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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, <i>Middle Temple.</i>
High Court	...	...	...	{ H. G. WEDDERBURN, <i>Inner Temple.</i>
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On page 333, line 4, from below *read* 1877 *for* 1879.
On page 478, lines 24 and 25, from top *read* complainant *for* defendant and *vice versa*.

JUDGES OF THE HIGH COURT.

1ST JANUARY—31ST DECEMBER 1868.

Chief Justice.

Hon'ble Sir ARTHUR J. H. COLLINS, Kt.

Puisne Judges.

Hon'ble J. KERNAN.

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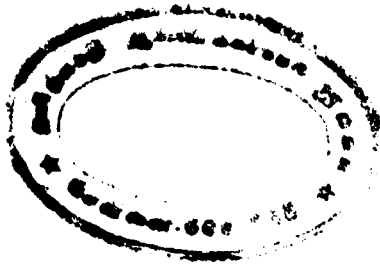
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CITY OF MADRAS MUNICIPAL ACT, 1878, s. 318—President, sole judge of necessity of cleansing tank likely to prove injurious to health:

By s. 317 of the City of Madras Municipal Act, 1878, the President of the Municipal Commissioners was invested with a discretion as to the necessity of cleansing and filling up tanks and wells and draining off stagnant water likely to prove injurious to the health of the neighbourhood; and by s. 318 was empowered on neglect of the owner to comply with a requisition to do the necessary work, to get the work done and to recover the costs in the manner provided for the collection of taxes. No appeal was allowed by the Act against the President's decision:—*Held*, in a suit by the Municipal Commissioners to recover from the defendants the cost of draining and cleansing a tank, that it was not open to the defendants to prove that the tank was not likely to prove injurious to the health of the neighbourhood.

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8. —————, s. 103—Exercise of calling—Investment of funds of society—sch. A, class 1 (A), (B)—Benefit Society:

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- CIVIL COURTS ACT, 1873—Jurisdiction—Suit for partition and mesne profits—Civil Procedure Code, s. 544:

N. sued S. and others for partition of a share of certain land and claimed mesne profits from other defendants who were tenants of the land. S. obtained a decree by consent for her share and a sum of 99 rupees was decreed to her against the tenants for mesne profits. Against this decree the tenants appealed. The Subordinate Judge finding that the subject-matter of the suit, the land of which partition was claimed, exceeded the jurisdiction of the Munsif, reversed the decree of the Munsif and directed the plaint to be returned for presentation in the proper court. It was contended, on appeal to the High Court, that the Subordinate Judge could not set aside the decree against the tenants for mesne profits:—*Held*, that, as the Munsif's Court had no jurisdiction to entertain the suit for partition, it could make no decree for mesne profits.

Nagamma v. Subba 197

2. —————, s. 12—Court Fees Act, sch. II, art. 17, s. VI—Suit to remove a karnavan—Valuation for jurisdiction:

Although, for the purposes of the Court Fees Act, a suit to remove the karnavan of a Malabar tarwad is incapable of valuation and subject to the fee prescribed by s. VI, art. 17, of sch. II of that Act, yet, for the purposes of determining jurisdiction under s. 12 of the Civil Courts Act, the right of management, which is the subject-matter of the suit, must be valued. If the value is estimated *bona fide* by the plaintiff, the court should adopt it.

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3. —————, s. 12—Jurisdiction—Suit to recover share of inheritance—Subject matter of suit:

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4. —————, s. 16—Suit by reversioner to recover land granted to Hindu widow—Presumption as to death of widow from absence, not a question of succession or inheritance:

Plaintiff sued as reversioner to recover certain land granted in lieu of maintenance to a Hindu widow. The widow had left her village 16 years before suit and had not been heard of since:—*Held*, that the question whether a presumption arose that the widow was dead was not a question regarding succession or inheritance to be decided according to Hindu law within the meaning of s. 16 of the Madras Civil Courts Act, 1873.

Balayya v. Kistnappa 448

- CIVIL PROCEDURE CODE, 1859, s. 259—Certificate of sale—Registration Act, 1866, s. 49—Proof of title without production of certificate—*Omnia presumuntur rite esse acta*:

Assuming that s. 49 of the Registration Act, 1866, required that a certificate of the sale of the land in execution of a decree passed under the Civil Procedure Code, 1859, should be registered, a plaintiff who has purchased land at such a sale is not bound to rely on the certificate to prove

his title. If it is proved *aliunde* that the sale took place and that possession was given, the Court should presume, after long lapse of time and possession by a mortgagee of the purchaser, that the sale was duly made by the Court.

Velan v. Kumarasami 296

- CIVIL PROCEDURE CODE, s. 11—Right to an office in a temple:

Plaintiffs sued for an injunction to prevent defendant from interfering with their right to present to certain persons at a certain festival in a certain temple a crown and water. The lower courts found that plaintiffs possessed the right claimed and granted the injunction:—*Held*, that the suit was cognizable by a civil court under s. 11 of the Code of Civil Procedure, and that the injunction was properly granted.

Srinivasa v. Tiruvengada 450

2. —————, s. 13—*Res judicata*—Issue decided in former suit, in which parties were rival defendants claiming under different titles:

B. sued L. N. and P. V. to recover certain property claimed under a nuncupative will of his father N. P. V. denied the will and alleged that the property was ancestral and had vested in him by survivorship. L. N. set up title to the property under a will in writing executed by N. and denied the title both of B. and of P. V. The question whether P. V. was divided or not from N. was tried. It was found that the will in writing was valid, that P. V. was divided, and that B.'s title was not proved. In a suit by L. N. against P. V. to recover certain land granted to her by the will executed by N.:—*Held*, that the question whether P. V. was divided from N. was *res judicata* under s. 13 of the Code of Civil Procedure by reason of the decision in the former suit, although in that suit P. V. and L. N. were both defendants.

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3. —————, s. 13, expl. V:

Where the uraima right over a certain devasam was vested in five trustees representing different illams, and a suit was brought by one of the trustees to recover certain property alleged to have been illegally alienated by three other trustees to a stranger and dismissed:—*Held*, that the decree in such suit was a bar to a second suit brought for the same purpose by the fifth trustee, who had not been a party to the former suit, on the ground that he must be deemed to claim under the plaintiffs in the former suit within the meaning of s. 13, expl. v, of the Code of Civil Procedure.

Madhavan v. Keshavan 191

4. —————, ss. 31, 53—Public right—Amendment of plaint:

A sued for an injunction to restrain interference with his right to graze cattle on the bed of a certain tank. The other raiyats of the village in whom the same right vested were originally joined as plaintiffs, but the plaint was amended under s. 53 of the Code of Civil Procedure, and their names were struck off the record. A proved no special damage:—*Held*, (1) that the fact that the other raiyats of the village have similar rights does not make A's right a public right in the sense that no action can be brought upon it unless special damage is proved; (2) that the right claimed vests in A severally as well as jointly with the other raiyats, and the amendment of the plaint was not contrary to the provisions of s. 31 or 53 of the Code of Civil Procedure.

