J6, dated July 1847, Chokkalingam stated to the Pandara Sannadhi that he appointed one Saravana Tambiran *as directed* to the Mutt at Achiram. It is not shown why he took the order of the Pandara Sannadhi in regard to this appointment, unless it was that the tambiran had also to manage the lands which as already shown were granted partly for the benefit of the Mutt at Dharmapuram.

With the same letter he forwarded also an account of receipts and disbursements in connection with his pilgrimage to the sacred places of Kuttalam and Papavinasam. It is not explained why this was done, but we observe that it was not an account in relation to his management at Tiruppanandal.

There is also documentary evidence in this period, which shows how tambirans were attached to the Ádhinam at Dharmapuram.

Exhibit U4 shows that in July 1841 Chokkalingam asked the Pandara Sannadhi to ordain or give mantra kashayam to certain persons mentioned therein, in order that they might be deputed for service in the Mutts under Tiruppanandal.

Exhibit K5 proves that in July 1846 Chokkalingam wrote to the junior Pandara Sannadhi at Sivasilam to the effect that the senior at Dharmapuram gave mantra kashayam only to one of several persons named by him."

By exhibit U7, dated September 1850, Chokkalingam asked the junior Pandara Sannadhi to send two tambirans, who were then in Tinnevelly, in order that he might depute them to places under his supervision, Benares and Chidambaram.

In exhibit C29, dated December 1846, the junior Pandara Sannadhi was asked to send several tambirans, and the letter stated that there must always be tambirans at Benares available for service in the cause of the charities, and that it was also the senior pandaram's opinion. In exhibit C7, dated December 1848, he applied to the junior Pandara Sannadhi for a supply of tambirans. Again, the evidence shows that it was Chokkalingam that sent tambirans to Benares in August 1850 and directed that one Kumarasami Tambiran be deputed to Morangi in Nepaul. It is also shown that when Chokkalingam desired to assert his authority,

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he sent back the tambirans deputed by the Pandara Sannadhi at the instance of Chitambaranadhan, and sent to Benares others of his own choice belonging to Dharmapuram.

40. There is further oral evidence that the Pandara Sannadhis alone can ordain tambirans. It is confirmed by the fact that they are alone consecrated or anointed as achariyas or preceptors, and that there is no power to ordain where there is no such consecration. The documentary evidence further supports it and conveys the impression that on the one hand Chokkalinga considered that the Pandara Sannadhi was alone competent to ordain tambirans, and that he ought to employ Dharmapuram men, whilst on the other, he believed that the right to appoint them to serve in the mutts under the supervision of Tiruppanandal was vested in him.

41. We shall here refer to the disagreement which arose between Chokkalingam and Chitambaranadhan at Benares, and which in the result humbled both and led to the nomination of Ganapati II as junior at Tiruppanandal. It appears that, when Aiyarappa was in charge at Benares, he incurred a debt of upwards of two lakhs of rupees, and that out of this amount, nearly a lakh of rupees still remained to be paid, the interest due thereon forming a heavy charge on the income that ought to be devoted to the charities. Both Saminadha Tambiran and Chitambaranadha Tambiran brought to the notice of Chokkalingam that the creditors were growing impatient and troublesome, and that it was necessary to arrange for paying them. Though the endowments at Benares were thus overweighted, Chokkalingam, it was said, continued his career of ostentatious liberality and even failed to remit the collections made in the south to Benares punctually. This dereliction of duty on his part caused dissatisfaction and hampered the Tambiran at Benares to a considerable extent in duly executing the charities in that place. The Pandara Sannadhi at Dharmapuram heard of this state of things, and placing himself in communication with Chitambaranadhan, cautiously drew forth from him revelations, which seriously compromised Chokkalingam's character for efficient management. Masilamani Desigar, the Pandara Sannadhi at Dharmapuram, it is suggested for the respondent, interfered in Tiruppanandal ostensibly to place the Benares charities on a satisfactory footing, but really, as the result shows, to bring in Ganapati II, another subordinate of the

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Ádhinam in the south as the managing Tambiran at Tiruppanandal. We shall examine into the correspondence to see to what extent this quarrel affected the previous relation between Dharmapuram and Tiruppanandal.

By exhibit S19, which refers to other confidential letters, Chitambaranadhan, Chokkalingam's subordinate at Benares, promised to send a letter to the Pandara Sannadhi, in order that the latter might show it to Chokkalingam and animadvert on his conduct in terms of severity. It concludes with the request that the Pandara Sannadhi would lecture Chokkalingam on his conduct, and refrain from giving cloth to any tambiran as junior at Tiruppanandal until the writer came to the south as directed.

This document shows that Masilamani Desigar opened a secret correspondence with Chitambaranadhan, that Chitambaranadhan eagerly entered into it, that both wanted to humble Chokkalingam, that Chithambaranadhan desired to influence the appointment of a junior, and wrote as if he thought that the power of appointing a junior was vested in the Pandara Sannadhi.

Exhibit G28 shows that Chitambaranadhan sent the letter which he promised to send, that it was shown to Chokkalingam, that he (Chokkalingam) pointed out that his conduct was all that might be expected in the circumstances in which he was placed and over which he had no control, and that the Pandara Sannadhi desired him to send a suitable reply to Benares enclosing therewith the letter received from Dharmapuram.

This indicates that Masilamani Desigar desired then to proceed no further, and was satisfied with his having interfered to demand an explanation and thereby used his power as the head of the Ádhinam to call upon his disciple to account for apparent mismanagement and to restore cordiality between Tiruppanandal and Benares.

But the letter which Chokkalingam wrote to Chitambaranadhan shows that he took umbrage at the conduct of the latter. He said in it that "he did the business of the charity at Tiruppanandal *under the orders of the Pandara Sannadhi at Dharmapuram*, while the Tambiran at Benares did business there under his (Chokkalingam's) orders." Our attention was drawn at the hearing to the expression "under the orders of the Pandara Sannadhi at Dharmapuram" as evidence of subordination. The circumstances in which the letter was written and the Pandara Sannadhi's position

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as a spiritual superior are the only evidence in regard to the sense in which that expression was used.

That letter provoked an assertion by Chitambaranadhan of the independence of Tiruppanandal and of subordination to Dharmapuram. Exhibit P is the communication addressed by him to Dharmapuram with reference to it and we consider it desirable to set out at length certain statements which it contains and on which considerable stress is laid for the appellant. Chitambaranadhan said—"The statements made by Chokkalingam without remembering well known and well attested facts are false, because when the first Gurupara Swami was made a tambiran, the then Pandara Sannadhi ordered him to travel to the north and return after bathing in the Ganges; Gurupara accordingly proceeded to Benares, bathed in the Ganges, resumed his travels, acquired means of conducting some charity, and submitted to the Pandara Sannadhi an account of acquisitions made by him. Thereupon the Pandara Sannadhi ordered him thus: "Get for the Ádhinam fame by going to the place wherein you acquired the means of conducting charity and by performing charity there. Do not mix up those charity funds with our resources." Accordingly Gurupara Swami got leave of his guru, came to Benares and began to perform charity. From that time to this date the charity has been conducted splendidly. In order that resources which could be collected there might not be wasted but duly realized and sent here, the predecessor in this mutt visited Dharmapuram, and under the orders of the Pandara Sannadhi there built mutts at Tiruppanandal and in other places. One of the tambirans here was placed in charge of the Mutt at Tiruppanandal, and he was ordered to act in accordance with the wishes of the tambiran managing the charities at Benares. If the Tambiran at Tiruppanandal should happen to be a senior and the tambiran here a junior, the charity is not to be neglected by reason of this seniority; but keeping in mind that the Benares charity is the most important of all charities, the two tambirans conducted the charity in harmony, but with due regard to seniority. In accordance with this practice Ramalinga Swami, who went from here and managed the charities at Tiruppanandal, caused the Tambiran now at Tiruppanandal to be sent for, instructed him in all necessary matters and had everything done for him in accordance with custom. If forgetting all this the Tambiran at Tiruppanandal imagines that

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the Mutt at Benares is his own and says it is under his control, is it not derogatory to your dignity?"

In exhibit R, dated January 1850, Chitambaranadhan referred to a letter from Chokkalingam as containing a statement that "Tiruppanandal was omnipotent, and all other places were subordinate to it."

This phase of the quarrel in which both tambirans, whilst contradicting one another as to the relation between them, acknowledged subordination to Dharmapuram, favored the interference of Masilamani Desigar then at Dharmapuram.

It seems that he wrote to Benares expressing dissatisfaction with Chokkalingam, and with the regard shown by him to one Kutti Tambiran, asking Chitambaranadhan to come to Dharmapuram, and promising to make a suitable arrangement for the due conduct of the charities and to appoint a proper person as Chokkalingam's junior (exhibit R). In this letter Chitambaranadhan said that "the honor and the fame of the charity conducted at Benares belonged to the Ádhinam at Dharmapuram, and that as a son of that Ádhinam, he placed implicit faith in the Pandara Sannadhi and asked for a further assurance that he might come to the south in expectation of a satisfactory arrangement being made. Though this assurance was given, the Tambiran at Benares put off his journey to the south and made various excuses from time to time. Meanwhile Chitambaranadhan complained to some of the zamíndárs and to the Maharaja of Travancore that the collections made at Tiruppanandal were not duly remitted to Benares, and the latter threatened to resume the village granted for the maintenance of a charity at Benares. This caused alarm at Tiruppanandal and at Dharmapuram, and for a time the *esprit de corps* influencing the heads of Ádhinams, prevailed against every other consideration. Both the senior and junior Pandara Sannadhis censured Chitambaranadhan for making to outsiders revelations which are likely to stain the Ádhinam in public estimation, and thereby checked disagreeable disclosures. Amidst these troubles Chokkalingam's health failed, and he also asked Chitambaranadhan to go over to Tiruppanandal. This softened Chitambaranadhan who wrote to the Pandara Sannadhi in December 1850 that in the event of Chokkalingam's illness proving serious, the Pandara Sannadhi should make some temporary provision for management at Tiruppanandal and invest a person with cloth

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permanently after his arrival. But Chokkalingam's illness did not then take a serious turn as was apprehended, and Chitambaranadhan delayed his visit to the south until 1852. In the meantime Kumarasami Tambiran, whom Chitambaranadhan desired to see appointed as Chokkalingam's junior, died, and the senior Pandara Sannadhi proceeded on a tour to Tinnevelly. In September 1851 he wrote to Chitambaranadhan to the effect that he knew the history of Chokkalingam's management, the conduct of his agents and the opinions of the representatives of those who endowed the charities, that he obtained an explanation from Chokkalingam, that he consulted the Tambiran at Tirunallar as to what should be done to secure efficient management, and that he was in communication with Vaidilinga Tambiran at Trichinopoly belonging to the Dharmapuram Ádhinam (exhibit H2). In the same letter Chitambaranadhan said that Vaidilingaswami would do well as Chokkalingam's junior. This letter shows also that for the previous six months no remittances were made to Benares, and that Chokkalingam said, when he was addressed:—"What is to be done? The endowment founded by the Raja of Pudukotta and the Zamíndár of Karvetnagar have been attached and remittances are being made to you direct from Travancore. The feeling of other endowers of charities is well known. Let things take their course according to the will of God." In addition to this imbecility on the part of Chokkalingam, the letter complained that Chokkalingam did not comply with a recent arrangement made, viz., that a fixed sum was to be sent punctually to Benares and that Rs. 15,000 was allowed to fall into arrears. For this amount Chitambaranadhan drew on Chokkalingam, who after wavering for some time as to whether he ought to honor the draft, eventually borrowed and paid it. Chitambaranadhan asked again for an assurance from the junior Pandara Sannadhi that a proper arrangement would be made for ensuring efficient management before he made up his mind to proceed to Dharmapuram. In January 1852 he wrote to the Pandara Sannadhi at Dharmapuram expressing his satisfaction with the letter received from the latter that it had been arranged that Vaidilinga Tambiran should go to Tiruppanandal and manage the charities (exhibit K2). In March 1852 Chitambaranadhan had an interview with Chokkalinga at Tiruppanandal. It was arranged that the past was to be forgotten and that they were to be friends again, that Chokkalingam was to act in accordance with

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Chitambaranadhan's opinion, viz., that Vaidilinga Tambiran was to manage the affairs at Tiruppanandal, that Chokkalingam was to be guided by him, and that not a pie was to be spent otherwise than with his consent. Chitambaranadhan reported this fact to the Pandara Sannadhi, who was then on his tour, and asked him to send Vaidilinga Tambiran to Tiruppanandal from Trichinopoly. To his surprise he got no reply. In his letter exhibit N2 he reminded the Pandara Sannadhi of the assurance he had given to induce him to come from Benares, spoke of the present indifference as a misfortune, and said he had to go back to Benares on the 10th April. In June 1852 he acknowledged the receipt of a letter asking him to go to Dharmapuram in order that the Pandara Sannadhi might settle in consultation with him what was to be done in regard to Tiruppanandal matters. He excused himself and said that he had written to Chokkalingam that the latter should come with Ganapati Tambiran to Dharmapuram, and requested that the Pandara Sannadhi would order Ganapati to do business at Tiruppanandal as junior. Exhibit O2 shows that shortly after Chitambaranadhan's return to Benares, he heard that Chokkalingam died and Ganapati succeeded him and wrote the letter exhibit P2 to the Pandara Sannadhi thus: "Your Sannidhanam has invested Ganapati with cloth. Give him such advice as may be necessary and protect him."

42. We shall here consider what advance was made by Dharmapuram in regard to the nature of its relation to Tiruppanandal. It will be remembered that exhibits R19 and W24 indicated in 1836 what that relation ought to be in order that the influence and interests of Dharmapuram might prevail at Tiruppanandal. There was then no opportunity for interference and no action was apparently taken.

Aiyarappa's supersession and Ramalingam's self-assertion created the first opportunity. Kandappa Desigar told Ramalingam not to deny the consideration due to his senior and to act in harmony with him. This was the first form of interference. This interference paved the way for frequent communications between Aiyarappa and Dharmapuram, and he showed a readiness to advise Ramalingam as suggested at Dharmapuram in regard to the appointment of Chokkalingam as junior. There is ground for the belief that in Kandappa Desigar's time the spiritual senior was kept well in hand and played off against his spiritual junior and

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official superior. This made both look to support from Dharmapuram and increased its influence at Tiruppanandal.

A further step was made when Ramalingam died. Masilamani Desigar proceeded to Tiruppanandal, and though Ramalingam had died before he arrived after appointing, according to custom, Chokkalingam as his successor, the Pandara Sannadhi remained to attend Chokkalingam's installation. On that occasion he presented to Chokkalingam a cloth. This act may be regarded by a disciple as a token of blessing and congratulation, and Chokkalingam appears to have treated it in this light. But the Pandara Sannadhi appeared to look at it as a present made by him to a tambiran when he gave him an appointment. In his letter to Aiyarappa he spoke of his having appointed Chokkalingam.

When Chokkalingam showed attachment to the Pandara Sannadhi and Aiyarappa's services were no longer needed, his suggestion that Kumarasami of Benares should be Chokkalingam's junior did not receive support from Dharmapuram, and it was not acceded to. When Aiyarappa began to assert his right as senior to appoint Ramalingam's successor, the Pandara Sannadhi left him to shift for himself.

The quarrel between Chokkalingam and Chitambaranadhan created another opportunity for Dharmapuram. The gain from it was this, viz., (i) that Ganapati, another former subordinate of Dharmapuram, was appointed to Tiruppanandal; (ii) the giving of cloth was repeated for the second time; (iii) during the controversy both the Tambirans at Benares and Tiruppanandal acknowledged that they were subject to the orders of the Pandara Sannadhi at Dharmapuram; (iv) the Tambiran at Benares frequently spoke of giving cloth as equivalent to appointment and treated the power to appoint a junior as vesting in Dharmapuram; and (v) Ganapati was practically, if not formally, appointed by Dharmapuram.

The Pandara Sannadhi himself appears to have formulated the character of his interference in his letter of the 19th May 1852 to Chitambaranadhan. Exhibit O2 shows that the latter was told that if he went over to Dharmapuram it would be arranged with the Tambiran at Tiruppanandal, first, how much of the money was to be remitted to Benares for the performance of charities; secondly, how much of it was to be applied in liquidation of

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debts due at Tiruppanandal and Benares; and, thirdly, who should be appointed as junior Tambiran at Tiruppanandal.

43. We shall now consider the relation between Tiruppanandal and Dharmapuram during Ganapati's management which commenced on the 25th July 1852 and extended to the 10th November 1853.

There is no reason for doubting that like his predecessors Ganapati was also a Dharmapuram Tambiran. Both Chokkalinga and Ganapati stated that they were elder and younger brothers, and this description implies that they were disciples of the same guru or attached to the same Ádhinam. On the day Chokkalingam died, Ganapati remitted Rs. 50 to Dharmapuram and prayed that "Mahesvarapuja and Abhishekam and Nevediyam to Chokkanadha and Giyana Sambanda Swami might be performed for the benefit of Chokkalingam." Special service to the idol at Dharmapuram and to the image of the founder of the Ádhinam there on the occasion of a tambiran's death is an indication that Dharmapuram was the seat of his spiritual family and ancestor. In June 1853 he stated in exhibit E9 that the Pandara Sannadhi asked for an explanation for his failure to attend the "Gurupuja" performed at Dharmapuram about that time, that he gave an explanation and that it was accepted as satisfactory. This discloses the consciousness of a duty to attend the Gurupuja at Dharmapuram, which points to the relation of disciple and guru. We may conclude, then, that the customary spiritual relation of disciple and preceptor continued to subsist in Ganapati's time between the Pandara Sannadhi at Dharmapuram and the Tambiran at Tiruppanandal.

44. As to his relation to the properties appertaining to the mutt and charities at Tiruppanandal, there was also no change. Though the will said to have been made by Chokkalingam is not produced, exhibits 38 and 616 show that one was considered to have existed at that time. However this might be, Chokkalingam stated in his petition to the Collector (exhibit 28) that no one but Ganapati, who was nominated by him as junior and associated with him in the administration of the affairs of his mutt, had any connection with his estate, and with whatever was due by or to him. Ganapati's conduct until his death in buying lands for him and his successors in the line of disciples points to the same conclusion.

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45. As to the basis on which Ganapati's succession was rested, there was also no difference. Both Chokkalingam and Ganapati referred, as the cause of succession, in exhibits 28 and 29, to the spiritual relation as elder and younger brothers, to the appointment of Ganapati by Chokkalingam as his junior and to Ganapati's association as such in the administration at Tiruppanandal according to custom. In his letter, dated the 19th June 1852, Chokkalingam said:—"After consulting Chitambaranadhan we sent for Ganapati Tambiran who was managing the affairs of the mutt belonging to us at Chitambaram, so that he might manage the charity affairs well, as our junior, and gave him cloth on the 5th June, and he has accordingly been looking after the affairs relating to this place. We therefore wrote to Chitambaranadha Tambiran who had come there to visit the Maharaja who fills the position of a parent in regard to this place, and he has made known these facts to the Maharaja." For the purpose of altering the registry in his books, the Collector recognized Ganapati's succession in October 1852, and stated that no objection was raised to it though notices were published inviting the same. It appears from exhibits 372 and 1449 that the then Maharaja of Tanjore, whose ancestors founded some of the important charities at Benares and were regarded as the patrons of the mutt from their position as former rulers of the province, recognized the succession and sent to Ganapati some presents as customary tokens of congratulation. The former states: "We are very glad to learn from your letter that during the lifetime of Chokkalinga Tambiran you were appointed to manage all his affairs in his stead, and that you having moved with the senior tambiran who was very pious and of good conduct, were liked by him, and as a reward for your good behaviour you have succeeded to his high position." In a letter from the Tanjore Palace, Ganapati's appointment by Chokkalingam as junior is referred to in these terms:—"Such a person (Chokkalingam) has chosen you and appointed you for this high place." Thus the ground of succession, which was publicly stated at Tiruppanandal as being in accordance with custom and accepted by the Collector and Maharaja of Tanjore, presumably with the knowledge of the Pandaram at Dharmapuram and without any protest from him, was the appointment of a spiritual brother by Chokkalingam as his junior and the association of such nominee in the administration of endowments at Tiruppanandal during Chokkalingam's life.

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Although wills were made, they invariably declared the junior appointed by the senior during his life and associated with him in management as lawful successor, and confirmed his succession.

46. In connection with the power of appointment claimed by the appellant, reliance was placed on three letters, two from Chitambaranadhan, the Tambiran at Benares, and one from Chokkalingam himself.

In exhibit O2, dated 7th June 1852, Tanjore, Chitambaranadhan said as follows :—

"It was written in your letter the 9th of Vyasi that I had been sent for on account of the Tiruppanandal affairs, that if I come soon it will be arranged with the Tambiran at Tiruppanandal in respect of the Benares affairs, what money was to be remitted for the Benares charity and what was to be paid annually towards the debt here and there, and that I may go to Benares on a junior being appointed according to my mind after consideration. It was stated in your letter of the 20th Vyasi that the Gurupuja fell on the 27th Vyasi and the Maheswarapuja on the next day, that I should conclude my business here and come there in order that the Tiruppanandal affairs might be considered and settled according to my mind. But I am detained here by the Maharaja and I am unable to come. I shall perform the Gurupuja in the place where I am, as it would be done when I was at Benares. It will not be auspicious to appoint a junior to Tiruppanandal in the month of Ani and I will not come before the commencement of the month. If you invest Ganapati with arukattu and sundaravadam and make him conduct the affairs at Tiruppanandal within this month, I shall come afterwards and make an arrangement as suggested by you in regard to receipts and disbursements and about what has to be done hereafter. I have written to Chokkalingam who is at Tiruppanandal on the strength of the promise made by you. He will come with Ganapati to Dharmapuram. I beg you will have mercy on the Benares charities and on me who came to see you, and you will appoint as mentioned above the said tambiran to conduct business holding the junior place at Tiruppanandal."