Venkatachala v. Kuppusami 42

5. —————, s. 43:

The plaintiff having obtained a decree against the defendants for the payment to her of a monthly sum for her maintenance, subsequently sued to have it constituted a charge on certain land:—*Held*, that the claim in both suits arose out of the same cause of action, and, therefore, the plaintiff was precluded by s. 43 of the Code of Civil Procedure from asserting in the second suit the claim which she might have asserted in the first.

Rangamma v. Vohalayya 127

6. —————, s. 43 :
A leased certain land to B. The lease expired in 1877, B continued to hold over and refused to accept a fresh lease from A. A sued B in 1882 for mesne profits for three years, but did not claim possession of the land. The suit was dismissed on a preliminary point. A then sued B to recover possession of the land and mesne profits. It was argued that A's claim to the land was barred by s. 43 of the Code of Civil Procedure, because he omitted to claim the land in the former suit for mesne profits :—*Held*, that the suit was not barred.
Tirupati v. Narasimha 210
7. —————, s. 43 —*Claim for mesne profits received prior to date of former suit for land* :
Where a suit to recover land was brought and no claim was made for mesne profits received prior to date of plaint :—*Held*, that s. 43 of the Code of Civil Procedure was a bar to a subsequent suit for such mesne profits.
Venkoba v. Subhanna 151
8. —————, ss. 50, 53 —*Amendment of plaint—Change in form of suit, the cause of action being unchanged* :
The plaintiffs alleged that the defendants had encroached on the bed of a tank, raised embankments, and cultivated crops which interfered with the plaintiffs' supply of water; and they prayed for a decree ejecting the defendants from the land encroached on and restraining them from interfering with it :—*Held*, that the Court was not precluded by s. 53 of the Code of Civil Procedure from passing a decree declaring the plaintiffs' right to the water of the tank, directing the defendants' embankments, &c., to be removed and regulating the cultivation of their lands; but that the defendants' liberty of cultivation should not be restricted more than was necessary to secure the plaintiffs' supply of water.
Palamada v. Ravutha 94
9. —————, s. 54—*Amendment of plaint—Multifarious suit—Malabar law—Stanom* :
A suit was brought by the junior members of a tarwad, which consisted of three stanoms and three tavaries, against the karnavan and others, including certain persons to whom he had alienated some tarwad property. The plaint, as originally framed, prayed (1) for the removal of the karnavan, (2) for a declaration that defendants Nos. 2 to 8, the senior anandravans, had forfeited their right of succession to him, (3) for the appointment of the plaintiff in his place, (4) for a declaration that his alienations were invalid as against the tarwad, and (5) for possession of the property alienated. Subsequently, the plaint was amended by the order of the court by striking out items 2 and 5 of the prayer, and finally the plaintiffs further amended the plaint and sued only for a declaration that the alienations in question were invalid. The lower court passed the declaratory decree prayed for :—*Held*, that the lower court was wrong in allowing the plaint to be amended after the first hearing, because the case on which the decree was passed was essentially different from that disclosed in the plaint; and that the appeal must be allowed accordingly. *Per cur.*—The suit was not bad for multifariousness—*Vasudeva Shanbhya v. Kuladi Narayana* (7 M.H.C.R., 290) considered. The plaintiffs were competent to maintain the suit as dealt with by the lower court if there was collusion between the senior anandravans and the alienees and the stani for the time being—*Rani Anund Koer v. The Court of Wards* (L.R., 8 I.A., 22), considered. Rights of members of a stanom *inter se*, considered.
Mahomed v. Krishnan 106
10. —————, s. 57—*Return of plaint when Court has no jurisdiction* :
An Appellate Court is not bound to return the plaint under all circumstances where defect of jurisdiction appears.
Yacoub v. Mohan Singh 482

11. —————, s. 146—*Failure of plaintiff to prove unnecessary averments—Decree on admission of defendant—Unnecessary issues raised by Court* :
In a suit brought by an undivided member of a Hindu family to set aside a sale made by the managing member and to recover a moiety of the land sold, the plaintiff alleged that he had been adopted by his deceased uncle and claimed as adopted son. The purchaser denied the adoption, alleged that plaintiff was the natural brother of the vendor, and justified the sale under Hindu law. The lower courts found that the adoption was not proved, and, on the plaintiff urging that if the adoption was not proved yet he was entitled to recover by virtue of the admission that he was the natural brother of the vendor, held that the latter claim was inconsistent with the claim as adopted son. The suit was therefore dismissed :—*Held*, on appeal, that the suit was improperly dismissed, and that if the purchaser could not justify the sale the plaintiff was entitled to succeed. The rule that the decree should be in accordance with what is alleged and proved, is intended to prevent surprise and is not applicable to a case in which the defendant's own admission is adopted as the ground of decision against him.
Appayya v. Ramireddi 367
12. —————, ss. 223, 228, 249, 622—*Mofussil Small Cause Court Act (Act XI of 1865), ss. 20, 21—Execution proceedings—Appeal* :
The plaintiff obtained a decree in a Small Cause suit in a Subordinate Court in the Mofussil and a certificate was granted to him under s. 20 of the Mofussil Small Cause Court Act for the execution of the decree against immovable property of the judgment-debtor in the jurisdiction of a District Munsif. He accordingly presented a petition to the District Munsif under s. 247 of the Code of Civil Procedure, but his petition was dismissed :—*Held*, that an appeal lay to the District Court.
Perumal v. Venkataráma 130
13. —————, ss. 228, 239, 344, 360—*Application to be declared insolvent made to Court to which decree was transferred for execution* :
Where a decree had been transferred for execution from the Court of the District Munsif of E, to that of the District Munsif of B, and an application was made by the judgment-debtor under s. 344 of the Code of Civil Procedure to be declared an insolvent and entertained by the latter Court :—*Held*, that the District Munsif of B. had no jurisdiction to entertain the application.
Venkatsami v. Narayanaratnam 301
14. —————, s. 230—*Execution proceedings—Limitation* :
An application was made in 1886 for execution of a decree dated 1873. In the interval, viz., in October 1879, the judgment-debtor was arrested on an application in execution by the decree-holder, but execution was not proceeded with further :—*Held*, that the application made in 1886 was time-barred under s. 230 of the Code of Civil Procedure.
Putamma v. Muse Beari 132
15. —————, s. 244—*Questions to be decided under—Hindu law—Obligation of son to pay debt of deceased father—Nature of obligation* :
D. obtained a decree against the father of A. and R., Hindus, on a hypothecation bond whereby certain land was pledged as security for repayment of a loan. The decree declared the land liable to be sold for repayment of the debt. The judgment-debtor having died before the decree was executed, A and R. were made parties to the proceedings in execution and the land was attached. A. and R. objected to the attachment on the ground that their shares in the land were not liable to be sold in execution of the decree as they were not parties to the suit. This objection was allowed, and D. brought a suit for a declaration that the property was liable to be sold. That suit was dismissed on the ground that a suit for a declaration would not lie. D. then sued to recover from A. and R. the balance due under the decree against their father after crediting the amount recovered by the sale of their father's share. It was objected that the suit was barred by s. 244 of the Code of Civil