Exhibit P2 is another letter addressed by the same tambiran to Dharmapuram from Benares three months later, on the 11th September 1852. It refers to Chokkalingam's death and a letter from Ganapati, and goes on to say "as your Sannidhanam has

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invested Ganapati with cloth, I pray you will give him such advice as may be necessary and guide him."

Exhibit H28 is a letter from Chokkalingam to the Pandaram at Dharmapuram on the 19th June 1852, twelve days after the date of exhibit O2, and on the same day on which the letter filed as exhibit 1248 was addressed to the Maharaja of Tanjore. It states "As I and Chitambaranadhan who has come from Benares have on consultation sent for Ganapati Tambiran with a view to appoint him as junior Tambiran at Tiruppanandal, and have sent the said tambiran to your Sannidhanam with the prayer that you will, according to custom, invest him with arukattu and cloth, I also pray that the charities at Benares, Rameswaram and other places may be properly protected by your Sannidhanam."

Exhibits, O2 and P2 should be considered in continuation of the correspondence relating to Chokkalingam's mismanagement, and the necessity that existed for securing a sufficient and punctual remittance to Benares in order that the charities there might be duly administered, and for making an arrangement for the liquidation of the debts which had been contracted both at Benares and Tiruppanandal. The appointment of an efficient junior, and an understanding with the senior that he was to be guided by his advice, was considered to be the appropriate remedy. The name of the Tambiran at Trichinopoly was first suggested by the Pandaram at Dharmapuram and agreed to by Chitambaranadhan, who obtained after his arrival in Tanjore the consent of Chokkalingam to the proposal and wrote to the Pandara Sannadhi ; but the Pandaram sent no reply to his letter, and Chitambaranadhan wrote again complaining of the indifference as a misfortune. Exhibit O2 was written on the receipt of certain letters in May from the Pandara Sannadhi whilst Chitambaranadhan was in communication with the Maharaja of Tanjore. Exhibit 1448 shows that two days before exhibit O2 was written Chokkalingam in consultation with Chitambaranadhan appointed Ganapati as his junior and gave him cloth. No allusion is made to this fact either in exhibit O2 or in exhibit H28. The entire correspondence which took place on this occasion shows that Chokkalingam in consultation with Chitambaranadhan appointed Ganapati on 5th June and communicated the fact through Chitambaranadhan to the Maharaja of Tanjore, and sent Ganapati on the 19th June to be invested by the Pandara Sannadhi with arukattu and sundara-

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vadam, without mentioning that he was already appointed as junior at Tiruppanandal. Having regard to the sequence of events, the investiture by the Pandara Sannadhi followed the appointment previously made by the Tambiran at Tiruppanandal. Having regard to the declarations of Chitambaranadhan in letters exhibits P2 and O2, the power of appointing a junior vested in the Pandara Sannadhi. Having regard to Chokkalingam's letter, it conveys the impression that he did not wish that the Pandara Sannadhi should know that Ganapati had been previously appointed at Tiruppanandal without reference to him. Chokkalingam's reticence was possibly due to a fear that he might give offence to the Pandaram and render his position worse than it was. Chitambaranadhan's declaration was possibly due to the belief that unless he imputed power to the Pandara Sannadhi, he could not invoke his interference in cases of necessity and seek to control the administration of his official superior at Tiruppanandal. We consider it safe to rely on the sequence of events in preference to declarations made by parties who might be influenced by interested motives or by fear. As to the prayer that the Pandara Sannadhi may invest Ganapati with arukattu and sundaravadam according to custom, the documentary evidence shows that only on one previous occasion the Pandaram at Dharmapuram gave cloth, &c., that that was on the occasion of Chokkalingam's installation, that Chokkalingam had been appointed junior previously, and that Ramalingam had died after making a will in Chokkalingam's favor prior to the Pandaram's arrival at Tiruppanandal. On that occasion also the giving of cloth followed the appointment made by Ramalingam at Tiruppanandal according to custom.

47. In connection with Ganapati's management we are referred to certain letters as indicating his subordination to Dharmapuram.

In exhibit U8, dated 4th November 1852, Ganapati acknowledged a letter from the junior Pandara Sannadhi, and stated that that letter and the order of the Collector in regard to the transfer of miras reached him at the same time. He dwelt on this coincidence as propitious and as a token of "your Sannidhanam's favor towards me as your humble servant." He promised to write to Achiram to send to the junior Pandara Sannadhi Rs. 130, and added that he had written to the tambiran at that place to remit the income of the property there so as to meet the expectations of the Pandara Sannadhi.

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In exhibit W8, November 1852, Ganapati referred to the state of the season, to the balance of Rs. 2,000 which he had to remit to Benares, and to a cloth which he sent to one Sundara Pillai as a token of courtesy, being refused and returned. In exhibit X8, dated the 12th December 1852, Ganapati interceded with the junior Pandaram and asked him to overlook shortcomings on the part of the Tambiran at Achiram, adding that provision might be made for better management. It went on then to give some information about two persons, viz., Sadaya Pillai and Apatharana Pillai. In exhibit Y8, dated the 30th December 1852, he referred to the state of the season and stated that he sent one Ambelavana Tambiran to the Kasi Mutt at Chitambaram. He next referred to a sum of Rs. 80 due upon account to the Tambiran at Benares and asked the junior Pandaram to arrange for its recovery. Exhibit Z8 is another letter from Ganapati, dated 21st January 1853. In this he stated that the Raja of Karvetnagar exempted certain lands in his possession from assessment, and that endeavours were being made to obtain a similar exemption from the Raja of Puducotta. It gives information as to the visits of the Raja of Cochin to Benares, to his having sent hundis to meet the expenses at Benares, and as to the price of paddy at Tiruppanandal. Ganapati then asked for information in regard to the collection of the debt due by Muttapa Kristnaien.

Another group of letters pressed upon us as evidence of subordination consists of exihibts A9–N9.

In exhibit A9, dated 7th March 1853, Ganapati advised the Pandaram at Dharmapuram of his sending Rs. 3½ and some articles of small value as a present in connection with the Sivaratri festival, and concluded it, as was common with many other letters with the sentence "I await your commands as to how I should conduct myself in future as your servant." This we may add is an ordinary form of etiquette observed when a person writes to a spiritual superior who is entitled to reverence from him.

Exhibit B9, dated 26th March 1853, referred to Achiram. Ganapati advised the junior Pandaram to obtain as much as he could from the tambiran at that place and promised to carry out his orders to the very letter. He then stated that he was borrowing money to pay hundis from Benares, that his creditors at Madras were demanding payment, and that his hope of obtaining a loan from Vydisvaran Kovil, which is a temple under the

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management of Dharmapuram, was not likely to be realized. He then gave information about the visit to Dharmapuram of the Tambiran at Tirunallur and the affairs of an Ádhinam temple in French territory and of the temple at Tirubuvanam.

In exhibit C9, dated the 30th March 1853, Ganapati reported to the junior Pandaram that the Tambiran at Vydisvaran Kovil was invested with arukattu and sundaravadam by the Pandara Sannadhi at Dharmapuram, and then referred to the violent storm which visited Tanjore and to the damage done by it.

Exhibit D9 is another letter dated 26th April 1853. It states that the Tambiran at Achiram reported the remittance to the senior Pandaram of Rs. 150. It then proceeded to give news regarding his visit to the Tanjore Palace, the investiture of the Tambiran at Valur, and the appointment of one Arumuga Tambiran to the Katlai at Sheali. It then advised of the despatch of a Gauri Sankam, a peculiar kind of shell used in worship, and concluded with the sentence "I am awaiting your commands as to how I should conduct myself as your servant."

Exhibit E9 is a letter dated 12th June 1853. Ganapati referred to a dispute in regard to some irrigation channel between him and the raiyats at Painkattur, and said that he was putting an end to it by purchasing nine velis of land belonging to his opponents. He also animadverted on the inefficiency of the Tambiran at Achiram, and stated that he duly wrote to Benares about matters at Tiruppanandal. He alluded to the repair of the kitchen at Sivasilam and stated that he had written to Achiram to send Rs. 200 to the junior Pandara Sannadhi.

The next letter we are referred to is exhibit F9. Ganapati noted a letter from the junior Pandara Sannadhi, intimating that the latter was dissatisfied with the management of the Tambiran at Achiram, and intended to proceed there and dismiss him and appoint another in his stead. He said by way of deference that he was not going to raise his voice against that of the junior Pandaram, but then added that the tambiran's errors might be pardoned that time, offering to stand responsible for the payment due from him. He then stated that he sent to Benares the Pandaram's order and the account of Muttukristnayan of Tenkasi.

In exhibit G9, dated the 4th July 1853, Ganapati reported to the junior Pandara Sannadhi that Ramalingakutti Tambiran left Benares about the 28th March.

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He referred next to Ambalavana Tambiran at Chidambaram, to his desire to go back to Tinnevelly and to his actual departure from the former place. He added: "I sent some one at once to take charge of the property there. I had allowed Ambalavana Tambiran to dismiss three men on the establishment at Chidambaram and to employ new men as he thought proper. I think he was destined to receive only so much from me." He then noted a letter from the junior Pandara Sannadhi declining to accept Rs. 200 which was offered to be sent, and remarked: "I do not know if you refused it as it was the money of a sinner or only naturally. But be it as it may, as it is your duty to protect me, I have little concern about it." It then refers to the rain, and to the price of paddy in Tanjore.

Exhibit H9 is another letter from Ganapati to the junior Pandara Sannadhi, dated the 6th August 1853. He noted the remittance of Rs. 340 to the junior Pandara Sannadhi for certain charities to be performed in connection with the bones of the then deceased Zamindár at Ettiyapuram when they are deposited in the Ganges. He noted also that the Tambiran at Achiram was told by the junior Pandaram to send Rs. 200 to Tiruppanandal, because Ganapati undertook to pay the balance, and authorized the Pandara Sannadhi to take Rs. 200 out of the Ettiyapuram remittance. He referred to a few other matters and stated that Ramalinga was in the Mutt at Chidambaram, and that he was suffering from a boil in the leg, adding that he would send him over to Tinnevelly as soon as he arrived at Tiruppanandal.

The next letter to which we are referred is exhibit J9. It repeated the promise to send over Ramalinga Tambiran as soon as he arrived, and then said: "I learned the contents of that piece of paper enclosed in your Sannidhanam's order with directions that no others should look into it." Ganapati referred next to the debts due by the junior Pandara Sannadhi, to the payment of a portion by Palaniyappa Tambiran of Tiruvalur, and added that there were debts to be paid at Tiruppanandal, that the Tambiran at Benares drew upon him, and that he could not remonstrate with him in any way for incurring additional and improper charges. He concluded with a promise to pay Rs. 300 in addition to Rs. 200 which he had already asked the Tambiran at Achiram to remit.

Exhibit K9 is another letter dated the 7th September 1853,

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Ganapati forwarded a letter to the junior Pandaram from Chitambaranadhan at Benares and asked for a reply saying that Chitambaranadhan desired him to send the reply. The letter next stated that Ganapati purchased four velis of land in a village called Vadapati in order to get rid of the annoyance caused by comirasidars in that village.

Exhibit L9 is another letter, dated the 16th October 1853. In this Ganapati referred to the payments due from Achiram and to those already made. He referred next to a letter which he wrote to Benares to induce the person that carried the bones of the late Yettiyapuram Zamíndár thither to make a favorable report about the choultries at Benares to the then zamíndár.

He then referred to his own illness and said that he ordered Rs. 25 to be remitted for performing Abhishekam to Chokkalingaswami at Sailapur, and Maheswarapuja for his benefit and for sending the holy ashes to him.

He said next that Ramalinga Tambiran suffered from fever on three occasions and was then getting better under medical treatment, and concluded with the remark—"*I shall send him over there as soon as I am perfectly recovered.*"

In connection with Ramalingam we were referred to two other letters, exhibits M9 and N9. Their genuineness was denied by the respondents, and we shall refer to them in connection with Ramalingam's appointment as junior.

There is another group of isolated letters to which also it is necessary to refer.

Exhibit D23 is a letter dated 1st January 1853, from the Tambiran at Achiram to the Pandara Sannadhi at Dharmapuram. He remitted Rs. 100, noted an order received from Dharmapuram, sent accounts for a few months, promised to send other accounts, and stated his estimate of the produce which might be realized under Pannai and Purakudi systems of cultivation.

Exhibit E23 is another letter from the same tambiran, dated the 16th January 1853. It contained a request that men might be sent to assist him in harvesting the matam lands at Achiram, and asked for instructions as to whether the harvest was to be conducted under the amani system, or whether the yield was to be estimated before hand and the Purakudis were to be left to cut the crop.

Exhibits F23, G23 and H23 are similar reports about harvest,

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about the sale of paddy, about the probable income, and about several other matters connected with the management of the Ádhinam villages. In the first document the tambiran said: "Need I tell you that ever since I was sent to Achiram I have been fairly managing the affairs of Sannidanam." In the second document he said: "I am always ready to act up agreeably to the instructions of your holiness and crave your forgiveness for shortcomings, and I am always deeply plunged in the meditation of your holiness' feet." In the last document he said also: "It is just and proper that the holy Sannidanam should put up with the faults of his subordinates and protect them."

Now, the foregoing letters, save those from Achiram, disclose no unequivocal traces of agency or subordination. As to those from Achiram they no doubt show subordination. It must, however, be remembered that Dharmapuram had lands at Achiram distinct from those allotted to Benares charities, that the tambiran at Achiram managed the lands of both institutions, and that though he acted under the immediate orders of the tambiran at Tiruppanandal and was appointed by him, he acted as the subordinate and agent of Dharmapuram in respect of Ádhinam lands. In this connection we may mention that in Chokkalingam's time an agreement was taken from the tambiran at Achiram that he would annually remit a definite income from the Ádhinam lands to Dharmapuram every year (J6). As to the Yettiyapuram charities we have already mentioned that all communications in regard to them and all remittances on their account passed through Dharmapuram on the ground that those charities were originally instituted at the instance of a former Pandara Sannadhi though managed by Tiruppanandal together with other Benares charities.

As to management the tambiran at Tiruppanandal did not render any accounts to the Pandara Sannadhi at Dharmapuram at stated periods. Nor did his letters state what income was realized, how much was spent and how much was saved or otherwise applied. Nor do the letters note how each charity was progressing, how each temple festival was performed, and how different subordinates behaved. Nor do they seek for instructions. Their contents contrast in a striking manner with the letters and reports from agents, especially with those sent by Ramalingam when he managed the affairs of the Ádhinam at Dharmapuram during the absence of the Pandara Sannadhi in Tinnevelly between 1871 and 1874, with the letters from Achiram to Dharmapuram

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in regard to Ádhinam lands in Travancore and from Benares to Tiruppanandal. They refer to matters and contain declarations which do not necessarily suggest agency, and which may appropriately find a place in communications from a disciple to a spiritual superior. Ganapati's declaration that "It is your duty to protect me and I shall act according to your orders" is referable to the spiritual relation. His remittances may also be payments made by a disciple to his guru, and his allusions to Tiruppanandal matters and matters connected with Dharmapuram, Sivasilam and other places under their control may find a place in correspondence conducted on the courteous supposition that as members of a common spiritual family or of the same brotherhood, they took an interest in the institutions under each others management. We are not prepared to hold that the letters mentioned above support of themselves the contention that the relation of principal and agent subsisted between Dharmapuram and Tiruppanandal in regard to the management of Benares charities.

48. The most important matter in connection with the management of Ganapati II is the appointment of Ramalingam as his junior and successor. The dispute and the litigation which ensued and their final adjustment have a material bearing on the question at issue, and we shall proceed to give a brief account of them. At this time Sachitananda Desigar was the junior Pandara Sannadhi in Tinnevelly and Ramalingam was his sister's son. The latter was about 21 years of age, and he had been in the mutt at Benares and employed at Morangi in Nepaul. If Chitambaranadhan could be relied upon, Ramalingam was a domineering young man and did not behave satisfactorily in Nepaul (exhibit R2). It appears from letter marked Q2 that Chitambaranadhan sent him to the south in April 1853 by the desire of Sachitananda Desigar. We have already seen that Ganapati informed the junior Pandara Sannadhi that Ramalingam had arrived at Chidambaram and then at Tiruppanandal, and that Ganapati would send Ramalingam to Tinnevelly after his own recovery from his illness. It will also be remembered that when Ramalingam was at Chidambaram, Ganapati received a piece of paper from the junior Pandara Sannadhi with the remark that no one else should see it (letter marked J9, dated 13th August 1853). On the 5th November Ganapati made his will whereby he appointed Ramalingam as his junior and successor and died on the 10th November. The Pandara Sannadhi at Dharmapuram addressed a petition to the

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Sub-Collector that Ganapati himself was appointed by him to the mutt at Tiruppanandal, according to custom, that at the instigation of one Arunachala Tambiran an attempt was being made by Ganapati to appoint a young man as his successor by the name of Ramalingam, and that an order should be issued to forbid the infringement of the custom. Thereupon the Sub-Collector issued an order to the Tahsildar to see that no breach of the peace occurred and to arrange for preventing it. The Deputy Tahsildar saw Ganapati, who alleged that he was appointed by his predecessor Chokkalingam, that on the 5th November he appointed Ramalingam as his successor in the same way in which Chokkalingam appointed him, that Ramalingam was looking after the affairs of the mutt since his appointment, and that the appointment was in accordance with the custom of the institution. Thus the recognized usage of the place in regard to the appointment of the managing tambiran at Tiruppanandal was the point in issue between the parties (exhibits 31 and 32). On the 10th November Ganapati asserted his unqualified power to name his own successor and applied to the Sub-Collector for protection, adding that the Pandara Sannadhi arrived at Tiruppanandal the previous night in company with the Tambiran of Vydisvaran Kovil and contemplated mischief (exhibit 32). On the same day Ganapati died, and on the 12th idem the Tahsildar of Kumbakonam had a muchalká taken from Ramalingam to the effect that he would be responsible for the properties at Tiruppanandal. Ramalingam applied to the Collector for the transfer of registry to his own name and referred to his appointment by Ganapati as his junior. He denied the claim of the Pandara Sannadhi to appoint the Tambiran of Tiruppanandal, and charged the Tahsildar of Kumbakonam with being under the influence of the latter and carrying away twenty of his agents (exhibit 33). The Collector forwarded Ramalingam's application to the Sub-Collector for disposal, and when it was pending before the Sub-Collector, Ramalingam executed the document marked H on the 21st November 1853. It purports to be an agreement in favor of Masilamani Desigar, the Pandara Sannadhi of Dharmapuram, and it states: "As Ganapati, who had been appointed to the mangement of the charities of the Benares mutt at Tiruppanandal, which is attached to the said adhinam, has breathed his last, and as Ulaganadha Tambiran has been appointed as the senior and myself have been appointed as

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the junior tambiran by the Pandara Sannadhi, and as I have been invested with arukattu, sundaravadam and cloth according to usage and placed in the said appointment, I shall act properly and continue to do so, according to the orders of Ulaganadha Tambiran, who is appointed as senior, and also according to the orders of your august presence and the usage of the Ádhinam." The Tahsildar then recommended that the registry of Tiruppanandal lands be altered in the Collector's books from the name of Ganapati II to that of Ulaganadha Tambiran. On the 3rd December 1853 Ramalingam represented to the Sub-Collector that the Tahsildar of Kumbakonam, the Pandara Sannadhi, and Ulaganadha Tambiran entered the mutt at Tiruppanandal with 50 peons, ill-treated him, and thereby obtained documents from him and took away the keys from him, and that from the time the said mutt came into existence, it had been the invariable custom for the presiding tambiran to appoint his successor if he had no hope of living and to make a will that the successor do acquire all rights, and for the Government to accept such will. Ramalingam supported this representation by a mahazarnama from certain mirasidars of the taluks of Kumbakonam and Kuttalam (exhibit 35), which in describing the usage stated that the unvaried custom had been for the tambiran at Tiruppanandal to appoint as his successor either the Tambiran of Benares or the junior tambiran at Tiruppanandal and to make a will in his favor (exhibit 36).

On the 27th December 1853, the Sub-Collector passed an order in favor of Ramalingam stating that from the previous proceedings on his record it appeared that since 1836 each tambiran at the place used to nominate a person as his junior, and that that had been the custom also before 1836. In this order a petition is said to have been addressed by Chitambaranadhan of Benares, and Ganapati is stated to have described Ramalingam as his younger brother. The order characterized the tahsildar's proceedings as strange, stated that the document marked H was alleged by Ramalingam to have been obtained by force, and that its contents were at variance with the custom of the institution (exhibit 38). The miras was transferred to Ramalingam's name. Ulaganadha Tambiran was displaced and he and the Pandara Sannadhi were ordered not to interfere with Ramalingam (exhibits 39, 40, and 43). These proceedings before the Revenue authorities were followed by litigation and three suits were instituted, one by the

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Pandara Sannadhi, another by his nominee, and the third by Ramalingam, and the question raised for decision was whether it was Ganapati's or the Pandara Sannadi's nominee that was entitled to succeed to management according to the usage of the institution at Tiruppanandal. We pass over the statements then made by the rival claimants as they were made during the controversy between them, and observe that the litigation terminated in a compromise which was suggested by the junior Pandara Sannadhi at Tinnevelly, and accepted both by Ramalingam at Tiruppanandal and the senior Pandara Sannadhi at Dharmapuram.

49. The document marked H19 is the petition of compromise filed in original suit No. 3 of 1854, which was instituted by the Pandara Sannadhi at Dharmapuram against Ramalinga Tambiran, and as the record of the usage of the institution then accepted by the Pandara Sannadhi at Dharmapuram and the Tambiran at Tiruppanandal, it is a document of considerable importance. It is as follows:—

(Exhibit H19.)

TO THE DEWANY ADALUT CIVIL COURT OF KUMBAKÓNAM ZILLA.

Original Suit No. 3 *of* 1854.

Razinama presented by Muttusami Pillai, holding muktiarnama (power-of-attorney) from Giyana Sambanda Pandara Sannadhi at Dharmapuram Ádhinam, plaintiff in the said suit, and Tiagaraja Mudali, holding muktiarnama from Kasivasi Ramalinga Tambiran of Kasi Mutt at Tiruppanandal, defendant in the said suit.

In this suit brought by the said Giyana Sambandha Pandara Sannadhi through his Muktiar agent to establish his right to appoint tambiran to the Kasi Mutt at Tiruppanandal referred to in the plaint, and to have the miras of the nunja and punja lands attached to the said mutt registered in the name of the charity, the valuation of the suit being Rs. 76,874-8-6, we have entered into a compromise as follows:—

That as Kasivasi Ramalinga Tambiran who has been, according to custom, appointed to the Kasi Mutt at Tiruppanandal, under a will of the deceased Kasivasi Ganapati Tambiran, the late incumbent of the aforesaid mutt, has been invested, according to usage, with aru-

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kattu, sundaravadam and cloth by the said Giyana Sambandha Pandara Sannadhi, the said Kasivasi Ramalinga Tambiran shall himself enjoy the said Kasi Mutt at Tiruppanandal, and the nunja, punja and other lands in dispute, as its owner, and as senior tambiran with miras and all other rights appertaining to the same; that, when the said Kasivasi Ramalinga Tambiran should be so disposed as to have a junior tambiran to him, he should, according to custom, send for one, suited to his liking from among the tambirans who have received kashayam (red cloth) from the said Dharmapuram Ádhinam, execute a will, according to usage, in his name, and send him to the said Dharmapuram Ádhinam; that the Giyana Sambandha Pandara Sannadhi of the said Ádhinam shall, according to custom, invest that tambiran alone with arukattu, cloth, &c., and send him; that that tambiran himself shall be the junior (tambiran) of the said Kasi Mutt at Tiruppanandal as long as the said Kasivasi Ramalinga Tambiran is alive; that he shall then become the senior tambiran and enjoy the miras and all other rights as those of the said Kasivasi Ramalinga Tambiran; that we shall always conform to and follow the said arrangement without deviation; and that each party shall bear his costs of this suit.

October 1855.

(Signed) MUTTUSAMI PILLAI.
(„) TIAGARAJA MUDALI.
(„) SAMI SASTRI, Vakil.
(„) M. RANGAIENGAR, Vakil.
(„) Rama Iyen, Vakil, I know.
(„) Sundara Row, Vakil, witness.
(„) Somasundara Kavirayar, son of Subramania Kavirayar of Tirukadayur in Peralem Taluk, I know.
(„) Sundaram Pillai, son of Nagalingam Pillai, residing at Tiruppanandal in Kumbakonam Taluq, I know.

Filed 16th October 1855.

(Signed) J. SILVER,
Ag. Civil Judge.

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This document, it will be observed, negatives the ownership and the power of appointment claimed for Dharmapuram. It vests the succession in the senior who is duly appointed for Tiruppanandal, and recognizes Ramalinga's right to appoint a junior when he desires to have one, but declares it to be limited to the extent that it is obligatory on him to select a junior from Dharmapuram Tambirans. It states that when a junior is so appointed the Pandara Sannadhi should invest that person only and no one else with arukattu and sundaravadam. These provisions purport to be founded on the usage of the institution.

Both parties to this appeal now repudiate this document, for it is against the contention of both in part. It is against the respondent because he is *not* a Dharmapuram man; and it is against the appellant because it negatives the ownership and the power of appointment claimed by him. The ground on which it is impugned is that it was brought about by Sachitananda Desigar who desired to favor his nephew, but we consider this objection to be frivolous; for the senior Pandara Sannadhi knew of the relationship and was perfectly free to exercise his own judgment. It is far more probable that Masilamani Desigar believed that Sachitananda Desigar knew as well as he did what the real usage had been. The document is dated the 16th October 1855, and there was no attempt on either side to impeach it either during Masilamani Desigar's life or that of Sachitananda Desigar. We may here refer to the two letters marked W9 and Y9 as showing the spirit in which Sachitananda interfered to effect an amicable settlement. Exhibit W9 is a letter addressed by Ramalingam to the junior Pandara Sannadhi on the 25th April 1854, and it shows that the latter desired an amicable settlement to avoid scandal. Exhibit Y9 is another letter written from Tiruppanandal to Sivasilam. It states, "your Sannidhanam intends to allow every one his proper privilege, whilst the senior Sannidhanam is avaricious. If you bring the matter to an amicable conclusion, you will do a charitable thing, which will not be forgotten as long as the Ádhinam exists, and lay me under obligation." There is no sufficient ground shown for the belief that the petition of compromise did not accurately formulate the recognized usage into reciprocal rights and obligations, and we shall recur to the question later on.

50. Before we pass on to Ramalingam's management, we shall refer to three documents on which considerable stress was laid,

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viz., exhibits M9, N9 and H. Exhibits M9 and N9 purport to be letters addressed by Ganapati Tambiran on the 23rd October and on the 5th November 1853. The former is an application to the senior Pandara Sannadhi for the appointment of Ramalingam as junior Tambiran at Tiruppanandal, and the latter intimates the fact to the junior Pandara Sannadhi in Tinnevelly. They are relied on as showing that the power of appointing a junior is vested on Ganapati's own showing in the Pandara Sannadhi at Dharmapuram. We concur in the opinion of the Subordinate Judge that they are open to grave suspicion. Exhibit N9 is a post letter, and the Post office seals which it bears do not appear to be genuine. In exhibit M9 Ganapati openly stated that the junior Sannidhanam was anxious to have Ramalingam appointed as junior, but seeing that junior Pandaram desired in exhibit J9 that the piece of paper enclosed therein should be read by no one else, it is not likely that Ganapati would have supported his recommendation in exhibit M9 by a reference to the junior Pandaram's wishes. Again, the contents of exhibit M9 are inconsistent with the representation made in exhibit 31 by Ganapati on the 8th November, or with the petition addressed by the Pandara Sannadhi protesting against Ramalingam's appointment. Nor are they consistent with the recitals in Ganapati's will, exhibit 6, which was made on the 5th November, the very day on which exhibit N9 was written. Even on the supposition that Ganapati wrote exhibit M9 lest his spiritual superior might take offence at his not being consulted in regard to so important a matter, it is by no means probable that he would have proceeded to make a will before he heard from Dharmapuram. The appearance of the Post office stamps on exhibit N9, the inaccuracy in spelling the name of the despatching station, and a comparison with genuine letters on record which were transmitted by post, induce us to think that it is altogether unsafe to rely on exhibits M9 and N9.

51. As to exhibit H, however, there is no doubt that it is authentic. It purports to contain an acknowledgment by Ramalingam that the Pandara Sannadhi appointed Ulaganadha as Ganapati's successor and Ramalingam as Ulaganadha's junior, and on this ground considerable stress is laid upon it at the hearing of the appeal. Adverting to it, the Subordinate Judge observed that it was eventually found by the Magistrate to have been coerced from Ramalingam, and that it was set aside and Ramalingam was

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restored to the senior tambiranship. It was urged in appeal that there was no satisfactory evidence to show that the document was obtained under coercion, that it was not set aside by any Magistrate, and that no Magistrate had power to do so. Exhibit 35 shows that on the 3rd December 1853, Ramalingam repudiated the document marked H and complained that he was ill-treated by the tahsildar, and that he executed it from fear. The contents of the document show that he gave up his position as senior tambiran, a position to which Ganapati raised him by his will on the 5th November, and consented to take up the position of a junior under the Pandara Sannadhi's nominee Ulaganadha, and they are obviously prejudicial to his interest. Having regard to the relative position of the parties at the time, we find that a young man of about 21 years of age had to contend against the head of his Ádhinam who was backed by his disciples and was accompanied by the tahsildar.

Again, exhibit 38 shows that the Sub-Collector refused to recognize it on the ground that it was inconsistent with the previous practice of the institution as disclosed by his records, and to alter the registry in accordance with it. Further, exhibit 32 indicates that on the 10th November even a tambiran in the position of Ganapati apprehended that the Pandara Sannadhi who was then at Tiruppanandal contemplated mischief. These circumstances convey the impression that document H was executed probably under fear, and to that extent corroborate the oral evidence on that point.

The Subordinate Judge was no doubt in error in treating the opinion of the Revenue authorities in regard to document H as conclusive, but we are unable to say that the circumstances in which the agreement was executed do not lend weight to the suggestion that its execution was not voluntary if not coerced. However this may be, it was superseded by the petition of compromise, exhibit H19, which, as the solemn act of the rival claimants adopted by a Court of Justice, must be taken to preclude the appellant now from falling back on document H. We pass on to Ramalingam's management.

52. Ramalingam succeeded Ganapati II on the 10th November 1853 and died on the 16th September 1880, his management extending over a period of nearly 27 years. When he rose to the responsible position of the superintendent of Benares charities and

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of the representative of the Mutt at Tiruppanandal, he was a young man of about 21 years of age and designated on that ground Kutti Tambiran. He owed his position more to his uncle's influence with Ganapati II than to his position as an elderly tambiran of recognized merit and piety. His career at Tiruppanandal opened with litigation with his own spiritual superior, but he had the sympathy and support of his uncle. In exhibit T9, dated the 17th March 1854, Ramalingam said, whilst writing to his uncle, "I herewith return the three letters sent in by your Sannidhanam as directed. I remain fearless as I depend entirely on your Sannidhanam's holy feet." The litigation however terminated in a compromise, of which the provisions are embodied in exhibit H19. Thus through Sachitananda Desigar's interposition, Ramalingam's position became secure and permanent.

53. The next event during Ramalingam's management is the death in January 1858 of his spiritual superior and opponent, Masilamani Desigar, who was succeeded by Sachitanandha Desigar. Between 1854 and 1858 Ramalinga conducted himself so as to avoid further collision with Dharmapuram. It will be seen from exhibit S10 that when the senior Pandaram died, Ramalingam proceeded to Dharmapuram, worshipped his remains at the burial ground, though the ceremony of interment was over, and took part in the Maheswarapuja which was performed on that occasion. This document discloses an effort on his part, probably under the advice of his uncle not to withhold from his superior the customary token of respect due to him from a disciple. That document and the document marked T10 indicate that Ulaganadha Tambiran whom Ramalingam superseded, enjoyed the confidence of the Pandara Sannadhi and had much influence at Dharmapuram at that time.

54. In dealing with documents and transactions during Ramalingam's management to which our attention was directed, it is convenient to consider them with reference to six distinct periods. The first is the one already referred to, commencing with the succession of Ramalingam and ending with the termination of his litigation with Dharmapuram; the second is the period extending from the date of the compromise exhibit H19, 16th October 1855, to the date of the death of Masilamani Desigar of Dharmapuram; the third period extends from the date of Sachitananda's succession to the end

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of 1862, when the relation between Tiruppanandal and Dharmapuram was very cordial; the fourth period extends from 1862 to 1871, during which there was disagreement between the uncle and the nephew; the fifth period extends from 1871, when there was reconciliation to the end of 1877; and the sixth period extends from 1878 to the date of Ramalingam's death in September 1880.

55. During the second period Chitambaranadhan at Benares (i) asked the Pandara Sannadhi at Dharmapuram to forgive him for his past conduct, and promised to behave better for the future; (ii) referred to Ramalingam in terms of disparagement; (iii) asked permission to retain one Manikkavachaka Tambiran as his junior at Benares; (iv) sent persons to Dharmapuram to be admitted as tambirans; and (v) wrote about the necessity for a supply of tambirans for service in Northern India. See exhibits R2 (8th November 1856), S2 (23rd April 1857), T2 (10th February 1858). In R2 Chitambaranadhan referred to a letter received from Dharmapuram in which certain texts were cited to remind him of his past conduct, probably during the litigation, and says: "I behaved wrongly either intentionally, or unintentionally, the burden of training and advancing me lies on your Sannidhanam and those of another Ádhinam and others have no interest in it. Therefore if you write to me as to how I am to behave hereafter, I shall do accordingly." Referring casually to Ramalingam's conduct whilst at Morangi, the letter says he appointed a stranger to be his successor without acting according to the wishes of those at Benares, and created dissensions which it took four years to pacify. The letter alludes next to the discharge of a portion of the debts at Benares and says: "Three-fourths of debts existing in Benares, Rameswaram and *places belonging to the Ádhinam* have been paid off through the effect of the virtues of your Sannidhanam." It then suggests that "if you send more tambirans, it will be good."

In exhibit S2 Chitambaranadhan said that he sent one Vydilinga Tambiran and asked the Pandara Sannadhi to initiate him. In exhibit T2 he complained that the Pandara Sannadhi did not care to send even one tambiran to Benares and that Chitambaranadhan was alone there.

These letters are referred to as evidence of subordination. They no doubt show that it was the Pandara Sannadhi who initiated laymen and admitted them as tambirans. They also show that tambirans were sent from Dharmapuram for service. It should

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be remembered, however, that as Tambiran Chitamaranadhan was Ramalingam's senior, though as manager of the mutt at Benares he was his subordinate. The letters show also that quarrel and litigation being over, Chitambaranadhan desired to ingratiate himself with the Pandaram at Dharmapuram by professing to act in accordance with his wishes. This fact has to be kept in view in determining their probative force as evidence of the subordination of Tiruppanandal in management. As to Ramalingam's relation with Dharmapuram during this period, he desired to avoid friction, and on Masilamani Desigar's death, paid to his remains the respect due from a disciple to those of his guru or preceptor.

56. Passing on to the third period we find that the relation between Tiruppanandal and Dharmapuram became once more cordial, and that Sachitananda Desigar at Dharmapuram was guided by Ramalingam's advice in many matters connected with the administration of properties belonging to the Ádhinam. It will be remembered that Ulaganadha Tambiran was the person whom the former Pandara Sannadhi desired to appoint as Ganapati's successor in preference to Ramalingam. So long as Masilamani Desigar was alive he confided in the former and was guided by his advice in managing the affairs of the Ádhinam. Ramalingam's first effort was to get rid of him. He called Ulaganadha by the nickname of Perumal, accused him of extravagance and complained of his conduct in refusing to accept from him a contribution of Rs. 100 towards the expenses of Maheswarapuja performed on the death of Masilamani Desigar (T10 and U10). In exhibit E11 he advised the Pandara Sannadhi not to repose confidence in the opposite party, and in exhibit M11 he characterized Ulaganadha as a wolf in sheep's skin. In the result Ramalingam displaced Ulaganadha as the trusted adviser at Dharmapuram and the latter stayed at Tiruvadutorai (exhibit W11, 11th September 1861).

57. Another event of this period is that Ramalingam became very influential at Dharmapuram and actively interfered in its management. He advised the Pandara Sannadhi to cancel a lease granted with respect to the Ádhinam lands at Kumbakonam, sent men to give evidence at Kumbakonam, recommended a person for an appointment in the Ádhinam, suggested that the Tambiran at Vydisvaran Kovil be not changed, and communicated with Dharmapuram in regard to various other matters which it is not necessary for the purposes of this appeal to enumerate.

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58. In May 1858 Ramalingam remitted Rs. 100 for the Gurupuja at Dharmapuram (exhibit Y10). In exhibit A11 (21st January 1859) he noted with pleasure the celebration of the festival in honor of the founder of the Ádhinam on a grand scale. In exhibit W11, dated 11th September 1861, he referred to the arrival of the junior Pandaram at Tiruppanandal and the performance of Puja and Maheswarapuja on a grand scale, and in exhibit X11 he asked for a palanquin to be supplied for the use of the junior Pandara Sannadhi during his journey to Tinnevelly. In exhibit A12, December 1861, he sent a silk cloth as desired by the Pandara Sannadhi at Dharmapuram, and with exhibit C12, 12th January 1862, he remitted Rs. 200 as a contribution to a festival at Dharmapuram. Thus during this period Ramalingam's contributions and other acts as a disciple of Dharmapuram were similar to those of his predecessors.

59. As to the relation between Chitambaranadhan at Benares and the Pandara Sannadhi at Dharmapuram, the former wrote a long letter to the latter in January 1859, in which he gave a detailed account of past mismanagement at Tiruppanandal and of the measures taken by him to remedy it. He complained of short remittances made in Ramalingam's time and of his insolence, adding that the letter was confidential and that the writer intended to retire from his post (exhibit X2). In December 1859 he asked the Pandara Sannadhi to send to Benares Subramania Tambiran if the latter were invested with mantra kashayam, and that a few more tambirans might be sent for service (exhibit Y2). In July 1860 he wrote to express his satisfaction with the appointment of Arulananda as junior Pandara Sannadhi, and prayed that he might be instructed to have regard for the Benares charities (exhibit Z2). In exhibits A3–J3 he reported the arrival of Subramania Tambiran, asked for a new arukattu and sundaravadum from Dharmapuram, advised of the despatch of cloths as presents, and asked for more tambirans. In exhibit F3, dated 3rd October 1863, Chitambaranadhan, referring to a letter from Dharmapuram, accused again Ramalingam of waste and mismanagement, and asked for permission to come to the South in view to remedy it. Exhibit H3, dated 15th March 1864, shows that the Pandara Sannadhi complained of the conduct of Ramalingam, and that Chitambaranadhan intended to come to the South to arrange for the due performance of charities. Thus it appears that a disagreement arose

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between the uncle at Dharmapuram and the nephew at Tiruppanandal in 1863, and that Chitambaranadhan at Benares sided with the former.

60. This disagreement continued from 1863 to 1871, and during this period no letters passed apparently between Tiruppanandal and Dharmapuram. The correspondence, however, between Benares and Dharmapuram throws light on its progress. It shows that the misunderstanding deepened into open hostility and led each party to seek to humble the other.

Exhibits J3 and K3, dated 31st July and 24th August 1864, show that Ramalingam caused a letter to be written to Chitambaranadhan by one Vridachella Mudali, that Chitambaranadhan did not send a satisfactory reply, that thereupon Ramalingam desired to go to Benares at once by sea and reduce Chitambaranadhan to submission, and that the latter was determined to thwart the former and carry out the wishes of the Pandara Sannadhi. But Ramalingam went to Benares, succeeded in obtaining from Chitambaranadhan the agreement marked 586 on the 15th November 1864 and returned in 1866. In the meantime Chitambaranadhan sent one Arunachella Tambiran to be initiated at Dharmapuram (exhibit L3, 21st September 1865) and obtained a letter from the Raja of Venoatagiri that the lands placed under attachment would be made over to him (exhibit M3, 27th June 1866). In July 1866 he forwarded a letter to Dharmapuram from one Subbaramayyar on the establishment at Tiruppanandal in regard to the management of affairs at that place, and reiterated his intention to visit the South, to arrange for its improvement, and in July 1866 Chitambaranadhan paid a visit to Scindia and promised to come to the South soon.

61. In view to check the interference contemplated by Chitambaranadhan in communication with the Pandara Sannadhi, Ramalingam instituted a suit against the former at Benares and led to the institution of another suit by the latter at Trichinopoly. In the former he asserted his right to manage as proprietor the mutt and the chattram affairs at Benares and the temple of Sri Kedareswarar, and to recover the properties belonging thereto, and rested his claim on his position as the mahunt and representative of the head-quarters Mutt at Tiruppanandal. The Tambiran at Benares denied that he was an agent, and contended that the movable property and the endowments were acquired by his predecessors, and that he was

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the real proprietor in possession and occupation by right of succession to his ancestors. The first court decreed the plaintiff's claim, but on appeal the High Court modified the decree, giving Ramalingam possession of certain chattrams and gardens built or purchased out of funds remitted from Madras, and declaring him entitled to an account of a sum admitted to have been remitted from Tiruppanandal, but holding that Ramalingam failed to make out his claim to the possession of the mutt, temple or other property. From this decree Ramalingam appealed to the Privy Council, who held that Ramalingam had failed to establish either that he was the proprietor of the property at Benares or that the defendant was his mere agent, and that the High Court at Allahabad was right in limiting the relief to what was mentioned in the decree(1). The Judicial Committee observed that the original foundation was admittedly at Benares, that its object was to afford to persons either resident in Southern India or making pilgrimages to Benares, facilities for worship and the performance of religious duties there, and that those facts raised a presumption that the establishment at Tiruppanandal was subordinate to that at Benares, that though such a presumption might be rebutted by evidence, it was not so rebutted, and that even assuming that Ramalingam's account as to the establishment of the mutt at Tiruppanandal was correct, it would by no means follow that the tambiran who migrated from Benares to Tiruppanandal had power to alter the original constitution of the community, or to say that Tiruppanandal should thenceforward be its head-quarters, and that the person in possession of the foundation at Benares should be the inferior or the mere agent of the Tambiran at Tiruppanandal, and that the change and the authority by which it was effected should have been distinctly proved. After referring to the evidence the Judicial Committee came to the conclusion that the then plaintiff failed to show either that he was the proprietor of the property at Benares or that the then defendant was his mere agent. They alluded to the representation made by Chitambaranadhan in support of Ramalingam's claim during the litigation between the latter and the Pandara Sannadhi at Dharmapuram, and considered it to embody what might fairly be inferred to be the true condition of things and the true account of the constitution and relation of the mutts at Benares and Tiruppanandal and their respective mahunts (tambi-

(1) Kashi Bashi Ramling Swamee v. Chitumbernath Koomar Swamee, 20 W.R., 217.

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rans). That representation was to the effect that, according to custom, when the tambiran of either mutt nominates a deputy or successor to himself, he is bound to secure the consent of that of the other as was done by Chokkalingam in connection with the appointment of Ganapati, and that he (Chitambaranadhan) sent a letter of appointment to Ramalingam on the 28th November 1853. In connection with that representation Ramalingam's admission that he received a deed of appointment as contained in his letter of the 16th December 1853 was referred to, and it was also observed that the correspondence then set out in the record began in 1843. A duty on the part of the tambiran of either mutt to secure the consent of the other whenever he nominated a junior was the only customary incident accepted as probable, and the relation of principal and agent was held not proved. The appeal was heard *ex parte* and decided on the 12th June 1873.

The Pandara Sannadhi at Dharmapuram was no party to this suit and the decree is not binding on him, but as between the Tambirans at Tiruppanandal and at Benares, who were parties to it and their successors, it is conclusive, although all the evidence now produced was not then adduced.