- Procedure:—*Held*, that the duty of a son under Hindu law to pay his father's debt out of his own share of ancestral estate is not a matter which can be decided under s. 244 of the Code of Civil Procedure. The questions contemplated by s. 244 are those which relate to the enforcement of the obligation created by the decree. The obligation to pay the father's debts out of the son's share of the ancestral estate is not an obligation created by a decree against the father.
- Ariabudra v. Dorasami* 413
18. —————, s. 258—*Mortgage in satisfaction of decree—Adjustment not certified—Mortgage invalid:*
- In a suit brought by a Hindu to recover certain land, defendant pleaded that he held the same under a mortgage granted to him by plaintiff's mother and guardian in satisfaction of a decree obtained against plaintiff's deceased father. Plaintiff contended that, as the mortgage was in adjustment of a decree and the adjustment had not been certified to the Court, the mortgage could not be recognized by virtue of s. 258 of the Code of Civil Procedure:—*Held*, that as there had been no certified adjustment of the decree, the mortgage could not prevail against plaintiff's claim.—*Haji Abdul Rahiman v. Khoja Khaki Aruth* (I.L.R., 11 Bom., 6) followed and *Mallamma v. Venkappa* (I.L.R., 8 Mad., 277) distinguished.
- Thirumalai v. Sundara* 469
17. —————, s. 266—*Attachment—Standing crops—Immovable property:*
- Standing crops are, for the purposes of the Code of Civil Procedure, immovable property.
- Madayya v. Yenkata* 193
18. —————, ss. 294, 295:
- M. and C. each obtained a decree against the same judgment-debtor and applied for execution. C., in execution of his decree, attached certain immovable property, and, with the permission of the Court, purchased the same under s. 294 of the Code of Civil Procedure and set off his purchase money against the decree. M. claimed that the proceeds of the sale to C. should be rateably distributed under s. 295 of the Code and that C. should either elect to have the property resold or pay into Court the rateable proportion due to M. C. objected to a resale or to pay:—*Held*, that C. might be compelled to refund the rateable amount due to M. by summary process in execution.
- Madden v. Chappani* 356
19. —————, ss. 311, 588 (8):
- An application under s. 311 of the Code of Civil Procedure to set aside a sale in execution of a decree having been dismissed for default, the petitioner applied to the Court to restore the application to the file. The Court having rejected this application, petitioner appealed against this order:—*Held*, that no appeal lay. *Singappa v. Gangawa* (I.L.R., 10 Bom., 433) followed.
- Raja v. Strinivasa* 319
20. —————, ss. 313, 315, 586—*Suit to recover purchase money—Suit by purchaser at Court-sale not of nature cognizable by Small Cause Court—Orders made not final:*
- A suit brought, under s. 315 of the Code of Civil Procedure, by a purchaser at an execution sale to recover the purchase-money, when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, is not a suit of a nature cognizable by a Small Cause Court constituted under Act XI of 1865. P. bought certain land at a sale in execution of a decree. Before the purchase money was paid, P. applied to the court by petition to set aside the sale and return the deposit money on the ground that the judgment-debtor had no saleable interest in the land. The court rejected the petition and confirmed the sale on the 15th March 1881. The sale was subsequently set aside by a decree obtained by V. in a suit against P., and the judgment-creditor. P. then sued the Judgment-creditor

- to recover the purchase-money. The District Judge dismissed the suit on the ground that P. was debarred from suing by the order of 15th March 1881:—*Held*, that the order did not conclude P. from bringing this suit.
- Paohayappan v. Narayana* 269
21. —————, s. 317 213
22. —————, s. 317—*Suit against benāmi purchaser at court-sale, by owner, to recover the land after ejectment:*
- If after obtaining a certificate of sale in execution of a decree, the purchaser acknowledges that his purchase is benāmi and gives up possession, or does some act which clearly indicates an intention to waive his right, or restores the property to the real owner, such act may, by reason of the antecedent relation of the parties, operate as a valid transfer of property. Defendant acted benāmi in buying certain land at a court-sale for plaintiff, paid part of the purchase-money for plaintiff, and allowed plaintiff to remain in possession on the understanding that defendant was to transfer the property on repayment of the balance of the purchase money. Defendant having ejected plaintiff, plaintiff sued to recover the land:—*Held*, that s. 317 of the Code of Civil Procedure was no bar to plaintiff's suit.
- Monappa v. Surappa* 234
23. —————, ss. 344, 588—*Appealable order—Insolvent judgment-debtor—Notice to decree-holder:*
- A debtor was arrested on civil process. He presented a petition to the court from which process issued, alleging that he was unable to pay the debt and praying to be declared insolvent and to be released. The court passed an order on the same day, directing that he should be released and that the creditor should proceed against his property:—*Held* (1) that an appeal lay against the order; (2) the order was bad for want of notice.
- Komarasami v. Govindu* 136
24. —————, ss. 345, 352—*Insolvency—Procedure on claim made by creditor—Proof of debt:*
- It is open to a creditor, at any time while the assets of an insolvent are undistributed, to produce evidence of his debt and to apply to be admitted on the schedule under s. 352 of the Code of Civil Procedure.
- Lakshmanan v. Mutia* 1
25. —————, ss. 373, 622—*Leave given by District Court on appeal to withdraw suit—Material irregularity:*
- A District Munsif having dismissed a suit, plaintiff appealed to the District Court, and, at the same time, applied to the Court to allow him to withdraw his suit with permission to bring a fresh suit on the same cause of action. The District Court granted the application without assigning any reasons for its order:—*Held*, under s. 622 of the Code of Civil Procedure that the District Court had acted with material irregularity.
- Tirupati v. Muttu* 322
26. —————, s. 424—*Collector as guardian of ward not entitled to notice in suit to recover money from estate of ward:*
- In a suit to recover money due on a promissory note executed by a deceased zamindar, out of the estate of the deceased and of his son, the defendant, a minor under the Court of wards, the Collector, being appointed guardian *ad litem* of the defendant, pleaded that under s. 424 of the Code of Civil Procedure he was entitled to notice before suit, and the suit was dismissed on the ground of want of notice:—*Held*, on appeal, that s. 424 was not applicable to the case.
- Anantharaman v. Ramasami* 317
27. —————, ss. 468, 475 428