62. In 1869 Ramalingam gained over the Tambiran of the Rock Fort Temple at Trichinopoly, a subordinate of the Ádhinam at Dharmapuram, and on the 23rd February 1869, the latter, asserting his independence, appointed the former as his successor. The Pandara Sannadhi at Dharmapuram was obliged to institute original suit No. 44 of 1869 in the District Court of Trichinopoly to obtain a decree declaring the appointment void and dismissing the Tambiran at the Rock Fort from office. On the 18th August 1870 this suit was dismissed on the ground that it was barred by limitation (exhibit 1396). In the meantime the conduct of the junior Pandara Sannadhi in Tinnevelly was not considered to be satisfactory, and it engaged the special attention of the senior Pandara Sannadhi. It appears from exhibit Y3, dated the 27th November 1871, that, acting on the view that whatever faults tambirans might commit the Pandara Sannadhi should forgive them, he pardoned Ramalingam, and was disposed to show a similar indulgence to the Tambiran at Trichinopoly. Chitambaranadhan was not satisfied with the policy of reconciliation which the Pandara Sannadhi was inclined to initiate, but his remonstrance was not heeded. Whilst the disagreement continued and before the Pandara Sannadhi became reconciled to Ramalingam, he obtained two agreements filed as exhibits J and K, one from Chitambaranadhan on the 11th June 1870, and the other from one Vydilinga Tambiran on the 16th August 1870. The former purports to have been executed in order to mention what rights the Ádhinam at Dharmapuram had in connection with the mutt at Benares. It declares that Chitambaranadhan was appointed by the Pandara Sannadhi's predecessor, that the Pandara Sannadhi was entitled to appoint a junior and successor to him, and to appoint the managing Tambiran at Morangi whenever it became necessary to appoint one. The latter is an agreement wherein one Vydilinga Tambiran acknowledged his appointment by the Pandara Sannadhi as Chitambaranadhan's junior, and undertook to act under his orders during his life, and to manage the mutt at Benares after his death according to the orders which might be issued from Dharmapuram. In connection with the agreement marked J, it is necessary to refer to four letters—U3, 31st October 1869; W3, 15th March 1870; X3, 9th July 1870, and Y3, 27th November 1871. They were written when the disagreement continued, and it will be remembered that there were heavy debts to be paid by the Tambiran at Benares, and that he was not in a position to expect remittances from Ramalingam in consequence of the litigation and quarrel with him. In exhibit N3, Chitambaranadhan referred to a promise made by the Pandara Sannadhi to pay off the debt of Rs. 44,000 due by the former in four months, and thanking him for it, promised to act according to the wishes of the Pandara Sannadhi. It is evident from exhibit W3 that he was in Tanjore in March 1870, and he states in that letter that he came from Benares with the intention of acting according to the views of the Pandara Sannadhi, that there was no doubt in regard to it, and that he was ready to act according to the orders which the Pandaram might give when he arrived at Dharmapuram. Exhibit X3, which is dated the 9th July 1870, shows that he had previously been to Dharmapuram and that he was then arranging for obtaining some documents in favor of the Pandara Sannadhi from the Palace of Tanjore to make out a strong case for the Pandara Sannadhi in view to a suit against Ramalingam which was then in contemplation, and the agreement filed as exhibit J was executed during that visit to Dharmapuram. In exhibit Y3, which he wrote after his return to Benares, he disapproved of the reconciliation with Ramalingam, but added, "I

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remember the assistance rendered when I came there from a distant country, and I must act according to the wishes of your Sannidhanam." He stated further that the Pandara Sannadhi and Ramalingam were then on good terms, and suggested that Ramalingam might be asked to write that he forgot the past and that an arrangement should be made about Benares. The foregoing letters convey the impression that agreement marked J was obtained probably as a price for the pecuniary assistance which was rendered to Chitambaranadhan from Dharmapuram, and when there was a desire to strengthen the Pandara Sannadhi's cause against Ramalingam, but that when the uncle and the nephew became reconciled, Chitambaranadhan also desired to become reconciled with Ramalingam.

63. In connection with the measures taken by Ramalingam during the period of disagreement, we may refer in this place to a few documents and letters. The first group consists of exhibits 7, 8 and 12, and they relate to the appointment of one Subramania Tambiran by Ramalingam as his junior and successor at Tiruppanandal. Exhibits 7 and 8 are wills made in favor of the former on the 6th July 1864 and on the 18th March 1867, and exhibit 12 is the agreement executed by him in favor of Ramalingam on the 6th July 1864. Exhibits 7 and 8 describe Subramania Tambiran as "our chief disciple," appoint him to be "the second to us during our lifetime and conduct himself under our orders," and declare that "after our death he is entitled to enjoy as full owner," and that neither "the tambirans who have been appointed by us and our predecessors and who are managing the charity affairs nor any other persons have any connection with our properties." By exhibit 12, Subramania acknowledged his appointment and undertook to act in subordination to Ramalingam and under his orders during his life.

The next group consists of exhibits 871, 1378, 1416, 1414, and 1514, which are letters written to and by Ramalingam in regard to Subramania's appointment as his junior and successor and in regard to Chitambaranadhan's conduct. They show that the appointment was made because Ramalingam intended to go to Benares, that Chitambaranadhan did not send accounts according to custom to Tiruppanandal, that remittances to Tiruppanandal from Travancore and Cochin were suspended owing to certain letters received from the Tambiran at Benares, and that Ramalingam proposed to inspect the charities at Benares and arrange for proper management. It is clear from documents 7, 8 and 12 that, according to Ramalingam, he was entitled to appoint his junior and associate him in management, and that the junior so associated in management was his lawful successor. To this extent the documents are not at variance with the terms of the petition of compromise (exhibit H19). There is no allusion to investiture by the Pandara Sannadhi at Dharmapuram, and Subramania was designated as Ramalingam's "chief disciple." It is however in evidence that Subramania was a Dharmapuram man.

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64. The next period is the one extending from 1871 to 1877. The events in evidence are (i) the reconciliation between Ramalingam and the Pandara Sannadhi; (ii) the latter's visit to Tinnevelly in connection with the conduct of the junior Pandara Sannadhi; (iii) Ramalingam's management of the affairs of the Ádhinam at Dharmapuram during the absence of Sachitananda Desigar; (iv) the death of Chitambaranadhan, the Tambiran of Benares, and Ramalingam's visit to that station; (v) the dismissal of the junior Pandara Sannadhi and the appellant's appointment in his stead; (vi) the death of the senior Pandara Sannadhi and the appellant's succession to him, and (vii) the disagreement between Ramalingam and the appellant.

65. We already referred to exhibit Y3 in connection with the reconciliation. Ramalingam resumed his duties as a disciple of Dharmapuram in December 1870. Articles were supplied according to custom for the puja at Dharmapuram (exhibit K12). In January 1871 he complained that the junior Pandaram did not reply to his letters (exhibit L12). In January 1871 he advised a journey to Tinnevelly in connection with junior Pandaram's conduct, he sent to the Pandara Sannadhi a pair of silver batons and promised to see him at Karuppur on his way to Tinnevelly (exhibits M12, N12 and O12). In January 1871 he remitted Rs. 100 out of Rs. 200 due for the festival in the Western Temple at Dharmapuram performed according to custom at the expense of Tiruppanandal and promised to pay the remainder (exhibit P12). In exhibit Q12, dated the 8th February 1871, he asked for information as to the balance due on account of the Uchchikala (midday) Katlai performed at the expense of Tiruppanandal.

Another result of the reconciliation was an endeavour to

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arrange for a conveyance from Chitambaranadhan of the property and the mutt at Benares to Ramalingam. We have already mentioned the substance of the judgment of the Privy Council in the suit by the one against the other. It appears from exhibit Q12 (8th February 1871) that Chitambaranadhan sent a draft conveyance to Ramalingam, and that the latter forwarded it to Dharmapuram with the remark that it was drawn up "in deceitful terms." In exhibit R12, dated the 13th February 1871, Ramalingam said "I do not think that in the affair of Benares, your Sannidhanam was an obstacle. It is impossible to make him (Chitambaranadhan) relent as he is a man of stubborn and mean disposition. It is his object to gain something for his expense at any cost to others." In the same letter Ramalingam alluded to his interference with the Tambiran at Trichinopoly in favor of the Pandara Sannadhi, and expressed his apprehension that that tambiran's conduct was fraudulent and that he might conspire with the Pandara Sannadhi at Tiruvavaduturai. This shows how the uncle and the nephew were at this time endeavouring to repair the injury done to one another by the litigation during the time when they had disagreed with each other and how Ramalingam regarded the Pandara Sannadhi at Tiruvavaduturai.

As to Sachitananda Desigar's visit to Tinnevelly, it ended in the dismissal of the junior Pandara Sannadhi, and Ramalingam was the confidential adviser of his uncle throughout the quarrel and even paid a visit to Tinnevelly. In his letter C13, Ramalingam alluded to the junior Pandara Sannadhi's remark about him, viz. :—"We had been trained in the same school," and explained it in the following terms: "I believe the only explanation possible is that the junior Sannidhanam, having been falsely informed by some intriguing gentlemen that I was taking measures calculated to excite their apprehensions, might have made that remark, meaning thereby that as we had the same guru (achariyar) he knew as much as myself and need not be afraid of me." It is not denied, and it is shown by exhibit Z2 that Arulananda Desigar was a Dharmapuram man, and there is therefore no doubt that Ramalingam was also a Dharmapuram man, though the respondent denied in his evidence that such was the case.

As to Ramalingam's management at Dharmapuram, the letters from him to the Pandara Sannadhi show distinctly that it was

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on behalf of the Ádhinam and as the agent or subordinate of the Pandara Sannadhi, but they do not necessarily prove that the relation of principal and agent extended also to Tiruppanandal.

The correspondence which took place at this time shows that Ramalingam was an able manager and exercised efficient supervision; and his reports (exhibits T12, U12, W12, X12, Z12) show on what points and with what detail information was given and orders solicited by the agent to and from the principal.

As regards his relation to Benares and the misunderstanding between him and the tambiran at that station. In February 1872 Ramalingam desired to go to Benares, but was dissuaded from going, and he then sent Paramasiva Tambiran and a clerk to Benares to restore, as he said, order there (exhibits J13 and 620). In October 1872 the Maharaja of Travancore visited Benares and his choultry and temple; they were locked up at that time and the charities were performed in another place. Ramalingam feared that if this should come to the notice of the Maharaja, and if he should learn that there was misunderstanding between Tiruppanandal and Benares, he might put an end to Ramalingam's management. In exhibit S13 he asked the Pandara Sannadhi to give strict orders to Chitambaranadhan and Paramasivan to open the Maharaja's choultry, to perform his charity there and to forbear to mention to him the existence of the disagreement between Tiruppanandal and Benares. It appears that there was an understanding between Ramalingam and Sachitananda Desigar as to what arrangements should eventually be made in regard to Benares and in his letter of 28th May 1873, J14, Ramalingam said to the Pandara Sannadhi, "Your Sannidhanam may recall to mind what we have agreed upon already after a discussion of the matter." In May 1873 Chitambaranadhan became seriously ill and Ramalingam went to Benares and made some arrangement (exhibits J14, K14 and L14).

It appears from exhibit 1523 that when Chitambaranadhan felt that he was in imminent danger, he sent for Paramasiva Tambiran, who was sent from Tiruppanandal, and placed him in possession and handed over the keys with the request that on Ramalingam's arrival they should be made over to him, and that Ramalingam arranged that Paramasivan should manage the affairs at Benares.

Chitambaranadhan died in 1873, and the senior Pandara Sannadhi died in 1874. We have already stated that the result of

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Sachitananda Desigar's visit to Tinnevelly consisted in the dismissal of his junior at Sivasilam for immorality and extravagance, and in the appointment of the appellant in his stead. Ramalingam was in management at Dharmapuram until the appellant relieved him on the 1st June 1874. But Ramalingam's relation to him continued to be cordial, and letters between 1st June 1874 and 12th December 1877 show that he continued to make contributions, send presents, advise in connection with the management of Ádhinam affairs and correspond as if he was on terms of intimacy with Dharmapuram. On the 22nd February 1874 Subramania Tambiran, who was appointed by Ramalingam in 1864 as his junior and successor, died, and from that time until respondent's appointment in 1880 there was no junior at Tiruppanandal.

66. In 1875 Arulananda Desigar, the dismissed junior Pandara Sannadhi, impugned the validity of his dismissal by Sachitananda Desigar, his senior, and disputed the appellant's right of succession at Dharmapuram. This dispute led to original suit No. 42 of 1875 on the file of the Subordinate Court of Negapatam, and the matter in contest was whether the senior Pandara Sannadhi was competent to dismiss his junior, and whether the plaintiff in that suit was guilty of immorality and extravagance and of conduct incompatible with his position as a tambiran and as junior Pandara Sannadhi. This litigation continued until October 1879, and both the Subordinate Judge and, on appeal, the High Court, held that the junior Pandara Sannadhi was properly dismissed, and that by reason of his misconduct and dismissal he forfeited his right of succession. During the progress of this litigation the cordiality between Ramalingam and the appellant was interrupted and replaced by a feeling of hostility to each other subsequently to 1877. The first step taken by Ramalingam during the litigation was to make his position at Benares perfectly secure. At the close of 1876, Paramasiva Tambiran, who was in management at Benares after the death of Chitambaranadhan, returned to Dharmapuram, and Ramalingam took advantage of this opportunity to place a layman named Kandadai Seshaiengar in management and took from him the agreement marked 624. This person is still in management, and the first matter in which Ramalingam disregarded the ancient and recognized usage of the institution was the substitution of a layman as the agent of Tiruppanandal in the room of a senior and a junior tambiran who used to manage, subject to

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the supervision and control of the Tambiran at Tiruppanandal. This change does not appear to have called forth any protest from Dharmapuram, probably because the senior Pandara Sannadhi's position was in danger on account of the litigation and he did not like to estrange Ramalingam from his cause.

The next step which Ramalingam appears to have taken to add to his own importance was an endeavour to obtain possession of the management of the temple at Tiruppanandal. It must be stated here that there is a temple at Tiruppanandal besides the Benares Mutt presided over by Ramalingam and his predecessors. From time immemorial the temple has been under the direct management of the Pandara Sannadhi at Dharmapuram, who deputed a separate tambiran from time to time to attend to its affairs, and the transfer of the management to Ramalingam appears to have been desired by him. There is oral evidence to the effect that the appellant declined to gratify his desire in this respect and to part with any of his Ádhinam property, and this seems to have produced a coolness. The Pandara Sannadhi at Tiruvavaduturai assisted the plaintiff in original suit No. 42 of 1875 and gave evidence as his witness and in his favor, and Ramalingam, it is stated by several witnesses named by the appellant, went over to the other side and co-operated with the rival Pandara Sannadhi in assisting Arulananda Desigar. The coolness between Dharmapuram and Tiruppanandal ripened into hostility, and the ultimate failure of Arulananda in his litigation tended only to deepen it. As regards the Ádhinam at Tiruvavaduturai, it seems to have acquired a reputation for learning under the present Pandara Sannadhi, for exhibit J13 shows that Paramasiva Tambiran, who belonged to Dharmapuram, was studying there. It was also a rival Ádhinam, for, in writing to Sachitananda Desigar on the 13th February 1871 about the affairs of the temple at the Rock Fort, Ramalingam said in his letter, exhibit R12, that the Pandara Sannadhi at Tiruvavaduturai was to visit the Rock Mutt at Trichinopoly, that the tambiran of that mutt might conspire with the Pandara Sannadhi, and that it was necessary to send persons to ascertain what takes place there. There is also an allusion to this kind of feeling in exhibit W11 of the 11th September 1861, in which Ulaganadha Tambiran, who was not then in favor at Dharmapuram, is reported to have been staying at Tiruvavaduturai. It is also in evidence that so early as between 1830 and 1840 there was the same feeling of rivalry, and that the agents of

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the Ádhinam at Tiruvavaduturai endeavoured to obtain precedence for it in connection with a festival at Suchendram in Travancore.

But on the 21st December 1874 Ramalingam wrote to Dharmapuram requesting that a room at Tiruvidamarudur be made over to the Pandara Sannadhi at Tiruvavaduturai, who, he observed, "was the staunch well-wisher of us all." During his disagreement with the appellant he spoke of Dharmapuram Tambirans as inefficient men.

Arulananda's appeal to the High Court was dismissed on the 2nd October 1879, and in June 1880 Ramalingam became seriously ill and he appears to have desired to make Tiruppanandal an independent Ádhinam.

67. On the 6th *idem* he made his will (exhibit 9) in favor of the respondent, and it is in these terms: "As we are weak through illness, and as Subramania Tambiran, who was appointed second tambiran by means of a will executed by us on the 18th March 1867, died on the 23rd February 1874, we have appointed now our disciple Kumarasami Tambiran the second tambiran in our Ádhinam. The said Kumarasami Tambiran is alone to be the full owner like ourselves of all the immovable and movable properties belonging to our Ádhinam. He is to enjoy the said properties from disciple to disciple, and he is to conduct with all the privileges of ownership, like ourselves, after our lifetime, all the charities conducted by us." Comparing the wording of this will with that of the wills made from 1818, exhibits 1 to 8, it will be observed that the expressions "and our disciple," "and our Ádhinam" are new. By exhibits 1, 2, 3, Sadayappa Tambiran appointed his junior as his successor. In exhibit 4 (1838) Ganapati I termed his successor "my junior," and described the properties as belonging to him; in exhibit 5 (1841) Ramalingam designated Chokkalingam as his junior and described the properties as belonging to him, and in exhibit 6 (1853) Ganapati II designated Ramalingam as his disciple and junior, and the properties as belonging to him. In exhibit 7, which is the first will made by Ramalingam, he designated Subramania Tambiran "as our chief disciple," and described the properties as belonging to our adhinam, and in exhibit 9 he designated himself Ádhina Karta, and the respondent as his disciple, and described the properties as belonging to "our Ádhinam." These new expressions are no doubt designed to convey the impression that Tiruppanandal was an independent

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Ádhinam in regard to succession and not a disciple Ádhinam in the sense that the managing tambirans are Dharmapuram men.

After the respondent was appointed, Ramalingam received letters of recognition from the Tanjore Palace (exhibit 386) and from Sankara Chariyar (exhibit 478) and the respondent received a letter of recognition from the Raja of Kalastri (exhibit 412). There were also several letters sent to the Pandara Sannadhi that the respondent's appointment was contrary to custom, and exhibit P37 stated that even the Pandara Sannadhi of Tiruvavaduturai, admitting that the appointment was contrary to the terms of the razinama and the custom hitherto prevailing, denied that it was done with his knowledge. Ramalingam died in September 1880, and the appellant brought the present suit in October 1881. During Ramalingam's time he purchased properties under exhibits 183 to 336, which provided, as usual, that they were to be enjoyed by the purchaser and his successors in the line of disciples.

The foregoing is the summary of succession and management at Tiruppanandal and of its relation to Dharmapuram and the mutt at Benares from the time of Tillanayaka Tambiran, its founder, to that of Ramalinga Tambiran, who died in September 1880.

The evidence on record is voluminous, and there are more than 2,000 exhibits and 150 witnesses. Most of this large mass of documents were admitted by the consent of counsel on both sides. Several of them are irrelevant and some are no legal evidence, and the Subordinate Judge has neither sufficiently set out the whole evidence nor discriminated between what is and what is not legal evidence, and he has disposed of it in a perfunctory manner. In stating the summary of succession and management, we have taken care to see that it rested on legal evidence and referred to the material evidence to which our attention was directed at the hearing of the appeal.

68. We now proceed to consider the effect of the evidence with reference to each ground of claim. It was stated in the plaint that the mutts at Benares and Tiruppanandal, together with the charities and the properties in dispute, belonged to the appellant's Ádhinam. Those mutts and their endowments are described from time to time in the wills left by the Tambirans of Tiruppanandal as belonging exclusively to them. We may here observe that the ownership which is referred to is not to be understood in the sense

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in which it is ordinarily used in connection with private property. It is intended to denote the legal relation of the head of an Ádhinam to the Ádhinam endowments under his supervision and control, and it is in this sense that both parties to this appeal have understood the averment in the plaint and proceeded to trial. What that relation is, to what extent it is that of a trustee, and in what respect the head of a mutt has a larger dominion over mutt endowments than an ordinary trustee, are explained by a Division Bench of this Court in *Sammantha Pandara* v. *Sellappa Chetti*(1). We take it then that the case suggested by paragraph 4 of the plaint is this, viz., that the appellant is the superintendent and responsible manager or trustee of the mutts and the charities in suit, though with an increased dominion over the endowments of the mutts as explained in the decision cited above.

69. We may also observe that it is the case of both parties that the right of conducting the charities in dispute and of administering their endowments follows according to usage the right to manage the mutt at Tiruppanandal. It will be seen from the history of management already set out that such has been the custom from 1720 to 1880.

70. Adverting to the appellant's claim that he is the responsible manager or superintendent of the Benares charities and of the mutts at Benares and Tiruppanandal, the Subordinate Judge has found that he has failed to establish it, and in this opinion we entirely concur. As to the mutt at Tiruppanandal and its endowments there is no evidence at all which shows that any contribution was made from the funds of the appellant's Ádhinam in connection with them. As observed in paragraph 11, it was Tillanayaka Tambiran who built the Mutt a Tiruppanandal, presumably with the funds in his possession as the managing tambiran of the mutt at Benares, and first purchased lands for its support to be enjoyed by him and his successors in the line of disciples. There is considerable documentary evidence on the record which proves that each of his successors made new purchases and added to the endowment from time to time. It was stated for the appellant that Tillanayaka Tambiran belonged to the Dharmapuram Ádhinam, and that he established the mutt at Tiruppanandal under the orders of Sivagiyana Desigar, the Pandara Sannadhi at that time. There

(1) I.L.R., 2 Mad., 179.