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28. ———, ss. 514, 521, 522—Award, appeal against decree in terms of—Extension of time for presenting award—Evidence : Where a decree purports to have been made in terms of an award under s. 522 of the Code of Civil Procedure, an appeal lies against it if there was no award in fact or in law. An order extending the time for the presentation of an award upon an application presented within time is not bad in law by reason of its having been made after the expiry of the term which it purports to extend. It is not a valid objection to an award that the arbitrators have not acted in strict conformity with the rules of evidence.	
<i>Suppu v. Govindacharyar</i>	85
29. ———, ss. 516, 622 : A District Munsif passed a decree in the terms of an award without giving notice of the filing of the award under s. 516 of the Code of Civil Procedure :—Held, that the District Munsif acted with material irregularity within the meaning of s. 622 of the Code of Civil Procedure.	
<i>Rangasami v. Muttusami</i>	144
30. ———, s. 544	197
31. ———, s. 549—No extension of period for finding security for costs of appeal after default : Section 549 of the Code of Civil Procedure being imperative, the time cannot be extended after the expiry of the period fixed in the order directing the appellant to find security for the costs of an appeal. <i>Haidri Bai v. East Indian Railway Company</i> , 1 L.R., 1 All., 687, followed.	
<i>Shrajudin v. Krishna</i>	190
32. ———, s. 583—Claim for mesne profits on reversal of decree for possession of land exceeded : A decree for possession of immovable property having been executed was reversed on appeal. The defendant applied under s. 583 of the Code of Civil Procedure for restitution of the mesne profits taken by the plaintiff. The lower courts dismissed the application on the ground that the proper remedy was by suit :—Held, that the defendant was entitled to the relief claimed.	
<i>Kalianaswaram v. Equacedeswara</i>	261
33. ———, s. 622	322
34. ———, s. 622—Court acting without jurisdiction : A Small Cause Court, which had jurisdiction under Act XI of 1865 to entertain suits for rent only where the claim was founded on contract, erroneously assumed that a sub-tenant, by entering on land with notice that his lessor was bound to pay rent to the landlord, became liable by an implied contract to pay the rent to the landlord, and passed a decree against the sub-tenant for the rent in arrears :—Held that, under s. 622 of the Code of Civil Procedure, the High Court had power to set aside the decree— <i>Amir Hassan Khan v. Sheo Baksh Sing</i> (1 L.R., 11 Cal., 6) discussed and explained.	
<i>Manisha Eradi v. Siyali Koya</i>	220
35. ———, s. 622—Error of law—Material irregularity—Personal decree against minors for debt of deceased Hindu father : In a suit to recover a debt incurred by the deceased father of a Hindu family, the District Judge gave a personal decree against the sons of the debtor, of whom two were minors :—Held, that under s. 622 of the Code of Civil Procedure, the decree against the minors should be reversed, but that the Court has no power to revise the decree against the other defendants.	
<i>Bashyam v. Jayaram</i>	303
COMPENSATION—Vexatious complaint	142
CONTRACT ACT, ss. 17, 19—Contract induced by fraud—Right to rescind : If a vendor has been guilty of fraud within the meaning of s. 17 of the Indian Contract Act by actively concealing a fact which it was material for	

the purchaser to know, and the purchaser was induced thereby to purchase, the fact that the purchaser by exercise of ordinary diligence might have ascertained the truth affords no answer to a suit to recover the purchase-money. Such a case does not fall within the exception to s. 19 of the Contract Act.	
<i>Morgan v. The Government of Haidarabad</i>	419
2. ———, ss. 49, 77, 92, 151	459
3. ———, ss. 69, 70	452
4. ———, s. 74—Penalty—Payment of higher rate of interest from date of bond on breach : Where a mortgage-deed provided for repayment of the debt in four instalments with interest at 6 per cent. and in default of payment of any instalment on the due date, for interest at 12 per cent. from the date of the bond :—Held, following <i>Balkishen Das v. Run Bahadur Singh</i> (1 L.R., 10 Cal., 305) that the stipulation being reasonable, the plaintiff was entitled on default to recover the higher rate of interest from the date of the bond.	
<i>Basavayya v. Subbarazu</i>	294
5. ———, s. 131 : See HINDU LAW, 15.	
CONTRACT TO SELL LAND—Rescission—Resale by registered deed : A. sued to recover certain land which he claimed under a registered deed of sale executed by the owner. Prior to the date of this sale to A., M. had been put in possession of the land under an agreement to purchase the land for Rs. 300. The sale deed to M. had not been executed because only Rs. 200 of the purchase money had been paid to the owner :—Held that A. could not recover, as it was not open to his vendor to rescind the contract with M.	
<i>Moidin v. Azaran</i>	263
CONTRIBUTION	452
COURT FEES ACT, s. 6, sch. II, art. 17	266
2. ———, sch. II, art. 17, cl. VI—Religious Endowments Act, ss. 14, 18 : A and B, being worshippers at a Hindú temple, obtained sanction under s. 18 of the Religious Endowments Act to sue for the removal of the Managers of the temple on the ground of breach of trust and for damages. A and B sued to remove the managers, but claimed no damages in their plaint :—Held, that, as the suit instituted differed from the one for which sanction was given, the plaint was properly rejected.	
<i>Srinivasa v. Venkata</i>	148
CRIMINAL PROCEDURE CODE, ss. 4, 191 (a), 200, 530, and 537—Third-class Magistrate taking cognizance of case on receipt of a yadast from a Revenue officer and convicting accused without examining complainant : A revenue officer sent a yadast to a Third-class Magistrate, charging a certain person, with having disobeyed a summons issued by the Revenue officer. The Third-class Magistrate thereupon tried and convicted the accused under s. 174 of the Penal Code. The District Magistrate referred the case on the ground that the conviction was bad under s. 530 (k) of the Code of Criminal Procedure :—Held, that as the yadast amounted to a complaint within the meaning of s. (4), although the complainant was not examined on oath as required by s. 200, the conviction was not illegal.	
<i>Queen-Empress v. Monu</i>	443
2. ———, s. 59	441, 480
3. ———, ss. 61, 167, 170, 344—Remand of prisoners in custody of the police : The right construction of s. 167 of the Code of Criminal Procedure is that in proceedings before the police under chapter XIV, the period of remand cannot exceed in all fifteen days, including one or more remands.	
<i>Queen-Empress v. Engadu</i>	98

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4. _____, s. 147— <i>Dispute concerning right to officiate in a mosque:</i> Where a dispute likely to cause a breach of the peace is shown to exist concerning the right to perform a religious ceremony in a mosque, the Magistrate may exercise the powers conferred by s. 147 of the Code of Criminal Procedure. <i>Muhammad Musaliar v. Kunji Chek Musaliar</i>	323
5. _____, s. 195— <i>Sanction to prosecute—Registration Act, 1877—Act III of 1877, s. 34—Forged document registered by Sub-Registrar:</i> A Sub-Registrar acting under s. 34 of the Registration Act, 1877, is not a "Court" within the meaning of s. 195 of the Code of Criminal Procedure. <i>Queen-Empress v. Subba</i>	3
6. _____, s. 195	375, 500
7. _____, s. 239	441
8. _____, ss. 250, 262— <i>Veracious complaint—Compensation:</i> The provisions of s. 250 of the Code of Criminal Procedure may be applied in summons cases whether tried summarily or not. <i>Queen-Empress v. Basava</i>	142
9. _____, s. 289— <i>Prosecutor's right to reply:</i> Where documentary evidence was put in by the accused during the case for the Crown and before examination of the accused:— <i>Held</i> , under s. 289 of the Code of Criminal Procedure, that the Crown had the right of reply— <i>Queen-Empress v. Grace Chunder Banerjee</i> (I.L.R., 10 Cal., 1024) dissented from. <i>Queen-Empress v. Venkatapathi</i>	339
10. _____, s. 488— <i>Maintenance order passed on report of Subordinate Magistrate, illegal:</i> Under s. 488 of the Code of Criminal Procedure a Magistrate of the first class may, upon proof of neglect or refusal by a person having sufficient means to support his wife, order such person to make a monthly allowance for the maintenance of his wife: a First-class Magistrate having referred a complaint by a wife for maintenance to a Subordinate Magistrate to take evidence and report upon the facts stated in the petition of complainant, passed an order upon such report in the absence of the husband for payment of maintenance:— <i>Held</i> , that the order was illegal. <i>Venkata v. Paramma</i>	199
11. _____, s. 535	441
12. _____, s. 537	441, 443
CROPS—Attachment: <i>See CIVIL PROCEDURE CODE, 17.</i>	
DANCING GIRL—Adoption	393
DECREE—Execution—Assignment of interest of judgment-debtor in surplus proceeds of sale—Attachment by creditor of judgment-debtor—Suit for declaration of assignee's title—Civil Procedure Code, s. 266 (k)—Contingent interest: In execution of a decree in a District Munsif's Court, certain property having been sold, a balance, after satisfying the decree, remained in favor of the judgment-debtor X. After the date of sale, but before the whole of the purchase money had been paid into court, X applied to the court by petition, praying that the amount due to him might be paid to A, to whom, he alleged, he had assigned it. Before any order was made on this petition, B, C, D, and E, in execution of separate decrees against X, attached the sum in court. The District Munsif ordered that B, C, D, and E should be paid before A. A brought a suit against B, C, D, and E in another District Munsif's Court for	

a declaration that he was entitled to the money and to set aside the said order. The Munsif set aside the order and declared the plaintiff to be entitled to the amount. B, C, D, and E severally appealed against this decree, and the District Court passed a decree in each appeal, dismissing A's suit. A presented one second appeal, making B, C, D, and E parties thereto, against the four decrees of the District Court:—*Held* (1) that A was bound to file a separate appeal against each of the decrees passed by the District Court; (2) that A (having by permission of the Court amended his second appeal and filed three more second appeals) was entitled to a decree, declaring his title to the amount claimed.

Chathu v. Kienhamed 280

DISTRICT MUNICIPALITIES ACT, 1884 (MADRAS), s. 173—Obstruction of public street:

Section 173 of the District Municipalities Act, 1884 (Madras), provides that no person shall deposit anything so as to cause obstruction to the public in any street without the written permission of the Municipal Council:—*Held*, that the depositing by any person of an article in the street without the permission of the Municipal Council amounted to an obstruction.

Queen-Empress v. Bolappa 343

EASEMENTS ACT—ACT V OF 1882, ss. 6, 7, 17—Natural streams—Surface water—Rights of riparian owners:

The owners of a tank fed by natural streams, which depended for their supply on natural rainfall and surface water, sued for an injunction to restrain superior riparian owners from damming the streams or interfering with the supply of water, over which the plaintiffs claimed a right of easement. The issue as to the ownership of the land on which the streams rose was undecided:—*Held*, (1) The Easements Act only declared the existing law as to easements over water; (2) An easement can therefore be acquired in regard to the water of the rainfall. But surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise is not a subject of easement by prescription, though it may be the subject of an express grant or contract; (3) It is the natural right of every owner of land to collect or dispose of all water on the surface which does not pass in a defined channel; (4) Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture, subject to the conditions (i) that the use is reasonable, (ii) that it is required for their purposes as owners of the land, and (iii) that it does not destroy or render useless or materially diminish or affect the application of the water by inferior riparian owners in the exercise either of their natural right or their right of easement if any; (5) It was therefore necessary to ascertain where the streams rose, and the course, source and length of their tributaries.

Perumal v. Ramasami 16

ESTOPPEL—Rent Recovery Act, ss. 3, 9, 79, 80—Yeomiah lands—Unregistered holder rendering service and granting pattas—Estoppel by acquiescence of person entitled to the yeomiah holding:

A yeomiahdar died leaving a brother who was then out of India. Shortly before his death, he made an invalid assignment of his holding to a third person who performed the service, and granted pattas of the land. The holding was resumable on failure of the service. The brother of the late yeomiahdar returned after three years and obtained registration of his title. He now filed this suit to enforce acceptance of pattas tendered by him to the rayats who had already accepted pattas from and executed muchalkas to the assignee:—*Held*, that the suit was not maintainable, as under the circumstances the plaintiff's conduct justified the tenant's belief that the assignee was entitled to collect rent from them until the assignment was questioned by the plaintiff and notice of his title given to them.

Khadar v. Subramanya 12

EVIDENCE ACT, ss. 13, 35 116

2. ———, s. 92—*Civil Procedure Code, s. 317 :*

By an agreement in writing, A, after reciting that he bid for certain property sold in execution of a decree benami for B and paid the deposit amount into court for B and that B paid the balance, promised to convey the property to B. In a suit by B to recover the property from A :—*Held* that, under s. 92 of the Evidence Act, B was not debarred from proving that A bought the property for himself and not benami for B.

Kumara v. Srinivasa 213

3. ———, s. 108 448

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FOREST ACT, 1882, RULES 7 AND 12—*Removal of leaves from classified trees no offence :*

The mere removal of leaves from classified trees on unreserved land does not constitute a breach of rule 12 of the Madras Forest Act, 1882.