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is no doubt oral evidence of reputation to that effect, and there is also documentary evidence to show that the former was a disciple of the latter. Assuming that there was such a consultation which was very probable by reason of the relation between them as guru and disciple, it does not follow from it that as between the Tambiran at Tiruppanandal and the Pandara Sannadhi at Dharmapuram, the mutt and its endowments belong to the latter and not to the former. As to the Mutt at Benares the appellant's own case, as disclosed by the oral evidence adduced by him is that a Dharmapuram Tambiran, named Gurapara, an ascetic, renowned for his piety and learning, and Tillanayaka's predecessor at Benares, founded and endowed the mutt there with property which he acquired in Northern India.

71. The only apparent foundation then for the alleged trusteeship is the ceremony of Dattam whereby each tambiran makes a gift of his soul, body, and wealth to his guru (preceptor). There is a great deal of oral evidence to the effect that such a ceremony is gone through by the Tambirans of Dharmapuram during their ordination, and it is corroborated by the allusions made to the spiritual slavery, which is an incident of that ceremony, by several managing tambirans including Ganapati I for upwards of sixty years. Although this ceremony may perhaps be a pious motive for a gift and a reason for upholding it when it is completed and executed, still we cannot recognize it as a source of property or legal right in those cases in which the tambiran acquiring the property either refuses to surrender it or devotes it to charity and thereby clothes it with a special trust, religious or charitable. It is provided by Act V of 1843, s. 3, that no person who may have acquired property by his own industry or by the exercise of any art, calling or profession, or by inheritance, assignment, gift or bequest, shall be dispossessed of such property or prevented from taking possession of it on the ground that such person or that the person from whom the property may have been derived was *a slave*. It is clear, then, that the agreement of a tambiran to become the slave of his guru could have had no legal operation since 1843, and that adverse possession on the part of the Tambirans at Tiruppanandal from that year is fatal to any claim which the appellant may choose to found upon it. Nor is there any trace in the evidence of the properties in suit having been treated at any time either by the Pandara Sannadhis or the Managing

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Tambirans at Benares or Tiruppanandal as legally vested in the Ádhinam at Dharmapuram; for, from 1818, each Tambiran of Tiruppanandal openly declared in his will when he appointed his junior as his successor that none but himself during his life and none but his successor after his death had any claim either to the mutts at Benares and Tiruppanandal or to the charities under his management or to their endowments. Further, the clause in each sale-deed commencing from the time of the founder, Tillanayaka, and ending with that of Ramalingam II, viz., that the property purchased shall be enjoyed by the purchaser and his successors in the line of disciples, is inconsistent with the consciousness of the legal import which the appellant now seeks to give to the religious ceremony. Exhibit 583, whereby the Pandara Sannadhi at Dharmapuram mortgaged some Ádhinam property to Sadayappa Tambiran by way of conditional sale in 1829, contains a recognition that the then Tambiran at Tiruppanandal and his successors were capable of acquiring and owning property for themselves. His silence when registry was altered in the Collector's books on the death of each managing tambiran and the recital in the petition of compromise, exhibit H19, lead to the same conclusion. In the light thrown on the legal effect of the ceremony by the usage of the institution, we hold that it did not operate to convert the properties in dispute into those of the Ádhinam at Dharmapuram. Furthermore, the ceremony was only designed to emphasize the solemn renunciation by tambirans of all desire for wealth and to constitute it into a spiritual offence if they own property for personal indulgence and comfort. It was certainly not intended to prohibit the acquisition and possession of property in view to advance religious knowledge or charity for the promotion of which the religious association itself was constituted, and it could therefore have no application either to religious or charitable trusts founded or accepted by tambirans.

72. As to the properties held by Ramalinga Tambiran on behalf of the charities at Benares and elsewhere, the question who is the trustee of those charities must depend for its decision on the intention of those who instituted and endowed them, as evidenced either by endowment deeds or by usage in regard to their management. The several endowment deeds set out in connection with the management of each tambiran show that the grantee in each case, except in that of certain money grants which we shall presently

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mention, was the managing tambiran at Tiruppanandal for the time being, and the course of succession to management was, whenever specified, that of his successors in the line of disciples. We have also noted that in several of them the grantees are described as being the disciples of Dharmapuram, but as remarked by the Subordinate Judge, there is nothing in those documents to show that they are more than words of description. It was urged in appeal that the Subordinate Judge did not give due legal effect to the endowment deeds produced by the appellants, and our attention was drawn to exhibits A, W52, E51, D53, B, C, E53, 778, A47, 781, X52, Y46, 780, Y52, Z52, A53, Z46, B53, C53, 774, D, E, F, G, J37, 775 and 776. On referring to them we find that, as already observed, the grantee is only said in several to be the disciple of Dharmapuram.

73. We find, however, that exhibits W52, X52, Y52, Z52, A53, B53 and C53 relate to grants of money on account of certain Benares charities, and they purport to be documents executed jointly by the Pandara Sannadhis at Dharmapuram, and the Tambirans of Tiruppanandal and Benares undertaking for themselves and on behalf of their successors duly to perform the charities therein mentioned. These documents no doubt show that the Pandara Sannadhi was constituted a joint trustee in regard to some money endowments, but as remarked by the Subordinate Judge, there is no evidence to indicate that the appellant or his predecessors ever acted as a co-trustee or exercised any supervision with reference to those money grants; on the other hand the wills made by Tambirans of Tiruppanandal describe all the charities as having been under their exclusive management, and as no one else having any claim to them; and for more than 60 years, the Pandara Sannadhi and his predecessors have abstained from all interference with their administration. His present claim to management must therefore be considered to be barred by limitation. It was held by the Privy Council in *Balwant Rao Bishwant Chandra Chor* v. *Purun Mal Chaube*(1), that s. 10, Act IX of 1871, to which s. 10, Act XV of 1877 corresponds, was applicable only to suits instituted to recover property to the trusts of the endowment, but *not* to suits brought to establish a personal right to manage or in some way to control the

(1) L.R., 10 I.A., 90.

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management of the endowment. In the case before us there is no question of *recovering these* endowments for the trusts of the endowments, nor was it alleged in the plaint that they were used for any purpose other than the proper purposes of the endowments.

74. In this connection it is also necessary to refer to a charity conducted for the Zamindár of Yettiyapuram. There is documentary evidence showing that this charity was instituted at the instance of a former Pandara Sannadhi of Dharmapuram, that remittances were made to him by the zamindár from time to time in view to its performance, and that although this charity was conducted by the Tambiran at Benares under the supervision of the Tambiran at Tiruppanandal in common with other Benares charities, the correspondence in regard to the remittances which were made and the due administration of the charity always passed through Dharmapuram, and there was no direct communication between Tiruppanandal and Yettiyapuram. It does not appear, however, that this charity has been endowed, but the special mode in which the founder and his representatives were communicated with in regard to it alone is suggestive.

75. It is also desirable to refer specially to the endowment under the management of the Tambiran at Achiram in Travancore. That endowment was founded partly for the benefit of the Ádhinam at Dharmapuram and partly on account of Benares charities, but as it is situated in Travancore territory, it is not part of the property over which we have jurisdiction.

76. These circumstances undoubtedly suggest the inference that in consequence of the *relation of guru* and disciple between Dharmapuram and Tiruppanandal, certain special arrangements were made in some cases as a matter of mutual convenience, and the Pandara Sannadhi, who was originally a *co-trustee* in regard to some money grants, forbore to interfere in their administration and left them under the sole management of the Tambirans at Tiruppanandal; but there is no foundation for the contention except in regard to the few money endowments mentioned above, that the endowment deeds constituted the Pandara Sannadhi either the sole or a superior trustee responsible for their due administration. The learned counsel for the appellant argued that because some grants made by the Zamindár of Ramnad to the tambiran for the time being in charge of the Ádhinam Mutt at Tiruvarur were subsequently treated as entrusted to the management of the Pandara Sannadhi

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at Dharmapuram, grants made to all the Tambirans of Tiruppanandal should likewise be treated as made to their spiritual superiors. The two mutts may not be in the same position, the one may be, as is alleged *for the respondent*, subordinate to the Ádhinam and presided over from time to time by a tambiran who is removable at the will of the Pandara Sannadhi, whilst the other may be independent of Dharmapuram in respect of management. In the one case the donor's intention may reasonably be presumed to have been to commit the endowments to the management of the responsible representative of the mutt, and not of a tambiran who is a mere agent and whom the Pandara Sannadhi may remove at his pleasure, whilst in the other there may be no special ground for such presumption.

77. The material question then is whether, according to usage, the relation of principal and agent has subsisted in regard to management between Tiruppanandal and Dharmapuram. It is in connection with this part of the appellant's case that reliance is placed upon the voluminous correspondence in evidence, of which the substance, so far as it is material, has already been stated. In considering its value, it is convenient to adopt the classification or headings suggested by the learned counsel for the appellant, viz., (1) Reports sent, (2) Advice sought, (3) Complaints made, (4) Remittances made to Dharmapuram for Uchikala Katlai, (5) Payments of the travelling expenses of the junior Pandara Sannadhi, (6) Management of the Ádhinam at Dharmapuram by the Tambiran at Tiruppanandal, (7) Repairs, (8) Letters recognizing the Dharmapuram *claim and referring* to the origin of the mutts, (9) Conceded remittances through Dharmapuram, and (10) agreements executed by tambirans.

As to remittances it is no doubt true that contributions were made from Tiruppanandal to Dharmapuram or the junior Pandaram from time to time since 1823. They were made usually, (i) for the expenses of Gurupuja or the anniversary of the founder of the Ádhinam; (ii) for Mahesvarapuja or the ceremony designed for the spiritual benefit of the deceased Tambiran of Tiruppanandal; (iii) for the expenses of Uchikala Katlai or midday services in the Western Temple built at Dharmapuram in honor of the founder of the Ádhinam; (iv) occasionally on account of a festival in that temple; and (v) for morning worship in the same temple in the month of Margali (December-

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January) every year. In addition to these remittances it appears that articles which were thought to be rare or fine, or beads which were considered to be sacred, were at times sent as presents either to the Pandara Sannadhi or for use in the Western Temple at Dharmapuram. It is also in evidence that materials were supplied on two or three occasions and repairs executed in 1820, 1822 and 1859 at Dharmapuram at the expense of Tiruppanandal, and that when a junior Pandara Sannadhi went to Tinnevelly from Dharmapuram, the Tambiran at Tiruppanandal received him whilst on his way with great respect, took him through the village of Tiruppanandal in procession, entertained him in a suitable style during his stay, and contributed articles for his use and money towards the expenses of his journey when he left for Tinnevelly. But the purposes for which contributions, payments and supplies have been made only imply the existence of the relation of disciple and guru between the Tambiran at Tiruppanandal and the senior and junior Pandara Sannadhis of Dharmapuram, and suggest that the Western Temple at Dharmapuram had been held in great veneration as one dedicated to the worship of their spiritual ancestor, the founder of the Ádhinam, and that the Mutt at Dharmapuram has been regarded with affection as the abode of the senior gurus or the primary hermitage of the Ádhinam. But it is noteworthy that no remittance, such as an agent ordinarily makes to his principal, is to be found among the contributions, and that there was no surplus income or saving from the Mattam endowments at Tiruppanandal ever remitted to Dharmapuram, either to be invested or for safe custody or to be devoted to fresh charity in furtherance of the object for which the Mutt at Tiruppanandal was originally founded. Having regard to the character of the remittances and of the presents or contributions, we are unable to say that they prove more than the relation of disciple and guru has subsisted between Tiruppanandal and Dharmapuram.

78. Several important groups of letters relate to the management of the affairs of the Ádhinam at Dharmapuram by the Tambiran at Tiruppanandal when the Pandara Sannadhi needed such assistance on account of his age or of absence, or by reason of imperfect local knowledge or experience. The letters which form the first group extend from 1823 to 1835, and refer to the time when Sadayappa Tambiran, who was reputed, on account of his attachment to the Ádhinam, to be its "eldest son and darling" was the manager at Tiruppanandal. Their contents prove (i) that he made some enquiry and expressed an opinion in September 1823 in regard to the purchase of a village called Sethur (F4); (ii) that in 1831 he gave instructions to the agents on the establishments at Dharmapuram in regard to the sale of Sambapisanam paddy at that place and payment of kist or assessment due to Government (G4); (iii) that in 1832 he gave directions in regard to arrangements to be made for the Gurupuja to be performed by the junior Pandara Sannadhi on his arrival at Dharmapuram (H4); (iv) that in 1833 and 1835, he executed repairs at his own expense and under his own superintendence to the kitchen at Dharmapuram (J4 and K4); (v) that he repaired the dome of the Western Temple and discussed the desirability of substituting an arch for the flat ceiling of a building near the Dakshanamurti Temple at Dharmapuram; and (vi) that he made a remittance on account of a Mahesvarapuja (feeding of the tambirans at the anniversary) for the spiritual benefit of his predecessor at Tiruppanandal, Chitambaranadha Tambiran (Q20). These only prove that Sadayappa and his predecessor were Dharmapuram men, that he assisted his guru in the management of the adhinam affairs in some particular matters; that he was attached to Dharmapuram and liberal in his contributions for the benefit of his spiritual superior; and that his junior spoke in exhibit F4, of the village which was intended to be purchased for the Ádhinam, as "ours" as if he belonged to the Ádhinam and as a disciple belonging to it would speak of it in his communications to his spiritual superior. But we cannot say that they prove agency as regards the management of the Mutts at Benares and Tiruppanandal or of Benares charities.

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79. Again, another large group of letters is pressed upon our attention in connection with the management of the Ádhinam property at Dharmapuram by Ramalingam II during the absence of Sachidananda Desigar in Tinnevelly on account of the conduct of his junior, Arulanda Desigar. They show that Ramalingam was also a Dharmapuram man, that he spoke of the Ádhinam as "ours," that his management was on behalf of the Pandara Sannadhi, that the latter reposed very great confidence in the ability and judgment of the former, that Ramalingam's relation to Dharmapuram at this period was extremely cordial, that his contributions were liberal, that mutual good will ordinarily subsist-

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ing between a disciple and his guru gained strength in his case during this period on account of recent reconciliation with his uncle to whom he owed his position at Tiruppanandal, and by whom he was pardoned for all he did against the Ádhinam during the period when there was disagreement between them from 1863 to 1871.

80. Another group of letters to which our attention is called relates to acts of interference in the management at Dharmapuram from 1858 to 1863 when Sachidananda Desigar had newly arrived at that place and when the relation between Dharmapuram and Tiruppanandal was marked on the one side by affectionate confidence in the ability and judgment of a nephew, and on the other, by attachment on the part of Ramalingam to his uncle and well-wisher. The next group of letters shows that Ramalingam assisted the appellant before us by continuing in management until the latter arrived at Dharmapuram from Tiruppanandal and by assisting in such management until 1875 by way of suggestion and advice. It must however be noted here that during the period extending from 1873 to 1875, the appellant was new to Dharmapuram, that as a tambiran he was only a junior at Benares when Ramalingam was superintendent at Tiruppanandal, and that Ramalingam had assisted and advised his uncle in connection with the proceedings which were instituted against Arulananda Desigar, the junior Pandara Sannadhi in Tinnevelly, and which eventually resulted in the appellant's elevation first as the junior Pandara Sannadhi and shortly afterwards as the senior Pandara Sannadhi.

These intervals of management at Dharmapuram on the part of Tambirans at Tiruppanandal, and of active interference in management by way of confidential advice and suggestion, first between 1823 and 1835, again in the time of Chokkalingam as explained in the summary of his career, and lastly on three separate occasions during the time of Ramalingam II, show that as a religious institution and a centre of control, the Mutt at Tiruppanandal was affiliated to Dharmapuram as a disciple Ádhinam, that is to say, as a mutt and a centre of control managed by tambirans who were disciples of Dharmapuram: and that as such disciples they looked upon the Ádhinam as the original religious institution of the brotherhood or holy crowd to which they belonged and helped the Pandara Sannadhi from to time to time in managing as his agent during his absence or interfering in particular matters and making confidential suggestions. They prove at the best that, as

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disciples, Tiruppanandal men were eligible for the management of Ádhinam property, but how do they prove agency in regard to management of the Mutts at Tiruppanandal and Benares and of Benares charities? According to the three wills left by Sadayappa Tambiran in 1818, 1820 and 1829, he and his successors were absolute owners, and according to Ramalingam II, his management was independent. Whenever the latter quarrelled with Dharmapuram, he denied that Dharmapuram had any control over him as managing Tambiran at Tiruppanandal, and according to the terms of the compromise, (exhibit H19) the Pandara Sannadhi had no right to interfere at all with the management at Tiruppanandal or with the selection of a junior and successor by the managing tambiran of that station, provided that he was a Dharmapuram man.

81. Passing on to the group of letters designated for the appellant as "reports sent," their contents fail likewise to satisfy us that the relation of principal and agent subsisted in regard to management at Tiruppanandal. The remarks which we have made in connection with the career of each tambiran at that place and the letters set out as also those not set out relate (i) to hundies from and upon Benares; (ii) to matters which may find an appropriate place in communications between tambirans and their spiritual superiors; and (iii) to the conduct, welfare and movements of particular tambirans in whom the Pandara Sannadhi may be supposed to take an interest as the spiritual head of the association or brotherhood which consisted of them. Whenever allusions are made to management, they are made in general terms and differ in their character essentially from the communications which pass between agent and principal. For instance, (i) they relate to hundies drawn at the instance of the senior or junior Pandara Sannadhi who desired to oblige men of position and influence who had to remit money to Benares; (ii) to arrangements made for the convenience of pilgrims or persons who took the bones of deceased persons to be thrown into the Ganges; (iii) to Gurupuja and Mahesvarapuja; (iv) to Yettiyapuram charities; (v) to jewels presented to the Western Temple; (vi) to the state of the season; (vii) to damage done occasionally by rain or storm, and to loss from low prices; (viii) to the pomp with which the Pandara Sannadhi visited particular places; (ix) to Ádhinam affairs which concerned the junior Pandara Sannadhi and Dharma-

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puram men and to other matters of a general nature which have no material bearing on the question of agency. In this connection we may refer to the reports made by Ramalingam II as the Pandara Sannadhi's agent whilst in management at Dharmapuram as showing what matters are usually mentioned by an agent who really manages a mutt for another. No accounts of management were submitted from Tiruppanandal to Dharmapuram, and this omission is remarkable, when it is remembered that accounts relating to Benares charities were sent from Ramesvaram, Chidambaram and Achiram to Tiruppanandal. There is a temple at Tiruppanandal which is managed direct from Dharmapuram by an agent or a subordinate, and if the Tiruppanandal Tambiran were himself an agent, there was no necessity for the employment of a separate agent in connection with that temple. Again, there are two distinct Mutts at Chidambaram, one existing on account of Benares charity under the management of Tiruppanandal, and the other on account of Ádhinam charities under the management of Dharmapuram. Further, accounts were submitted from Achiram to Dharmapuram in regard only to the Dharmapuram endowment at that station. We find no instance in which the surplus income was paid to Dharmapuram or instructions were sought in regard to management, or reports submitted in detail at stated periods either at the time of cultivation or harvest. We cannot accept the letters under the heading of reports sent as proving agency in regard to management at Tiruppanandal.

82. As to the group of letters which, it is said, show that *advice was sought from, and complaints were made to*, Dharmapuram, they appear to be of no value as evidence of subordination with respect to the management of Benares charities. Many letters in this group have *no reference at all to* Benares charities or their management. Several are news letters, several relate to remittances made for Gurupuja, to presents made to Dharmapuram, and to arrangements made for throwing the bones of deceased persons into the Ganges. Many relate to advice given *to the Pandara Sannadhi* in connection with his management of the Ádhinam affairs, and to complaints made against persons who managed the Ádhinam property, and they were written when Sadayappa Tambiran, Chokkalinga Tambiran, Ramalingam II and Chitambaranadha Tambiran of Benares advised the Pandara Sannadhi as their disciples and confidential friends in regard to matters connected

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with the Ádhinam. Several of the letters have reference to remarks made and instructions applied for by Ramalingam when he was in management at Dharmapuram, and with reference to Ádhinam property. There is a series of letters which relate to the management of the Ádhinam lands at Achiram, to the shortcomings of Vydilinga Tambiran and Saravana Tambiran who managed them for a time, and to the measures taken in view to ensure at least a remittánce of Rs. 200 a year to Dharmapuram from the Ádhinam endowments in Travancore. We have already observed that the Tambiran at Achiram managed there as well the Dharmapuram endowment as the endowment founded in connection with Benares charities. As to the former, the letters show that the Tambiran was the agent of the Pandara Sannadhi, and the solicitude shown by the junior Pandara Sannadhi and his interference in regard to it as compared with his indifference to the endowment on account of the Benares charities, indicate a belief on his part that he had no right to interfere with the management at Tiruppanandal. A few letters relate to a new charity founded at Ramesvaram by one Bacha Rao, a sheristadar, in communication with the Pandara Sannadhi. They show that the tambirans at Tiruppanandal wrote to the Pandara Sannadhi in regard to the arrangement which was to be made for its management under their supervision. Some letters relate to Yettiyapuram charities, to which we have already referred as instituted at the instance of Kandappa Desigar, a former Pandara Sannadhi at Dharmapuram. Though there are a few letters and complaints which relate to Benares charities, they by no means prove agency as to their administration. As to exhibit Q19, which was a complaint made in 1838 by Aiyarappa against Ramalingam I, it only shows that a senior tambiran applied to the common spiritual superior when a junior tambiran who was his official superior treated him with disrespect. There are several letters of complaints addressed by Chitambaranadhan of Benares first against Chokkalingam's management, and next against that of Ramalingam II. There are also similar complaints made against Chitambaranadhan's conduct both by Chokkalingam and Ramalingam. They were written when there was a disagreement or controversy between them; but as evidence of their precise relative position, according to ancient and recognized usage, they have no probative value. But they evidence the fact that the Mutts at Tiruppanandal and at Benares were managed by tambirans

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who were disciples of Dharmapuram, and who appealed to their common spiritual superior for interference in order to restore cordiality between them, and to suggest for adoption by them arrangements for the efficient administration of Benares charities.

83. There are again a few more letters which indicate that in the hour of difficulty or embarrassment, the Tambirans at Tiruppanandal appealed to the Pandara Sannadhi for advice and even active interference. We may refer to exhibits 2, A and other letters which show that the junior and senior Pandara Sannadhis interfered to prevent Chitambaranadhan from complaining of mismanagement to outsiders. There is also exhibit L8 which shows that Chokkalinga Tambiran sought the advice of the junior Pandara Sannadhi in regard to hundis drawn by Chitambaranadhan for Rs. 15,000 in connection with the expenditure at Benares. There is again exhibit S13 in which Ramalingam II asked the Pandara Sannadhi to give strict orders to Chitambaranadhan not to reveal the misunderstanding between Tiruppanandal and Benares during the visit of the Maharaja of Travancore to the last mentioned city in 1872. Lastly, there is exhibit X21 which proves that in 1870 Ramalingam sought the advice of the Pandara Sannadhi at Dharmapuram, when the Mutt at Benares and its endowments were advertised for sale for payment of debts contracted by Chitambaranadhan. But these are incidents referable to the Pandara Sannadhi's position as the head of the Ádhinam and spiritual superior and friend interested in the efficient management of the charities by his disciples. But we cannot say that they indicate agency with respect to the management of the Benares charities at Tiruppanandal.

84. The next group of letters, it was urged, supported the appellant's claim and showed the origin of the mutts. They prove (i) that the charities of Yettiapuram were instituted by the desire of Kandappa Desigar; (ii) that Chokkalingam said to the junior Pandara Sannadhi in 1851 that it was his concern to see that the affairs of all the Mutts from Benares to Ramesvaram were duly and properly conducted; (iii) that when the same Pandara Sannadhi returned some money sent from Tiruppanandal, Ganapati II said that though it was refused as the money of a sinner, it was the Pandaram's duty to protect him; (iv) that Chokkalingam referred in 1847 to his having made a "gift" of his soul, body and property when he became the Pandara Sannadhi's slave; (v)

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that Chitambaranadhan said during his misunderstanding with Chokkalingam and Ramalingam that the Tambirans at Benares and Tiruppanandal and the Benares charities were subject to the jurisdiction and control of the Pandara Sannadhi; (vi) that he characterized Ramalingam's written statement in Original Suit No. 3 of 1854 as showing that he was faithless to his guru; (vii) that he gave an account of the reputed origin of the Mutts at Benares and Tiruppanandal, of the mode in which they were originally managed, and of their mismanagement in the time of Aiyarappa, Chokkalingam, and Ramalingam II; (viii) that all the Tambirans at Achiram, viz., Vydilingam, Chokkalingam, Arunachalam, Vydilingam, and Saravana acknowledged that they were the agents and servants of Dharmapuram; and (ix) that in 1838 Chokkalingam repudiated any desire on his part to proceed to Tiruppanandal and assured the then Pandara Sannadhi that he would always remain under him. They also show that the Mutt at Benares is called the Kumaraswami Mutt of the Ádhinam at Dharmapuram, and that Subramania Tambiran and Paramasiva Tambiran were Dharmapuram men. We fail to see how these letters prove that the Tambiram at Tiruppanandal was the agent of the Pandaram at Dharmapuram. Chitambaranadhan's declarations made in view to propitiate the Pandara Sannadhi and strengthen his position and authority against Chokkalingam and Ramalingam are not entitled to much weight. Nor could we accept allusions to the spiritual jurisdiction of the Pandara Sannadhi over every charity and every disciple connected with his Ádhinam as proof of his status as the managing or controlling trustee of Benares charities. The conclusion to which we come, after a careful and elaborate analysis of the voluminous correspondence, and on consideration of the history of management for upwards of 150 years, is that the relation of master and servant or of principal and agent is not shown to have existed between Dharmapuram and Tiruppanandal, and that the first ground of claim cannot be supported.

85. The next question for decision is what has been the usage in regard to succession to management at Tiruppanandal, and whether the Pandara Sannadhi at Dharmapuram has any and what right in connection with it. In dealing with the right of succession to the office of a mahunt or the head of a religious establishment in Northern India, the Judicial Committee observed

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in *Genda Puri* v. *Chhatar Puri*(1) that "in determining who is entitled to succeed as the mahunt in such a case as the present, the only law to be observed is to be found in custom and practice which must be proved by testimony, and the claimant must show that he is entitled according to the custom to recover the office and the land and property belonging to it." Again, it was held by the Privy Council in 1867 in *Greedharee Doss* v. *Nundo Kissore Doss Mohunt*(2) "that the only law as to these mahunts and their offices, functions and duties, is to be found in custom and practice which is to be proved by testimony." That was a suit instituted to establish the right of succession to the Mahunt of Akra, a religious institution wealthily endowed in the zilla of Burdwan, and to obtain investiture and possession of the mutt with its subordinate mutts and properties belonging to them. A similar opinion was expressed in 1882 by the Judicial Committee in *Srimati Janoki Debi* v. *Sri Gopal Acharjia* and others(3), and it was then held that when the plaintiff, a Hindú widow, claimed to succeed to a religious trust under the ordinary rules of inheritance applicable to private property, she must show that the usage as to succession had been in accordance with those rules. The material point for consideration is what has been the recognized usage of Tiruppanandal, first in regard to the power of appointing a successor to the office of managing tambiran, secondly, as to the qualifications, if any, which render him eligible for the office, and, thirdly, with reference to his investiture or installation.

86. As to the power of appointing a successor, it is desirable to consider it as it existed at three different periods in the history of this religious institution. It has already been shown that the Mutt at Tiruppanandal was in its origin the offshoot of the Mutt at Benares, and that prior to, and after its establishment, the founder, Tillanayaka Tambiran, was the superintendent of all the Benares charities in Northern as well as in Southern India. The only evidence of usage as to the first or Benares period is to be found in exhibit 17, dated the 11th March 1836, in which Ganapati I traced the succession at Benares and said that each tambiran appointed his own successor. There is no evidence whatever that the power of appointment vested at Dharmapuram at all events during this period. There is, however, reason to think that all the

(1) L.R., 13 I.A., 105. (2) 11 Moore's I.A., 428. (3) L.R., 10 I.A., 32.

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managing tambirans were Dharmapuram disciples as explained in paragraph 9 of this judgment.

87. The next period includes in it three cases of succession, viz., Kumaraguru Tambiran, Chitambaranadha Tambiran, and Sadayappa Tambiran. There is abundant documentary evidence to show that the succession was in the order mentioned above, and that the successor was the junior of his predecessor, but located at Benares. It was already shown by reference to recitals in endowment-deeds and sale-deeds that they belonged to the Ádhinam at Dharmapuram. The reputed usage as to the cause of succession during this period consisted, according to Ganapati I, in the appointment made by the predecessor in office. Having regard to the evidence before us, there is no ground for saying that the Pandaram at Dharmapuram exercised any power of appointment during this period.

88. From the time of Tillanayaka there was a change in the centre of control. Prior to his time, there was but one centre, and it was the Mutt at Benares. From his time there were two centres, the subordinate and the principal, the former at Benares and the latter at Tiruppanandal. In some documents the tambiran at the first mentioned place was described to be an agent of the tambiran at the last mentioned station. However this may be, the senior tambiran was at Tiruppanandal and his junior or spiritual brother was at Benares. Referring to this change and to its effect upon the relative position of the Tambirans at Tiruppanandal and Benares as principal and agent, the Privy Council observed in 1873, in the case of *Kashi Bashi Ramling Sawmee* v. *Chitumbernath Koomar Swamee*(1) that even if the story of the plaintiff as to the first establishment of the Mutt at Tiruppanandal were correct, it would by no means follow that the mahunt (tambiran) who migrated from Benares to Tiruppanandal had power to alter the original constitution of the community, or to say that thenceforward, Tiruppanandal should be its head-quarters, and that the person in possession of the foundation at Benares should be the inferior or mere agent of the mahunt (tambiran) at Tiruppanandal. The Judicial Committee added that the change and the authority by which it was effected should have been distinctly proved, that the object of the original foundation at Benares was

(1) 20 W.R., 217.

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to afford to persons resident in the south of India, or making pilgrimages to Benares, facilities for carrying on their worship and performing their religious duties, that it seemed to raise a presumption that the establishment at Tiruppanandal was subordinate to that of Benares, rather than that the ancient foundation became subordinate to that at Tiruppanandal, and that such a presumption might no doubt be rebutted by evidence of the facts, but that there was not sufficient rebutting evidence in that case. Seeing that there is a distinction in principle(1) between a deviation from the founder's intention as to the objects of the charity and a deviation from the directions as to management, which were no doubt originally meant to be governed by circumstances, the matter for determination in this case would be whether the appellant, who was not made a party to the former suit, has proved by clear evidence that the removal of the centre of control was in the special circumstances of the institution a change in furtherance of the object of the charity and not at variance with it.

89. We may here call attention to the numerous endowments and charities extending in value to several lakhs of rupees which are shown by the evidence before us to have been acquired subsequently to the removal of the centre of control to Tiruppanandal. Though the endowments were created on behalf of charities which were intended to be conducted at Benares, there is reason to think that those who instituted them knew well that the senior and responsible tambiran resided ordinarily at Tiruppanandal, and that it was from there that he issued orders and exercised supervision and control. It is also in evidence that the considerable landed property owned as the endowment of the Mutt at Tiruppanandal was acquired from and after the time of Tillanayaka Tambiran. It appears further that the representatives of the Maharaja of Tanjore and of the wealthy zamíndárs in the south who founded important charities at Benares, never regarded the establishment of the centre of control at Tiruppanandal as a departure from the original intention as to the trusts of the endowments. We have also adverted to the fact that Sadayappa Tambiran accompanied the Maharaja of Tanjore in 1825 during his pilgrimage to Benares, and then appointed Aiyarappa and Ramalingam I to carry on the charities there, subject to his supervision and control. We may again refer to the fact that when Saminadha Tambiran wrote from Benares, the Maharaja of Tanjore declined to enter into correspondence with him until and unless he clearly stated that he was appointed by Chokkalingam. For upwards of 150 years the change of centre of control has been recognized as an incident of beneficial management. The object with which Tillanayaka is reputed to have made the change was (i) to enable him to further the causes of charity by residing at Tiruppanandal, visiting often the rajas and zamíndárs in the south, and inducing them to found new charities at Benares to be managed under his superintendence and that of his successors in the south; (ii) by promptly collecting the income and remitting it to Benares; and (iii) by exercising supervision and control from there in order to see that it was duly applied. The addition since made to the mattam and charitable endowments shows that the change proved beneficial in the result. If all the evidence now before us had been before the Privy Council in the suit of 1867, and if the evidence as to usage had not been limited to the correspondence commencing, as it appears from the judgment of the Judicial Committee with 1840, the Judicial Committee would probably have come to the conclusion to which we are led by the evidence, viz., that the removal of the head-quarters from Benares to Tiruppanandal was intended to promote and did promote the cause of Benares charities in regard to endowed wealth and considered for a century and a half to be an incident of beneficial management.

(1) Lewin on Trusts, ed. 8, p. 66.

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90. In the third period, there were five cases of succession, viz., of Ganapati I, of Ramalingam I, of Chokkalingam, of Ganapati II, and of Ramalingam II. Each successor was his predecessor's spiritual brother, and appointed as his junior and associated during his life in management at Tiruppanandal. There was a will produced in each case except as regards Ganapati II, which referred to the successor's appointment as junior by the managing Tambiran at Tiruppanandal, to his association in management at Tiruppanandal, and declared his right as such to succeed to the senior after his death. We have pointed out that a similar will existed in regard to Ganapati II also, though it was not produced in this case. (ii) There were also muchalkás executed by some of the tambirans appointed as juniors, as in the case of Ramalingam I and Chokkalingam acknowledging their appointment and undertaking to act in subordination to their senior Tambiran at

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Tiruppanandal. (iii) The letters written to the Collectors and the orders issued by them in connection with the alteration of registry refer to the relation as senior and junior spiritual brothers, to the appointment by the senior as his junior, and association in management during the senior's life as the customary ground of succession. (iv) The letters of condolence and congratulation addressed by the representatives of some of the zamindárs and others who founded and endowed several of the Benares charities lead to the same conclusion. (v) Chokkalingam's description of the usage of the institution in his petition to the late Supreme Court is in accordance with what is stated above. (vi) The petition of compromise, exhibit H19, is framed on the same view of custom. Although wills were made, there was no instance in which they recognized any other mode of succession to management.

91. It will be seen that the usage, as disclosed by the foregoing evidence, differs from that of the prior period in two particulars. Prior to the time of Sadayappa Tambiran, there was but one managing tambiran both at Benares and at Tiruppanandal, but in the third period there were two tambirans at each place at one and the same time. For instance, Aiyarappa and Ramalingam were at Benares as senior and junior managing tambirans at the same time, and so Ganapati I and Ramalingam I were senior and junior tambirans at the same time at Tiruppanandal. This double agency is referable to the exigency of efficient management, arising partly from the number of charities and endowments which had to be managed, and partly from the age of the managing tambiran which induced him to seek the help of a junior and a deputy, and we may safely take it that this variation is an incident of good management in furtherance of the objects of the endowment. The practice in the Dharmapuram Ádhinam of there being a senior and a junior Pandara Sannadhi at one and the same time was the probable origin of the double agency. Another point in which there is difference is as to the place from which the junior was selected. In the last century, the junior appointed as successor was always the managing Tambiran at Benares. Ganapati I selected as his junior Ramalingam I in preference to Aiyarappa who was Ramalingam's senior at Benares. Both Ramalingam and Chokkalingam selected their juniors from the Dharmapuram Tambirans in the south. Ramalingam II was employed at Morangi in Nepaul before his uncle asked that he should be sent to

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Tinnevelly, but when he was selected by Ganapati II as his junior, Ramalingam was not employed in any mutt. This variety may at first sight be perplexing, but when it is considered in connection with the ordinary rules of succession applicable to spiritual brothers in regard to the property of an ascetic, it is consistent with a well known principle recognized in spiritual families. In paragraph 5 we have already referred to the constitution of a spiritual family, and to Chapter II, s. 8, of the Mitakshara, and to s. 5 which explains what is meant by a spiritual brother and associate in holiness. An associate in holiness is said to be one belonging to the same hermitage, and if Dharmapuram, which is the seat or residence of the Guru or the Pandara Sannadhi, is regarded as the hermitage, every Dharmapuram Tambiran will be an associate in holiness. A spiritual brother is said to be one who is engaged as a brotherly companion, having, according to Subodhini, consented to become so. One who is both a spiritual brother and associate in holiness is entitled to take such property as a hermit is permitted to own (see also s. 8). By appointment as junior, the tambiran became a spiritual brother or a brotherly companion, and by both the senior who appoints and the junior who is appointed belonging to the same Ádhinam, they were associates in holiness. The only qualification that is necessary for one becoming a spiritual brother is that he must be an associate in holiness, that is to say, he must belong to the same hermitage or spiritual family. If the usage then disclosed by the evidence is compared with the rule applicable to the succession of a spiritual brother and associate in holiness, it is found to be in perfect accordance with it, the points in which it has varied being immaterial to the right of succession. The only difference observable in the last century, when there was but one Tambiran at Tiruppanandal and at Benares, consisted in that the association as managing Tambiran at Benares was considered to constitute the associate a spiritual brother, and in this there was no substantial discrepancy, as both were associated in the administration of same religious charities though one was in a subordinate, and the other in the superior centre of control.

92. As to the appellant's claim there is no trace of it in the documentary evidence until Ganapati's succession in 1838. In exhibits R18 and W47 there was a new suggestion that the then Pandara Sannadhi should appoint a junior to Ganapati with his consent, and that the appointment of one Ulaganadha would be most

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conducive to the interests of the Ádhinam. But we have explained in paragraph 22 that they appear to suggest a new theory rather than describe the pre-existing usage. We have also shown that no power of appointment was asserted at Dharmapuram until Chokkalingam's succession, and that the oral evidence to which we were referred was untrustworthy. In connection with Chokkalingam's succession we referred to the documents relied on for the appellant in paragraph 34. As to the letter of appointment, exhibit X41, we are unable to attach any weight whatever to it. It is on a plain cadjan and is inconsistent with exhibits 5, 11, 23, 24, 26, 27, 389, 405, 422, and 456, which are admittedly authentic. These prove Chokkalingam's appointment as junior by Ramalingam and succession to him on the 4th May 1841 according to the recognized usage. Looking at the cadjan then, in the light of prior custom, it was not called for. Testing it by Chokkalingam's conduct at the time as shown by exhibit G30, mentioned in paragraph 34, Chokkalingam treated the allusion to his appointment by the Pandara Sannadhi with contemptuous silence. Viewing it again in connection with Chokkalingam's subsequent conduct as evidenced by his petition to the late Supreme Court, exhibit 1273, and by exhibits 28 and 1448 set out in paragraphs 36 and 45, its existence was altogether ignored by him. Assuming for a moment that it is genuine, the then Pandara Sannadhi's omission to refer to it, when Chokkalingam described the customary mode of succession in exhibit 1273 and in his letters 23 and 24 mentioned in paragraph 33 and when adverse claims were asserted, is strange. Having regard to the facilities which exist for fabricating a cadjan document like exhibit X41 and to the value of the property in litigation, we considered it and the oral evidence in its support as unreliable. It appears however to be a fact that on the day Chokkalingam was installed, the Pandara Sannadhi attended the installation and gave him a parivattam or head cloth as shown by exhibits L and M mentioned in paragraph 34, which corroborate the oral evidence for the appellant on that point. This is the first occasion on which, according to the documentary evidence, there was an investiture by the Pandara Sannadhi. Those exhibits show also that the Pandara Sannadhi and Aiyarappa affected to treat this apparent innovation as equivalent to an appointment by the Pandara Sannadhi, but the Pandara Sannadhi was an interested party anxious to create a right for himself. To his

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statement, therefore, weakened as it is by his subsequent conduct and that of Chokkalingam, we are not prepared to attach weight. Aiyarappa's profession that Chokkalingam obtained his appointment from Dharmapuram is worthless, and, as stated in paragraph 34, he subsequently asserted his own right to appoint a tambiran in his petition to the Collector. In connection with the next succession, viz., of Ganapati II, we have shown in paragraph 41 that he was appointed on the suggestion made by the Pandara Sannadhi, that the investiture by the Pandara Sannadhi was repeated a second time, that he interfered on this occasion owing to the serious misunderstanding between Chokkalingam at Tiruppanandal and Chitambaranadhan at Benares, and that the character of his interference was shown by exhibit O2. Judging of this interference in the light of letters which Chokkalingam wrote in connection with Ganapati's succession, he treated it as the interference of a common spiritual superior and friendly arbiter to which he voluntarily submitted under pressure of circumstances, but ignored it as part of the custom that obtained at Tiruppanandal in regard to succession. On the other hand, Masilamani Desigar and the Tambiran at Benares, Chitambaranadhan, affected to treat it as equivalent to a power of appointment. As to Chitambaranadhan's declaration, his character as revealed by a series of documents considerably lowers its value as evidence. Exhibits N2, O2 and P2 show that he treated at this time the power of appointing a junior and giving him a cloth as vested in the Pandara Sannadhi. The judgment of the Privy Council(1) on appeal from the decision of the High Court at Allahabad shows that in the litigation of 1854, he colluded with Ramalingam against the Pandara Sannadhi and said that the power of appointing a tambiran at Tiruppanandal was vested in himself. In 1856 he asked the Pandara Sannadhi to forgive him for what he did and promised to act for the future according to his wishes (see exhibit R2, cited in paragraph 55). It will appear from the same paragraph that during the disagreement between Ramalingam and Sachitananda Desigar, he sided with the latter and professed subordination to him. Exhibit J shows that on the 11th June 1870 he executed an agreement, acknowledging that he was appointed to Benares by the Pandara Sannadhi and that the Pandara Sannadhi was entitled

1) Kashi Bashi Ramling Sawmee v. Chitumbernath Koomar Swamee, 20 W.R., 217.

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to appoint tambirans both to Benares and Morangi, whilst the letters mentioned in paragraph 37 show that the recitals contained in the agreement are not true. Again in May 1873 he gave up all the properties in his possession to Ramalingam II, and in 1864 when Ramalingam suddenly visited Benares he executed in his favor the document marked 576 which is inconsistent with exhibit J. Thus it is evident that his declarations and acts were not consistent with due regard to truth but fluctuated from time to time according to his view of his own interest. As to the declaration of Masilamani Desigar, it was that of an ambitious and unscrupulous Pandara Sannadhi, who endeavored to build up a right for the Ádhinam. The next succession was that of Ramalingam II. In connection with it two letters marked M9 and N9 were relied upon, but they are shown in paragraph 50 to be open to grave suspicion. As to investiture, it was repeated for the third time when the agreement filed as exhibit H was obtained from Ramalingam and in paragraph 51 we stated why we regard that document as of no avail. But at this succession the Pandara Sannadhi openly asserted his power of appointment to the exclusion of the Tambiran at Tiruppanandal. But Ganapati II and Ramalingam II denounced the claim as contrary to the recognized usage of the institution and this difference was adjusted by the compromise, exhibit H19. That document contained an acknowledgment that Ramalingam's appointment by Ganapati II was in accordance with custom and that it ought to prevail against the appointment of Ulaganadha Tambiran made by Masilamani Desigar. Thus, the power of appointment asserted for the first time in 1841 was rejected in 1855 as not warranted by the ancient usage of the institution. As to the investiture of which the evidence discloses traces from 1841, that document stated that it took place according to usage, but it provided that Ramalingam should, according to custom, appoint a junior from among the tambirans of the Ádhinam at Dharmapuram, and that the Pandara Sannadhi should thereupon according to custom invest the one so appointed and no one else with arukattu and cloth. In effect the document recognized investiture by the Pandara Sannadhi as part of the custom, but treated it as a compliment and a mere form so long as Ramalingam appointed a Dharmapuram man as junior according to custom. In so far as Masilamani Desigar sought to build up for the Ádhinam on the ceremony of investiture a right of appointment in competition with

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the managing Tambiran at Tiruppanandal, his claim was discarded as an unwarranted innovation upon the ancient usage. In so far as he insisted on the investiture for the purpose of enforcing the appointment of a disciple of the Dharmapuram Ádhinam as junior and successor, the document treated it according to ancient usage not as a mere ceremony, but as a right vested in the Ádhinam. We have no hesitation in saying that this document appears to be a correct record of the usage of the institution. The claim that the Pandara Sannadhi and not the Tambiran at Tiruppanandal is the responsible trustee or legal owner is negatived by the evidence before us and this document also negatives it. The appellant's claim to appoint a junior and successor is negatived by the evidence of usage and rests on a few recent acts of aggression committed by Masilamani Desigar during his administration and this the document condemned as an attempted encroachment and imposed a duty on the Pandara Sannadhi to invest the Dharmapuram man appointed as junior by the Tambiran at Tiruppanandal and no one else. Again, the evidence shows that, for several centuries, and from the time the Mutts at Tiruppanandal and Benares were founded, the managing tambirans have been Dharmapuram men and the document recognized the usage as limiting the power vested in the Tambiran at Tiruppanandal to the appointment of Dharmapuram men only and imposing on him an obligation to do so. As to the investiture, the document treated it as a compliment provided that the appointment made was in accordance with ancient usage. There is no foundation then for saying that exhibit H19 did not contain a correct description of the previous usage. Ramalingam said to his uncle in exhibit Y9 that the latter intended to allow, in the amicable adjustment he desired to bring about, his proper privilege to every one; and the document appears to have done so. Again, exhibit P37 shows that, on behalf of the Ádhinam at Dharmapuram, the respondent's appointment was questioned so recently as on 14th June 1880 on the strength of exhibit H19. In all probability the fact seems to be that because Ramalingam unscrupulously violated the terms of exhibit H19, the appellant in his turn urged that he had rights which he did not possess either under that document or according to usage.