Queen-Empress v. Siranna 139

2. ———, s. 10—*Decision as to title to land, appeal to High Court from decision of District Court on appeal—Boundary Act, 1860, s. 25—Regulation V of 1804—Representation of minor by manager of estate—Decision of Boundary Officer res judicata, if not contested by suit under s. 25 :*

An appeal lies to the High Court from a decision of a District Court passed under s. 10 of the Madras Forest Act, 1882, on appeal from the decision of a Forest Settlement Officer. A Survey Officer in 1875 held an enquiry under the Boundary Act, 1860, and demarcated certain land out of a zamindar. At that time the zamindar was a minor under the Court of Wards and he was represented at the enquiry by the manager of his estate appointed under s. 8 of Regulation V of 1804. In a suit brought by the zamindar to recover the land it was contended that the decision of the Survey Officer was not binding on the zamindar because he was not properly represented by his guardian at the enquiry—*Held*, that the decision of the Survey Officer was binding on the zamindar, and that the matter in dispute was *res judicata*, no appeal by way of suit as provided by the Boundary Act, 1860, s. 25, having been brought.

Kamaraju v. The Secretary of State for India 309

GIFT—Construction 258

2. ——— :

See HINDU LAW, 7.

HINDU LAW—Adoption among Brahmans—*Datta Homam, when it may be dispensed with :*

The ceremony of Datta Homam is not essential to a valid adoption among Brahmans in Southern India, when the adoptive father and son belong to the same gotra. *Singamma v. Ramanga Charlu*, 4 M.H.C.R., 165, approved and followed. *Shoshinath Ghose v. Krishnasunderi Dasi*, 1 I.L.R., 6 Cal., 381, considered.

Govindayyar v. Dorasami 5

2. ———— Adoption by Naikin or dancing girl—Adoption of more than one daughter at a time—Rights of adopted daughter—Custom of adopting more than one girl at a time not proved :

Ammu, a Naikin, or dancing girl, in South Canara, affiliated prior to 1849 three girls and a boy. These four persons lived together as a joint family till 1849, when a partition of their joint property was decreed between them in equal shares. T., one of the girls, died in 1880, leaving certain property. V. claiming to be the sister by adoption of T., sued to recover T.'s estate from M., T.'s uterine brother :—*Held*, (1) that an adoption of a daughter by a Naikin or dancing girl can be recognized by the Civil Courts and does confer rights on the girl adopted—*Mathura Naikin v. Esu Naikin* (I.L.R., 4 Bom., 545) dissented from : (2) that there being no warrant for a plurality of

adoptions in the analogies of Hindu law, and no special custom having been proved V. could not claim T.'s estate.

Venku v. Mahalinga 393

3. ———— Adoption—*Dattaka Mimāṃsā, s. V, slokas 16-20—Dattaka Chandrikā, s. II, sloka 7—Yājñavalkya, chap. II, verse 128—Mitāksharā, chap. I, s. XI, paragraph 1—Smṛiti Chandrikā, 152 :*

It is a general rule of Hindú law that there can be no valid adoption unless a legal marriage is possible between the person, for whom the adoption is made, and the mother of the boy, who is adopted, in her maiden state.

Minakshi v. Rāmnāda 49

4. ———— Adoption—Only son :

Whether an elder widow who had purported to adopt a son to her deceased husband under his authority had received such authority orally or by will, was disputed by a junior widow, the Courts below differing as to the question of fact. Upon the evidence, the finding of the Subordinate Judge that no such authority had been given, was maintained. The Courts below also differed as to whether the adoption if authorized was validly effected, the boy adopted having been the only son of his natural father. Whether this is a disqualification invalidating an adoption, is a question that has not come before Her Majesty in Council for decision.

Sri Ammi Devi v. Sri Vikrama Devi 486

5. ———— Adoption—Only son given in adoption by widow :

A widow is competent to give in adoption whenever the husband is legally competent to give and when there is no express prohibition from him. Three principles appear to regulate the power to give in adoption—(1) the son is the joint property of the father and the mother for the purposes of a gift in adoption, (2) when there is a competition between the father and the mother, the former has the predominant interest or a potential voice, and (3) after the father's death the property survives to the mother. The adoption of an only son is not invalid.—*Chinna Gaundan v. Kumara Gaundan* (1) followed.

Nārdyanasāmi v. Kuppusāmi 43

6. ———— Decree against father—Sale of ancestral estate in execution of money decree—Son's rights and liabilities :

A purchased the half share of the judgment debtors in certain immovable family property, at a court-sale held in execution of money decrees against B and his brother, who were members of an undivided Hindú family. B's undivided son sued A—B and the remaining members of his family, being also joined as defendants—to recover a share in the land, alleging that his interest was not bound by the sale; but he did not prove that the debt for which the decrees were passed was immoral, and it appeared that A had bargained and paid for the entire estate. The plaintiff was a minor at the time of the sale, and B was not the managing member of the family :—*Held*, that the court-sale was binding on the plaintiff's share—*Nanomi Babuasin v. Modhun Mohun* (L.R., 13 I.A., 1; s.c. I.L.R., 13 Cal., 21) discussed and followed (1).

Kunhali Bera v. Keshava Shanbaga 64

7. ———— Gift of ancestral property by father to stranger—Suit by minor son to recover :

Where a Hindú made a gift of certain land, which he had purchased with the income of ancestral property, and a suit was brought to recover the land on behalf of his minor son, who was born seven months after the date of the gift :—*Held*, that the gift was invalid as against the plaintiff and that he was entitled to recover the land from the donee.

Ramanna v. Venkata 246

8. ———— Grant by widow for religious benefit of husband :

Where two widows of a zamindar granted a small portion of the zamindari to a Brahman who had been brought up by them with a view that he

should perform the funeral and annual ceremonies of their deceased husband :—*Held*, that the grant was not *ultra vires*, and could not be resumed by the zamindar's successor.

Lakshminarayana v. Dasu 288

9. ———— *Impartible estate—Zamindari—Partition—Limitation Act, 1877, s. II, art. 127—Limitation Act, 1859, 1(13) :*

In 1803 G. being in possession of the zamindari of M., the permanent settlement was made with him and a sanad was granted to him as prescribed by Regulation XXV of 1802. In 1827 C., the only son of G., being in possession of the zamindari, got into debt and the zamindari was sold in execution of a decree and bought by Government. In 1835 the zamindari was granted to J., the son of C., by Government and a sanad issued in the usual terms as prescribed by Regulation XXV of 1802. J. died in 1864 leaving four sons, the three plaintiffs and C., his eldest son. C. died in 1869 leaving an only son, J., the defendant. In 1869 the Court of Wards took charge of the estate on behalf of the infant defendant and allowed his uncle, plaintiff No. 1, to receive the rents of the zamindari as renter. J. and his three uncles lived in the same house and participated in the joint family property until 1872, when the plaintiffs claimed to have the zamindari divided. By an agreement between the plaintiffs and the Court of Wards all the movable and immovable property, except the zamindari taluk, was divided into four shares and distributed in 1874 between the plaintiffs and defendants. In 1884 the plaintiffs sued for partition of the zamindari, alleging that their cause of action arose in 1872, when the Court of Wards denied their right to a partition of the zamindari taluk. The defendant pleaded (1) that the estate was not partible; (2) that the suit was barred by limitation :—*Held*, (1) distinguishing the *Hunsapore case* (12 M.L.A., 1) and the *Siraganga case* (I.L.R., 3 Mad., 290), and following the principle laid down in the *Nazvid case* (I.L.R., 2 Mad., 128) that the zamindari was partible; (2) that the suit was not barred by limitation.

Jaganatha v. Ramabhadra 380

10. ———— *Inheritance—Bhandu—Daughter's son's son :*

N., the daughter of J., inherited his property under Hindu law. N. had a son, who predeceased her, leaving a son K. :—*Held* that K., being a bhandu, was entitled to the property of J. on the death of N. in preference to the daughters of N.

Krishnayya v. Pichamma 287

11. ———— *Maintenance of son's widow—Self-acquired property :*

A Hindu is under no obligation to maintain his adult son or the son's widow out of his self-acquired property. Thus a daughter-in-law can enforce no claim for maintenance against the self-acquired property of her father-in-law which has passed to his grandson, unless the father-in-law showed by conduct or otherwise an unequivocal intention that it should be taken subject to the obligation of providing for his support.

Ammakannu v. Appu 91

12. ———— *Presumption as to death of Hindu widow from absence* 448

13. ———— *Release by a coparcener of his rights in favor of another coparcener :*

In a joint Hindu family, consisting of four brothers A, B, C, D, A and B obtained their shares by a partition suit. In the plaint they stated that they relinquished their shares of the movable property in favor of C. In a suit by C against D to recover his share C claimed three-fourths of the movable property. D contended that the release by A and B in favor of C could not, according to Hindu law, add to the share of C as a coparcener :—*Held*, that C was entitled to the share claimed.

Peddayya v. Ramalingam 406

14. ———— *Representation of estate by mother—Decree against mother when adopted son in existence, null :*

Plaintiff obtained a decree on a bond executed by S. against the mother of S., whom he believed to be the heiress of S. In attempting to execute this

decree against the estate of S., plaintiff was obstructed by the defendant who was the adopted son of S. Plaintiff sued the defendant for a declaration that he was entitled to execute his decree against the estate of S. in the hands of the defendant :—*Held*, that the suit must fail, inasmuch as the estate of S. was not properly represented in the former suit. *S. C. Lahiry v. N. C. Lahiry* (I.L.R., 11 Cal., 45) distinguished.

Subbanna v. Venkatakrishnan 408

15. ———— *Son's estate liable for debt of deceased father contracted as surety—Contract Act, s. 131, not applicable to case :*

In a suit brought to recover money from the estate of a deceased Hindu in the hands of his son on a surety bond executed by the father :—*Held*, that the estate of the son was liable according to the principles of Hindu law, and that the question was not affected by the provisions of the Contract Act.

Sitaramayya v. Venkataramanna 373

16. ———— *Widow's estate—Mortgage by two co-widows—Sale of equity of redemption in execution of decree against one widow—Suit to redeem by other widow—Decree for redemption of moiety on payment of moiety of mortgage amount :*

A mortgage of ancestral estate having been made by A and B, two Hindu co-widows, the equity of redemption of the said estate was sold in execution of a decree for money against B only and purchased by the mortgagee :—*Held*, that A was entitled to redeem only a moiety of the estate during the lifetime of B.

Ariyaputri v. Alamelu 304

17. ———— *Will—Construction—Gift to husband and wife—Joint tenancy—Survivorship—Alienation by husband to creditor invalid :*

A Hindu, by his will, granted jointly to his brother's son and Nagammal, the wife of latter, certain land with power of alienation. The recitals in the will showed that the husband was included in the gift not because of his relationship to the testator but because he was the husband of Nagammal :—*Held* that the grantees were joint tenants and not tenants in common and that the joint tenancy was not severed by an alienation of the land by the husband to a creditor.

Vydimadu v. Nagammal 258

IMPARTIBLE ESTATE 380

INSOLVENCY :

See CIVIL PROCEDURE CODE, 24.

JURISDICTION 134, 140, 197

2. ————

See CIVIL COURTS ACT, 3.

3. ————

See CIVIL PROCEDURE CODE, 34.

LANDLORD AND TENANT—*Right of occupancy—Permanent cultivator—Paracudi—Burden of proof—Form of suit :*

The defendants' ancestors or predecessors in title were the cultivating tenants of the lands of a certain temple from a date not later than 1827, in which year they were so described in the paimash accounts. In 1830, they executed a muchalka to the Collector, who then managed the temple, whereby they agreed among other things to pay certain dues. They were described in the muchalka as *paracudis*. In 1857, the plaintiffs' predecessors took over the management of the temple from, and executed a muchalka to, the Collector, whereby he agreed among other things not to eject the raiyats as long as they paid kist. In 1882, the dues (which were payable separately), having fallen into arrear, the manager of the temple sued to eject the defendants :—*Held*, (1) that the suit was not bad for misjoinder; (2) that the burden of proving the permanent character of the tenure set up by the

defendants lay on them: (3) that there was nothing to show that the defendants were more than tenants from year to year. *Chackalinga Pillai v. Thythealinga Pandara Sannady*, 6 M.H.C.R., 161, and *Krishnasami v. Varadaraja*, 1 I.L.R., 5 Mad., 345, discussed and distinguished.

Thiagaraja v. Gityana Sambandha Pandara Sannadhi 77

LIMITATION 116, 132

2. Adverse possession—Redemption of land by one of two co-mortgagors and re-mortgage thereof—Possession under second mortgage for more than 12 years:

A and B, two brothers, being entitled to certain land, mortgaged it in 1852 to C. In 1864 A redeemed the mortgage and re-mortgaged the land to D for the same amount. In 1885 the defendants (sons of A) redeemed the mortgage to D. In 1886 the plaintiff (son of B) sued defendants and the representatives of C and D to redeem a moiety of the land on payment of a moiety of the amount due on the mortgage of 1852. The defendants pleaded, *inter alia*, that the suit was barred by limitation as the land had been held adversely since the mortgage of 1864:—*Held*, that in the absence of proof that the land was held with an assertion of adverse title the plaintiff was entitled to a decree.

Moidin v. Oothumanganni 416

LIMITATION ACT, 1859, s. 1 (13) 380

2. ———, s. 1, cls. 9, 10, 16

The period of limitation applicable under Act XIV of 1859 to suits upon written instruments which could not have been registered under the law in force at the time of execution of such instruments is six years under cl. 16 of s. 1 of the said Act.