93. It is urged in appeal that exhibits R18 and H19 were misconstrued and that the Subordinate Judge did not give due legal

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effect to exhibits J, E15, M9, N9, and S4. As to exhibit R18, we do not consider that it contains a correct description of the usage for the reasons mentioned in paragraph 22; as to exhibits M9 and N9 we regard them with suspicion for the reasons stated in paragraph 50, and as to exhibit S4 we have referred to it in paragraph 38. As to exhibit J, it is an agreement executed on the 11th June 1870 by Chitambaranadhan in favor of Sachitananda Desigar when the two were acting in concert to humble Ramalingam II, and we consider it as evidence made by them to serve the end which they had in view at that time. In paragraph 62 we stated the grounds on which we believe that it was executed probably in return for a price paid. We may also observe that the recitals in it are at variance with exhibits 988 and 989 (see para. 37). Again, Sachitananda Desigar not only took no action upon it but he appears also from exhibit J4 to have permitted Ramalingam to make his own arrangements with Chitambaranadhan in supersession of it. It is again at variance with the agreement given by Chitambaranadhan to Ramalingam during his visit to Benares in 1864. We are of opinion that the agreements filed as exhibits J and K were not executed *bonâ fide*, that no action was taken upon them by Sachitananda Desigar and that there is reason for the belief that after he was reconciled to Ramalingam, he treated them as evidence made during a quarrel to serve a party purpose. The only document in regard to which the Subordinate Judge has fallen into error is exhibit H19, which is dealt with by him in paragraphs 118 and 119 of his judgment. He states that it was a personal act or contract of Ramalingam which ceased to have force on his death. But this construction is obviously wrong. The subject dealt with by the document was the legal relation *inter se* between Dharmapuram and Tiruppanandal, and there is nothing whatever in the document to show that it was to have no operation beyond the life time of Ramalingam. It provides in terms which are unmistakeably clear that Ramalingam should according to custom appoint a junior and successor from among the tambirans of the Ádhinam at Dharmapuram, and it is wrong then to say that the appointment of the respondent who did not belong to the Dharmapuram Ádhinam by Ramalingam was not an act intended to be governed by the document. Again, the Subordinate Judge observed that it was not competent to Ramalingam to make a deviation in the trust. Where was there any deviation when the

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effect of the evidence is that all the Tambirans at Benares and Tiruppanandal have for more than 150 years been Dharmapuram men? The endowment deeds in evidence show in express terms that three out of four tambirans of the last century were Dharmapuram men and the fourth was probably also a Dharmapuram man. The acts and the letters of each tambiran until 1880 show, as set out above in the summary of management, that they were disciples of Dharmapuram. The usage disclosed by the whole evidence is that the course of succession was as already explained that of spiritual brothers and associates in holiness and that it is an essential feature of such succession that they should have belonged to the same spiritual family. There is further reason to think that all the tambirans of the Mutt at Benares even prior to the establishment of the Mutt at Tiruppanandal were Dharmapuram men. The inscription at the Benares Mutt was, as stated by the Subordinate Judge and shown by the oral evidence, "Kumarasami Mutt of the Dharmapuram Ádhinam." The special arrangements to which we referred in paragraph 76 imply a mutual belief that this relation of disciple and guru will continue to subsist between the Tambiran at Tiruppanandal and the Pandara Sannadhi at Dharmapuram. Some doubt was expressed by the learned counsel for the respondent as to whether Ramalingam II and Chokkalingam were Dharmapuram disciples. As to the former he stated himself that he and Arulananda Desigar had a common guru (exhibit C13) and Chitambaranadhan said that the written statement filed by Ramalingam showed that he was faithless to his guru. As to Chokkalingam, he called the senior Pandara Sannadhi of his time his father, and an incarnation of God, designed for his salvation and that of others belonging to the Ádhinam. He said also in one of his letters that he became the slave of the junior Pandara Sannadhi in evident allusion to the ceremony of Dattam or the gift of his soul, body and wealth. We do not understand how the Subordinate Judge came to characterize a provision made in exhibit H19 in conformity to the usage which had prevailed for centuries as a deviation from the trust. His observation is contrary to the evidence on the record. Another remark made by the Subordinate Judge is that the deed of compromise did not operate to convert the properties of Tiruppanandal into those of Dharmapuram in case Ramalingam departed from its provisions. This is no doubt true, but he was in error in omitting

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to notice that such a departure invalidated the respondent's appointment. Again, he spoke of Tiruppanandal as an independent Ádhinam because the endowments and charities showed a distinct group of trusts and because their management was independent of Dharmapuram. He failed to go a step further and see if Tiruppanandal was affiliated to Dharmapuram as a disciple Ádhinam, that is to say, an Ádhinam the succession to which is confined by the immemorial usage of the institution to the disciples of the Ádhinam at Dharmapuram. The bare existence of the spiritual relation of disciple and guru may not of itself be a legal basis of affiliation but where the recognized usage of the institution discloses a legal right in a class of persons to be selected for management, it is certainly a valid basis of affiliation and this distinction the Subordinate Judge has not apprehended. In *Kashi Bashi Ramling Sawmee* v. *Chitumbernath Koomar Swamee*(1), the Judicial Committee alluding to Chitambaranadhan's statement that the Tambirans at Benares and Tiruppanandal ought according to usage to obtain the consent of one another to the appointment of a junior, said that to that extent the two mutts were affiliated institutions. The conclusion to which we come is that the Subordinate Judge's view as to the effect of the compromise, exhibit H19, cannot be supported and that it is a correct record of the recognized usage of the institution and that effect should be given to the rights and obligations which flow from it. It was urged for the respondent that each tambiran is at liberty to give mantra kashayam to any one he likes. But the question is not to be treated in cases like this as an abstract question of theology, but it ought to be considered and decided with reference to the usage of the particular Ádhinam concerned in litigation. There is abundant oral evidence that according to the usage of the Dharmapuram Ádhinam, no one but the Pandara Sannadhi could ordain a tambiran as of that Ádhinam. It is corroborated by a series of letters asking from time to time for a supply of tambirans from Dharmapuram, and intimating that particular persons are sent to be initiated by the Pandara Sannadhi. It is also corroborated by the fact that the Pandara Sannadhi is alone anointed as "Achariya" or guru. There is further considerable oral evidence which proves that if a tambiran belonging to another Ádhinam desires to become a tambiran of the

(1) 20 W. R., 217.

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Ádhinam at Dharmapuram, he must receive his mantra kashayam *de novo* from the Pandara Sannadhi and be initiated by him. This is consistent with the probabilities of the case. As affiliation in the form of adoption is necessary before a person can be severed from one lay family and transferred into another, so a fresh initiation is in reason necessary to create the relation of spiritual father and son and to enable a person to pass from one spiritual family into another. As Ramalingam was a Dharmapuram Tambiran, he was not competent to select any ascetic he chose in defiance of the usage of his Ádhinam, so as to give him the status of a tambiran of that Ádhinam. For these reasons we hold the managing Tambiran of Tiruppanandal is entitled to select his junior and successor, but subject to the condition that the selection should be made from the disciples of the Ádhinam at Dharmapuram, that the Pandara Sannadhi is to invest the person appointed with arukattu and sundaravadam only when that condition is complied with, and that as the head or representative of an affiliated Ádhinam, he is entitled to insist that the character of the Tiruppanandal Mutt as a disciple mutt or centre of control is maintained in its integrity according to ancient and recognized usage.

94. The next question for decision is what is the relief to which the appellant is entitled upon the facts as found by us. In paragraph 4 of the plaint, the appellant asserted that the Ádhinam was the legal owner of the properties in dispute and our finding is that this averment is not established. The relief which he claimed as an incident of that right was a decree in his favor for possession as the representative of the Ádhinam. We must dismiss this part of the appellant's claim and confirm the decree of the Subordinate Judge in regard to it. In paragraph 5 of the plaint he asserted that according to custom he was entitled to appoint tambirans to the management of the Tiruppanandal Mutt and their juniors and successors. Our finding is that this averment is also not proved to our satisfaction. The relief which was prayed for in the plaint consisted of a declaration in the decree that he was so entitled to appoint and an order for delivery of the properties in suit to a tambiran who might be appointed by him in the exercise of such right. As to this part of the claim also, the suit must be dismissed and the decree of the Subordinate Judge must be affirmed.

95. In paragraph 11 of the plaint it was asserted that with the

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view of defeating the superior right of the appellant's Ádhinam and usurping the extensive properties now in litigation, Ramalingam executed an invalid will in favor of the original respondent and appointed him as his successor contrary to custom. Our finding is that the respondent's appointment and Ramalingam's will have no legal force and that the appellant is entitled as the head of the Dharmapuram Ádhinam to see that a competent Dharmapuram man is appointed instead. The relief claimed in the last paragraph of the plaint is a decree declaring that the respondent's claim is invalid and setting aside his appointment as the managing Tambiran of Tiruppanandal on the ground that he belonged to a foreign Ádhinam and he was not eligible for such appointment. To this declaration and this direction the appellant is entitled upon our finding, in the decree which we have to pass. The only relief prayed for in the same paragraph as a further incident or step was the delivery of possession to a tambiran whom the appellant may appoint. In advertence to it, we desire to draw attention to the 5th, 6th and 11th issues recorded by the Subordinate Judge with reference to the provisions of ss. 146 and 147 of the Code of Civil Procedure. The 5th issue relates to the declaration sought for and the 6th and 11th issues refer to the consequential relief to which the appellant may be entitled in the nature of the case. The last paragraph of s. 146 directs that the court shall proceed to frame and record the issues on which the right decision of the case appears to the court to depend and s. 147 mentions the various materials in addition to the plaint on which the issues may be framed. The obvious intention is to provide against failure of justice upon technical rules of pleading, and with that intention the legislature makes it incumbent on the court to frame issues on which the right decision of the case depends, and adds to the plaint other materials on which those issues may be framed. The appellant's right consists in seeing that a Dharmapuram Tambiran is appointed to management in supersession of the respondent who did not belong to the Dharmapuram Ádhinam, and the appropriate remedy for its infraction consists in asking the court to appoint on his suggestion a competent tambiran of Dharmapuram, and to direct the transfer of possession to such tambiran, whereas the prayer in the plaint was that possession might be transferred to a tambiran who was to be appointed by him. The difference, then, was as to the precise form,—as to whether the person to whom

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possession was to be transferred as an incident of the declaration that the respondent's appointment is illegal and of the order setting it aside on that ground, was to be appointed by the Court or by the appellant. The 6th and 11th issues were framed with reference to it and the parties to this suit proceeded to trial as well upon those as upon the other issues. The variance, if any, was substantially cured at the first hearing and we are of opinion that no weight is due to the contention of the learned counsel for the respondent that this suit must be dismissed on the ground that the appropriate form in which the decree ought to be passed was not indicated with precision in the plaint itself though it is included in the issues which were framed under ss. 146 and 147 of the Code of Civil Procedure. In this connection we may refer to *Greedharee Doss* v. *Nundokissore*(1). The Judicial Committee quoted in that case with approval the remarks of the High Court in answer to the contention of the counsel for the appellant. "We can understand," they say, "a suit being brought to set aside the election of the defendant and to order the mahunts to make new election." They observed further that the suit before them was not a suit to set aside the election, but to put the plaintiff in possession of the whole estate. So it was in the case of *Gunga Das and another* v. *Tiluk Das*(2). In the case before us, the plaint prayed in clear terms that the respondent's appointment be declared to be invalid and that it be set aside, and we cannot therefore say that the suit from which this appeal arises was not, *inter alia*, a suit to set aside the respondent's appointment. The case last mentioned awarded the relief to which the party was entitled when the respondent's appointment was considered to be contrary to the usage of the sect. Our decree should therefore award the appellant the relief indicated above as due in the nature of the claim with reference to the 6th and 11th issues and as forming a part of the relief which was substantially, if not by a formal amendment, added to the plaint at the first hearing.

96. We have to consider next a few subsidiary and preliminary questions raised for decision in this appeal. It has been urged by the learned counsel for the respondent that the deed of compromise, exhibit H19, created no right in the appellant's favor though it limited the right of the managing Tambiran at Tiruppanandal by

(1) 11 Moore's I.A., 431. (2) 1 Select Report, 309.

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directing him to appoint his junior and successor from among the tambirans of the appellant's Ádhinam. But this objection cannot be supported either with reference to the provisions of exhibit H19, or to the usage of the institution as proved by testimony. It must be remembered that neither party can arbitrarily vary the usage and that the compromise is binding on the parties to this appeal not simply because it is a valid agreement between their predecessors but also because its provisions are based on the usage of the institution which is the law applicable to this case. As to the document, it provides that both parties are to conform to and follow the arrangement embodied in it without deviation. It is clear then that the intention was to create reciprocal obligations in the nature of mutual rights and that their infringements would constitute mutual grounds of action. Again, it provides that Ramalingam shall be the lawful manager because he was according to custom appointed by will by his predecessor and because he was according to usage invested by the appellant's predecessor with arukattu, sundaravadam and cloth, the appointment by the managing tambiran and the investiture by the Pandara Sannadhi forming together the foundation for his title. It then provides that when a Dharmapuram man is appointed, the Pandara Sannadhi shall invest him. Thus, it creates a right in favor of the Tambiran at Tiruppanandal to an order directing the Pandara Sannadhi in case of refusal on his part to invest the person appointed if he is a Dharmapuram man. These two provisions, when considered together, show that the Pandara Sannadhi may lawfully refuse investiture without which there can be no lawful right of management or ownership as trustee when the person appointed is not a Dharmapuram man, and the last clause enables him to enforce compliance with the usage.

97. Independently of the instrument, the evidence shows that the founders of the Mutts at Tiruppanandal and Benares were Dharmapuram Tambirans, that the course of succession indicated by custom was the line of spiritual brothers appointed by them and their associates in holiness. This was also shown by reference to the Mitákshará to be a well-known rule of succession applicable to a spiritual family or to indicate a right created for the benefit of the Ádhinam to which the Tambirans at Tiruppanandal belonged and of which the appellant is the head and representative for the time being. The power of appointment possessed by the managing

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Tambiran at Tiruppanandal is a personal interest coupled with a trust in favor of the Dharmapuram Ádhinam both according to exhibit H19 and the proved usage of the institution.

98. Another contention for the respondent is that assuming that no lawful successor was appointed by Ramalingam, it would amount to a case of vacancy, that the razinama did not comtemplate such a contingency and provide for it and that in the history of the institution, a similar event never occurred before and no rule of decision can be found in it. We do not consider that this objection either is tenable. The founders of the Mutts at Tiruppanandal and Benares intended that the institutions should exist for ever and the rule of decision necessary to give effect to that intention consists in the Court exercising, in accordance with usage, the power which Ramalingam failed to exercise in conformity to it. For this purpose, the representative of the Ádhinam at Dharmapuram in favor of which a trust arises from usage is competent to maintain a suit and to put the Court into motion to fill up the vacancy.

99. The third objection for the respondents is that the appellant's claim was denied *in toto* by Ramalingam in original suit No. 3 of 1854 and that it is therefore barred by limitation. As to the claim to personal possession as responsible trustee and as to the right to appoint managing tambirans, it may be that there is foundation for the contention, but as to the right to set aside the respondent's appointment and see a competent Dharmapuram man appointed, the claim is clearly not barred. The will in respondent's favor was made on the 6th June 1880, and he entered into possession on the 16th September 1880 when Ramalingam died, while the present suit was instituted on the 15th October 1881.

100. Another preliminary objection taken was that the appellant was not the lawful Pandara Sannadhi of Dharmapuram and that Arulananda Desigar, whose claim was finally rejected in Regular Appeal No. 108 of 1878, was lawfully entitled to that position. The learned counsel for the respondent intimated to us at the hearing that he abandoned that contention.

101. It was urged, however, that the suit could not be entertained without the consent in writing of the Advocate-General or proper Government officer under s. 539 of the Code of Civil Procedure. That section provides that in case of any alleged

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breach of any express or constructive trust created for public charitable or religious purposes or whenever the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General acting *ex-officio* or two or more persons having a direct interest in the trust and having obtained the consent of the Advocate-General in writing may institute a suit to obtain a decree for appointing a new trustee, &c. The words "or religious" were not in Act X of 1877 and introduced by Act XIV of 1882 whilst this suit was instituted in October 1881. *In Thangakaruppa Nadan* v. *Arumuga Nadan*(1), it was held by a Division Bench of this Court that the section did not apply to an endowment founded primarily for religious purposes. Apart from it, the cause of action in this suit is not an alleged breach of trust such as the diversion of the endowment from its original trusts, nor is the suit instituted by a person having merely an interest in the trust as a worshipper or an object of the charity contemplated. It is a suit to enforce a vested right to see that certain religious and charitable endowments are managed by a person entitled to manage them as being the member of a particular religious association or brotherhood. We do not attach weight to this objection either.

102. Another objection is that the present suit was instituted contrary to the provisions of s. 44 of the Code of Civil Procedure. It is provided by that section that no cause of action shall unless with the leave of the Court, be joined with a suit for the recovery of immovable property, or to obtain declaration of title to immovable property. But this section should be considered together with s. 43 which directs that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action. There is nothing irregular in seeking to recover immovable and movable property if the cause of action is the same in respect of both. Nor is there any misjoinder of causes of action, the several grounds of claim being between the same parties.

103. The next objection is that some of the properties in suit were acquired and managed by Tambirans at Tiruppanandal on their own account. It appears further from paragraph 22 of the written statement that objections were taken to various items of

(1) I.L., 5 Mad., 383.

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property claimed in the plaint. There was no issue recorded as to whether any of the properties claimed in the plaint are the private properties of the tambirans, not being the endowments of mutts or endowments of charities, and an issue must be referred for trial before a decree can be finally made. Although the 9th issue was recorded with reference to the averment contained in paragraph 13 of the written statement, the Subordinate Judge has recorded no finding on that issue and he must be asked to return a finding. Another objection is that it is contrary to public policy to restrict the power of selecting successors to management and that there may be no one fit for the office among the disciples of the Ádhinam at Dharmapuram, that Ramalingam spoke of Dharmapuram men as inefficient and that one tambiran can make another tambiran. The question is one of vested right and of the recognized usage of a specific religious establishment or society, and no rule of public policy is violated by recognizing and enforcing such right. For centuries there have been men at Dharmapuram competent to manage the Ádhinam at that place and the mutts and charities in question and to administer their extensive endowments, and it was not the respondent's case in the Court below that there were no Tambirans at Dharmapuram competent to manage. As to Ramalingam's remark, we can attach no weight to it as he was very unscrupulous and violated the usage of his Ádhinam, and as it was not pleaded by the respondent in the Court below and thereby made the subject of a specific issue. As to the question whether a tambiran can make another tambiran, we have already observed that the proper mode of dealing with it is to test it by the usage of the particular Ádhinam in dispute and there was not a single instance in which the managing Tambiran at Tiruppanandal or Benares was not a Dharmapuram disciple. Another question is as to the nature of the right which the appellant has in connection with the Mutt at Benares according to usage. He is entitled to see that it is managed by a tambiran of his Ádhinam and that the junior selected for that station is also a Dharmapuram man; for, that had been the custom from the time of Tillanayaka until Ramalingam appointed a layman as his agent in 1876. But with the power of appointing those tambirans or with the right to the legal possession or administration of the endowments under their management or to exercise supervision over the subordinate mutts under their control, the appellant and his predecessors have

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had no concern according to usage and they are vested in the managing Tambiran at Tiruppanandal.

104. The result is that the appellant's claim that the properties at Tiruppanandal and Benares belong to the Ádhinam at Dharmapuram and to the possession of those properties must be dismissed; that his claim to a declaration of his right to appoint tambirans to management at Tiruppanandal and Benares and to a direction that possession be transferred to a tambiran whom he may appoint must likewise be dismissed; that so far the decree of the Subordinate Judge must be confirmed; that in other respects the decree of the Subordinate Judge must be reversed; that the appellant's claim to a declaration that the respondent's appointment by Ramalingam as junior and successor and the will in his favor are illegal and to a direction that they be set aside so far as they relate to the Mutts at Tiruppanandal and Benares and other subordinate mutts and their endowments and the endowments of the Benares and other charities mentioned in the plaint be decreed; that it must be ordered that the Subordinate Judge do direct the appellant to name a tambiran from among the tambirans of his Ádhinam competent to discharge the duties of the managing Tambiran of Benares (Kasi) Mutt at Tiruppanandal, that if the Subordinate Judge sees no objection to the fitness of the person so named for the office aforesaid, he do appoint him as such managing tambiran, but in case the Subordinate Judge should object to the person so named by appellant as aforesaid the Subordinate Judge do appoint a competent tambiran of the Dharmapuram Ádhinam as managing Tambiran of Benares Mutt at Tiruppanandal; that he do thereupon direct the appellant to invest him with arukattu, sundaravadam and cloth as usual, and to certify to such investiture; that upon such investiture being certified, the Subordinate Judge do place the person so appointed and invested in possession of the Benares Mutt at Tiruppanandal and of the properties forming its endowments and the endowments of Benares and other charities attached to the aforesaid mutt and mentioned in the schedule attached to the plaint; that in regard to the Mutt at Benares and the endowments there, the decree should further declare that the Tambiran at Tiruppanandal is bound to appoint a competent tambiran of the Dharmapuram Ádhinam to manage the Mutt at Benares and the Benares charities according to custom under his supervision and control.

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105. Before a decree is finally made, the Subordinate Judge will be asked to return a finding upon the 9th issue and upon the issue whether any and what properties, not being endowments of the Mutts at Tiruppanandal and Benares and of the charities or their accretions managed by the tambirans at those stations, have been held by the Tambirans of Tiruppanandal on their own account; costs will be provided for in the final decree. The finding called for will be returned within three months from the receipt of this order, when ten days will be allowed for filing objections.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

RANGASÁMI (DEFENDANT), APPELLANT,

and

MUTTUKUMARAPPA (PLAINTIFF), RESPONDENT.*

1886. July 21. 1887. January 18. July 18.

Limitation Act (Act XV of 1877), sch. II, arts. 132, 147—Transfer of Property Act—Act IV of 1882, ss. 58, 100—Hypothecation bond.

The period of limitation for suits upon hypothecation bonds, which contain no power of sale, or effect no transfer of property, executed before the Transfer of Property Act came into operation, is twelve years under sch. II, art. 132, of the Limitation Act of 1877—*Aliba* v. *Nanu* (I.L.R., 9 Mad., 218) followed.

Per MUTTUSÁMI AYYAR, J.—"The transaction in suit appears to be of the kind described in s. 100 of the Transfer of Property Act, which defines how a charge is created;" but "it seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages, whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages."

SECOND appeal from the decree of J. Hope, District Judge of South Arcot, in appeal suit, No. 73 of 1884, reversing the decree of C. Sury Ayyar, District Múnsif of Cuddalore, in original suit No. 734 of 1883.

This was a suit to recover principal and interest due on a hypothecation bond, dated 1st June 1862, of which the terms are set out *infra* in the judgment of Kernan, J.

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* Second Appeal, No. 918 of 1884.

RANGASÁMI v. MUTTU-KUMARAPPA.

The defendant pleaded that the suit was barred by limitation under art. 132, sch. II, of the Limitation Act of 1877.

The District Múnsif held that that article governed the case and accordingly dismissed the suit. His decree was, however, reversed by the District Judge on the ground that art. 147 and not art. 132 was applicable.

The defendant preferred this second appeal.

This second appeal came on for hearing before Collins, C.J., and Muttusámi Ayyar, J., who referred to the Full Bench the question whether twelve or sixty years is the period of limitation for suits brought on hypothecation bonds executed before the Transfer of Property Act, 1882, came into force.

Rámachandra Ráu Saheb for appellant.

Mr. *Subramanyam* for respondent.

The arguments adduced on this second appeal appear sufficiently for the purposes of this report from the judgments of the Court.

The Full Bench (Collins, C.J., Kernan, Muttusámi Ayyar, Brandt, and Parker, JJ.) delivered the following judgments:—

KERNAN, J.—The question for determination appears to me to be whether the document sued on, dated the 1st of June 1862, is to be held a mortgage within art. 147, sch. II, of the Limitation Act of 1877, or a charge on land under art. 132. If it is held to be merely a charge, then the suit is barred by limitation. If it is held to be a mortgage, then the suit is not barred.

The following is a copy of the instrument:—

"Deed of hypothecation of brick-built house, house-ground, and backyard executed on 20th Vayyasi of the year Dhatu, corresponding to 1st June 1862, to Mulligramampattu Vydialinga Reddi, residing in Tiruppapur in Cuddalore district, by us both, viz., (i) Kanakammal and (ii) Ranganayaki Ammal, widows of the deceased Virasami Naiker, residing in the said village.

"Having pledged to you this day, owing to our necessity, the brick-built house belonging to our deceased husband, Virasami Naiker, in the said village and bounded as follows: north of the northern car street, east of Alappakkattan's house, south of Puduteru, and west of the goldsmith Virabadran's house, the amount (we have borrowed) is Rs. 99¾, made up of Rs. 60, the principal of the hypothecation bond executed by our husband, Virasami Naiker, on 21st Vayyasi of Siddardhi (2nd June 1859) for Rs. 60, and interest thereon up to date, viz., Rs. 21½ as per settlement made touching the said document, and Rs. 18¼ received by us in cash this day for our food expenses. We bind ourselves to pay you the said ninety-nine and three-quarters of rupees, together with interest accruing thereon at 1 per cent. per mensem, within seven years from this date and take back the hypothecation bond.

"Thus we have executed the deed of hypothecation of house of our own accord.

+ Mark of KANAKAMMAL.
+ " RANGANAYAKI AMMAL.

Witnesses.

(Signed) K. RAGHAVULU NAIKER—I know.
(") KANDAMPALAYEM MUDDUKRISHNA PILLAI of the said place—I know.
(") V. NARAYANA PILLAI, writer hereof."

Possession of the land was retained by the borrower and never delivered to the lender. The terms of the instrument appear to me to do no more than create a charge or security for the debt on the land. In order to have effect given to the contract for a charge, the lender was entitled to file his suit praying to have the lands declared well charged with the debt and interest and to have the interest of the borrower in the land sold and the debt paid out of the produce of the sale. The right of sale in such cases, and in cases where land was expressly pledged or hypothecated, has been admitted always without question in this Presidency long before any legislation in respect to limitation was introduced. Such right is constantly enforced, and also the corresponding right of the borrower to enforce redemption by suit. After the Limitation Act XIV of 1859 came into force, it was held that such security or hypothecation bonds created an interest in immovable property under s. 12 of that Act, to which the period of twelve years was applicable—*Chetti Gaundan* v. *Sundaram Pillai*(1).

In that case it was however decided that the contract was not one of mortgage, but that it was one of hypothecation, the thing pledged, land, remaining with the pledgor subject to the creditor's claim. The court pointed out that, in the case of a mortgage, the mortgagee of land had the absolute property in the land on the debtor failing to perform the condition of payment of the money secured by the mortgage, subject however to redemption.

(1) 2 M.H.C.R., 51.

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In that case the instrument ran as follows, viz., "mortgage deed executed to Chetti Gaundan by us," giving the names, and states that the lands described there are thereby mortgaged. It then stated the amount to be paid and the time of payment and provided that if payment was not so made, the land should be sold to Chetti Gaundan for that amount. The form of the instrument in that case is a good representation of the ordinary hypothecation instrument when possession is not given to the pledgee. Such instruments have never been treated by any of the courts in this Presidency as mortgages, and the case in *Chetti Gaundan* v. *Sundaram Pillai*(1) has been always acknowledged as explaining an essential difference between a mere pledge or hypothecation of land and a mortgage of land.

The term mortgage not being defined in the Limitation Acts must be held to have been used in those Acts as bearing the meaning ordinarily attached to it by the course and practice of law. In Coke on Littleton, s. 332, it is stated: "If a feoffment (conveyance) be made on condition that if the feoffor pay to the feoffee at a certain day, of say £40 money, that then the feoffor may re-enter (on the lands): in this case the feoffor is called tenant in mortgage, which is as much to say in French as *mortgagor* and in Latin *mortuum vadium.*" In the note to s. 332, after referring to the origin of the term mortgage, it is said: "now it is so called mortgage, for the reason given by Littleton, and also to distinguish it from that which is called *vivum vadium*, '*quia nunquam moritur.*' As if a man borrow £100 of another and make an estate of lands unto him until he hath received the said sum of the issues and profits of the land—so as in that case, neither money nor land dieth or is lost and therefore it is called *vivum vadium.*"

In Coke on Littleton, s. 333, it is stated: "as a man may make a feoffment in mortgage, so a man may make a gift in tayle in mortgage, and a lease for term of life, and for term of years in mortgage"—see Coote on Mortgages, 4th edition, pp. 1 to 10, which refers to Bacon's Abridgment and many other authors on the subject of mortgage; Blackstone, vol. 2, pp. 157-8; and various books of Precedents in conveyancing.

In Watkins' Conveyancing by Mansfield, chap. 19, on Equity of Redemption, it is said mortgages are of two kinds—first, when a man borrows money of another and *grants him an estate* to hold

(1) 2 M.H.C.R., 51.

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until the rents and profits shall repay the sum borrowed, this is usually called a Welsh mortgage; but the most usual and common form of the mortgage is, secondly, when a man borrows of another a specific sum and *grants him an estate for the whole or part of his interest* as in fee or for term of years on condition that if the mortgagor shall repay the mortgage money on a certain day named in the deed, then the mortgagor may re-enter on the estate, or, as is now more usual, that the mortgagor shall re-convey the estate.

It is, therefore, quite clear that an essential of a mortgage (except an equitable mortgage) always has been that some interest of the mortgagor in the lands shall be transferred by the mortgage to the mortgagee.

In this case no interest in the land was transferred. When the amount secured by a mortgage is not paid on the day named in the mortgage, the estate of the mortgagee became absolute at law, subject, of course, to be redeemed in equity by the mortgagor. But it is open to the mortgagee to file a suit in equity against the mortgagor, either for foreclosure or sale. The decree for foreclosure directed an account to be taken of what was due on the mortgage, and, on payment of that sum and costs within a time fixed, that the plaintiff should re-convey the estate, but in default of such payment the mortgagor should stand barred and foreclosed from all right, title, interest, and equity of redemption in the mortgaged premises—see 1 Seton on Decrees, p. 364. This right of foreclosure was attached to a mortgage as above described alone, and not to a security on the land which was a mere charge thereon not secured by transfer of any interest in the land.

Article 147 of sch. II of the Limitation Act, 1877, refers to a mortgage and to suits for foreclosure, and in my judgment does not include a charge such as that created by the instrument sued on in this case which creates merely a charge on the land. Other cases are, I believe, awaiting the decision of this case, the facts of which show that there was a mere pledge of the lands without possession and without any transfer of any interest of the mortgagor. To such cases in my judgment art. 147 does not apply. Article 132 applies to this case and to all cases of mere hypothecation of the land without possession and without any transfer of any interest of the mortgagor therein.

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The Transfer of Property Act, 1882, does not apply to the instrument sued on in this case, and I have not, therefore, referred to that Act. I may, however, say that the definition of mortgage given by s. 58 is in accord with the meaning of the term mortgage, as expressed on the authorities I have above referred to. The term mortgage has not, as I am informed by one of the Court interpreters, any corresponding vernacular term denoting a *transfer* of land as security. The vernacular word used, as I am informed, means literally only "security bond or pledge of land." Transfers of land are of course made by natives as security, but they are mortgages.

I am unable to agree with the decision of the Allahabad High Court in *Shib Lal* v. *Ganga Prasad*(1). I cannot see that the instrument sued on was a transfer of any interest of the pledgor in property to the pledgee as security. It was not, therefore, a mortgage.

I agree with the conclusion arrived at by the Bombay High Court in *Lallubhái* v. *Náran*(2).

MUTTUSÁMI AYYAR, J.—The suit, which is the subject of this second appeal, was brought by the respondent upon a "hypothecation bond" executed on the 1st June 1862 for Rs. 99-12-0. The document is termed a hypothecation bond; it stipulates for repayment of the debt in seven years and secures the debt on the property hypothecated. The appellant pleaded *inter alia* limitation in bar of the claim. The District Múnsif upheld the contention on the ground that art. 132 and not art. 147 was applicable to the case. On appeal, the District Judge considered the art. 147 and not art. 132 was the one that applied. He observed "the suits contemplated by that article, viz., suits for foreclosure or sale are not such as can be brought by a mortgagee in possession, but only by simple and conditional mortgagees. This is the law as announced by the Transfer of Property Act, s. 67, and although this enactment is subsequent to the Limitation Act XV of 1877, I consider that it must be held to explain anything that is doubtful in the latter as to the matter at issue." The question referred to the Full Bench is whether twelve or sixty years is the period of limitation for suits brought upon hypothecation bonds executed before the Transfer of Property Act came into force.

(1) I.L.R., 6 All., 551. (2) I.L.R., 6 Bom., 719.

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Article 132 prescribes twelve years from the date when the money sued for becomes due for a suit to enforce payment of money charged upon immovable property. Article 147 prescribes sixty years for a suit by a mortgagee for foreclosure or sale. Article 148 prescribes sixty years for a suit against a mortgagee to redeem or recover possession of immovable property mortgaged. The substantial question then for consideration is whether the hypothecation bond in suit operated to create only a charge on immovable property or a simple mortgage within the meaning of the Transfer of Property Act, s. 58, cl. 6.

The transaction is, I think, clearly not a simple mortgage as defined in s. 58 of that Act. There is neither the transfer of property mentioned in that section, nor a special agreement whereby the creditor acquires a power to sell the hypothecated property on default of payment according to the contract. On the other hand the transaction in suit appears to be of the kind described in s. 100, which defines how a charge is created. It was argued that the courts used to sell the hypothecated property at the instance of the creditor, and that a power to sell on default might be taken to be inherent in every contract of hypothecation made prior to 1882; but it must be remembered that the power contemplated by Transfer of Property Act, s. 58, cl. 6, is a power to sell otherwise than through the intervention of a court of justice, and that if the court directs a sale in the case of a hypothecation bond, it is for the reason that it is the only mode in which the amount charged on immovable property can be realized.

It is true that, under the Transfer of Property Act, simple mortgages operate to create for the mortgagor a right to redeem, and for the mortgagee a right to ask for an order for sale, and that a suit by the one to redeem and a suit by the other to sell are governed by arts. 148 and 147 respectively; but the Act has no retrospective operation and prior transactions must be interpreted according to the intention of the parties at the time they were concluded. It is also true that we must look to the law in force at the date of the suit for the remedy that is available, but it is necessary that the right in respect of which the remedy is prescribed must exist as an incident of the particular transaction

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which it is sought to enforce. It seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages.

As observed in Macpherson on Mortgages, the earlier regulations in this Presidency did not profess to introduce new principles of law, and may, therefore, be presumed to be an embodiment of the law which was found to prevail in this country when they were passed. It is stated in Strange's Hindu Law, vol. I, p. 288, that hypothecation was a transaction long known in this country under the name of Drishtabandaka. According to the decisions in *Kadarsa Rautan* v. *Raviah Bibi*(1), *Golla Chinna Guruvuppa Naidu* v. *Kali Appiah Naidu*(2), *Sadagopa Chariyar* v. *Ruthna Mudali*(3), the transaction was held to create a lien or charge on the property hypothecated, and the remedy was considered to be a decree for the sale unless the debt was satisfied within a given time. The question was considered by Mr. Justice Parker and myself in *Aliba* v. *Nanu*(4), and I still adhere to the opinion which was then expressed, viz., that it is art. 132 that governs suits like the one before us.

THE CHIEF JUSTICE.—I concur.

BRANDT, J.—The instrument, which we have to consider is styled an "adaimana pattiram," a pledge-bond or security bond; it bears date the 1st June 1862 and recites the advance of a sum of money in the year 1860 to the deceased husband of the executant, and the pledge of certain immovable property as security for that loan, and declares that, in consideration of the amount then due on settlement of accounts on the footing of that debt and of a further advance, the executant covenants to pay the principal and interest at a rate stated within seven years, and concludes with a clause to the effect that on payment of the principal sum and interest the debtor shall receive back the instrument.

The question to be determined is whether this instrument creates a charge only on the land pledged as distinguished from a mortgage in the sense in which those words are used in the Limitation Act of 1877, in which case the suit as a suit to enforce

(1) 2 Mad. H.C.R., 103. (2) 4 Mad. H.C.R., 434.
(3) 5 Mad. H.C.R., 457. (4) I.L.R., 9 Mad., 218.

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payment of money charged on immovable property is barred under art. 132, sch. II, of the Act; or is it a suit by a mortgagee for sale to which art. 147 applies?

The personal covenant to pay may be left out of consideration, the only relief sought being the realization of the money claimed by sale of the land.

It has been held by a Divisional Bench of this court in *Aliba* v. *Nanu*(1) that a suit of this nature does not fall under art. 147 but under art. 132. It is in consequence of one of the learned Judges who decided that case having seen reason to doubt the conclusion arrived at that this reference is made.

The question appears to me also to be not free from doubt, and I was inclined to take the opposite view; having, however, had the advantage of seeing the judgments written by my learned colleagues Kernan and Muttusámi Ayyar, JJ., and having further discussed the matter with them, I am content to accept the conclusion arrived at by them on the grounds on which their decision is based.

I adhere to my opinion that, for the purpose of determining whether instruments of the character under consideration constitute charges only, as distinguished from mortgages within the meaning of the Limitation Act, regard cannot properly be had to the definitions of a charge and a mortgage in the Transfer of Property Act, which was passed five years later than the Limitation Act; nor to the fact that art. 147 in the latter Act may possibly have been inserted in view to the intended enactment of the Transfer of Property Act; and that the law of limitation previously in force in respect of mortgages, and changes in that law in English Acts do not afford a basis for determination of the question; but these are not the grounds on which the conclusions arrived at, and which I am prepared to accept, are based.

Obligations of the character now under consideration were entered into, and recognized and enforced by the courts in this Presidency for a long series of years prior to 1877, and in the absence of any express provision in the Limitation Act of 1859 for suits to enforce a sale—the relief which was afforded to the creditor by the courts *Chetti Gaundan* v. *Sundaram Pillay*(2)—they were dealt with under the general twelve years' rule, the distinction between a transaction by way of mortgage and an

(1) I.L.R., 9 Mad., 218. (2) 2 M.H.C.R., 51.

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hypothecation being clearly distinguished on the principle enunciated by Holloway, J., in the case last above cited; and although the courts in a suit for that purpose would make a decree for the sale of the pledgor's interest in the land and for payment of the debt out of the proceeds, this was done irrespective of any condition for sale contained or implied in the contract, and an implied contract for such sale cannot, as I am now satisfied to hold, be inferred from the fact that such contracts may have been entered into by the parties with a knowledge of or even with reference to the usual practice of the courts in the case of suits brought for the recovery of money under such contracts, and there is not any such transfer of property or of an interest in property as to constitute the transaction a mortgage as distinguished from a charge in the nature of a pledge or hypothecation not being a mortgage.

PARKER, J.— I have nothing to add to the opinion I have already expressed in *Aliba* v. *Nanu*(1). I am of opinion that the instrument creates a charge and that art. 132 is applicable.

The second appeal was accordingly allowed and the decree of the District Múnsif restored.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1887. March 11. April 18.

THANGAMMÁL (PLAINTIFF), PETITIONER,

and

THYYAMUTHU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 622—Small Cause suit to recover money paid by the plaintiff in discharge of a decree-debt against him and the defendants—Jurisdiction of Court to go into facts of former suit.

A sued four persons, against whom, together with A, a money decree had been passed in a previous suit, to recover a proportionate part of a sum paid by A in discharge of the decree-debt. Two of the defendants pleaded that they had not appeared in the former suit, and have been unnecessarily brought on to the record by A:

Held, that the Court had jurisdiction to inquire into the circumstances of the previous suit. *Suput Singh* v. *Imrit Tewari*, I.L.R., 5 Cal., 720, followed.

PETITION under s. 622 of the Code of Civil Procedure praying the High Court to revise the decree of T. Kanagasabai Mudaliar,

(1) I.L.R., 9 Mad., 218.

* Civil Revision Petition No. 107 of 1886.

THANGAMMÁL v. THYYAMUTHU.

Subordinate Judge of Tanjore, in Small Cause Suit No. 299 of 1885.

This was a suit to recover together with interest, the amount paid by the plaintiff for the defendants in discharge of a decree-debt payable jointly by the plaintiff and the defendants. Defendants Nos. 1 and 2 pleaded that they had been unnecessarily joined as defendants by the present plaintiff in the former suit in which they did not appear. The Subordinate Judge found that this plea was true and dismissed the suit as against defendants Nos. 1 and 2.

The plaintiff presented this petition.

Mr. *Norton* and *Subramanya Ayyar* for petitioner. The Subordinate Judge travelled beyond his jurisdiction in going into the facts relating to the previous suit; he had only to decide the plaintiff's claim with reference to the decree on which it rested.

Respondents were not represented.

The further arguments adduced on this petition appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Parker, J.).

JUDGMENT.—This is not a suit for contribution brought by one of several debtors against his co-debtors, in which an obligation *quasi ex contractu* may be inferred as in *Govinda Muneya Tiruyan* v. *Bapu*(1). Nor is it a case in which there is no right of contribution, because plaintiff and defendants were joint wrong doers. Defendants Nos. 1 and 2 seem to have been quite needlessly included in the former litigation, and the only contesting and interested defendant was the present plaintiff. If she caused persons to be unnecessarily brought in, that fact will hardly give her a right to call upon them to contribute to costs which have been levied from her, though they by their non-appearance may have rendered themselves liable for costs to the original plaintiff.

We think, therefore, that in this case, the Subordinate Judge had jurisdiction to go into the facts *Suput Singh* v. *Imrit Tewari*(2). The petition must be dismissed.

(1) 5 M.H.C.R., 200. (2) I.L.R., 5 Cal., 720.