Venkatachalam v. Venkatayya 207

LIMITATION ACT, s. 10—Suit against dharmakarta of temple to recover money misappropriated:

Plaintiff, as dharmakarta of a Hindu temple, alleging that the defendant, a former dharmakarta, who had been removed from office, had, when in office, misappropriated certain temple funds held by him, sued to recover a certain sum alleged to have been misappropriated:—*Held*, that the defendant was a person in whom the temple funds had become vested in trust for a specific purpose within the meaning of s. 10 of the Limitation Act, 1887, and that as the plaint disclosed a right to follow trust funds in his hands, the suit might be treated as a suit for that purpose.

Sethu v. Subramanya 271

2. ———, s. 15—Period of injunction included.

A member of a firm sued for a partnership debt and obtained a decree; he died before execution. In a suit brought by his widow an injunction was issued restraining his partner from realising the partnership assets. Subsequently, a receiver was appointed for the partnership assets, and he applied for execution of the above decree:—*Held*, that the time during which the injunction was in force was not to be excluded in computing the period of limitation.

Rajarathnam v. Sheelayammal 103

3. ———, sch. II, art. 29 315

4. ———, sch. II, arts. 36, 49:

Plaintiff was the owner of a house mortgaged to defendants. On the 22nd August 1885 defendants sold the house by auction under a power of sale contained in the mortgage and gave possession to the purchaser. On the 2nd September 1887 plaintiff sued the defendants to recover the value of certain timber which was stored in the house and not mortgaged and which plaintiff alleged the defendants had taken possession of and converted to their own use. It was proved that the timber was in the house when defendants took possession from the plaintiff and defendants did not account for it:—*Held*, (1) that plaintiff was entitled to recover from the defendants the value

of the timber, and (2) that the suit was not barred by art. 36 of sch. II of Indian Limitation Act, 1877.

Russanha v. The Madras Deposit and Benefit Society 333

5. ———, sch. II, art. 80:

Suit on an unregistered bond, whereby certain movable property in the debtor's possession was pledged as security for the repayment of principal and interest:—*Held*, that the suit was governed by art. 80, sch. II, of the Indian Limitation Act, 1877.

Tilla Kamti v. Kalekara 153

6. ———, sch. II, art. 116—Transfer of Property Act, ss. 130, 135, 136, 137—Apportionment:

A sued as assignee of a bond (payable in 1872), hypothecating land in the mofussil. B, A's assignor, was a vakil practising in the High Court. B had obtained an assignment of the obligee's interest in the bond sued on, and also another bond for Rs. 3,000 between the same parties after the 1st July 1882, for Rs. 4,500. B had previously purchased the two bonds at a sale in execution of the decree of a Mofussil Court for Rs. 5 each. A's assignment from B purported to be made to A in payment of certain debts owed to him by B. No interest has been paid on the bond and no tender had been made to the plaintiff:—*Held* that the creditor's personal remedy was passed by art. 116 and on the evidence, that there was no consideration for the bond sued on or that it had failed.

Rathnasami v. Subramanya 56

7. ———, sch. II, art. 127 380

8. ———, art. 179 (4)—Application for copy of decree not a step in aid of execution:

The application by a decree-holder for a copy of a decree with intent to apply for execution is not a step in aid of execution within the meaning of cl. 4 of art. 179 of sch. II of the Indian Limitation Act, 1879.

Gopilandhu v. Domburu 236

9. ———, s. 20—Payment of interest—Prescribed period—Extension of period:

The words "prescribed period," used in s. 20 of the Limitation Act, 1877, mean the period prescribed by the Act. The contention that only one extension of the period of limitation is given by payment of interest is unfounded.

Venkataratnam v. Kamayya 216

MAINTENANCE:

See CRIMINAL PROCEDURE CODE, 10.

MALABAR LAW 134

2. ——— Decree for maintenance against karnavan—Execution against tarwad property:

A member of a Malabar tarwad having obtained a decree for maintenance against her karnavan, assigned the decree to the plaintiff, who proceeded to execute it against the tarwad property. The then karnavan objected and his claim was allowed. In a suit by a plaintiff to have it declared that he was entitled to execute the decree against tarwad property:—*Held*, that the plaintiff was entitled to execute the decree against the tarwad property.

Chandu v. Raman 378

3. ——— Maintenance claimed by anandravans living in tarwad house against karnavan, who had left tarwad house and neglected to maintain family:

Where a suit was brought by an anandravan of a Malabar tarwad living in the family house for maintenance against the karnavan, who had left the family house, resided elsewhere, and neglected to maintain the plaintiffs:—

Held that the plaintiffs were entitled to maintain the suit—*Kunhammatha v. Kunhi Kutti Ali* (I.L.R., 7 Mad., 235), distinguished.

Kesava v. Unikkanda 307

4. ———, *Nambūdris—Marumakkatayam law—Adoption of an adult male—Form of adoption—Specific Relief Act (Act I of 1877), s. 42—Declaratory decree—Evidence Act (Act I of 1872), ss. 13, 35—Limitation:*

In a suit the parties to which were Nambūdrī Brahmans following the Marumakkatayam law, the plaintiff sued as the adoptive son of the last member of an otherwise extinct māt for a declaration of his title to certain lands as the sole urulan of a devas m. He was in possession of the greater part of the land, but one parambi was alleged to be held adversely to him by a person not joined in the suit, and the tenants of part of the remaining land had attorned to the defendant. The plaintiff was an adult at the time of his adoption and no female was adopted at the same time with the plaintiff. In 1876 a suit was brought by the defendant's brother and others against the plaintiff and others to set aside an alienation by the present plaintiff's predecessor in title, but the suit was dismissed without any decision as to the co-urama right of the then plaintiff; and the present plaintiff had no further notice of interference by the present defendant's māt. —*Held*, that the claim was not barred and that the plaintiff was entitled to the decree sued for. *The form and evidence of adoption considered. Per cur.*—The restrictions imposed under s. 42 of the Specific Relief Act must be held to refer to the consequential relief properly obtainable by the plaintiff as against the defendants in the suit and not to be extended to the case of all third parties who may possibly support some of the contentions of the defendants. The appellants filed an application for the admission in evidence of certified copies of certain judgments and decrees rejected by the Lower Court. The appellants sought to make use of these documents not as constituting matters in dispute *res judicata*, but as containing summaries of statements made by parties concerned in the management of the plaint properties and as evidence of conduct:—*Held*, that the documents were inadmissible in evidence.

Subramanyan v. Paramaswaran 116

5. ———, *Nambūdris, their personal law—Power of disposing of tarwad property by an antharjanam—Sarvasvadhānam marriage:*

Suit by the Secretary of State to declare a right of escheat of the property of a Nambūdrī illam. The last male member of the illam died about 1859, leaving defendant No. 1 and her mother the sole surviving members of the illam. Defendant No. 1 had previously been married to a member of another illam by a sarvasvadhānam marriage, but her husband died without issue. In 1872, defendant No. 1 and her mother—there being no attaladakkam heirs—appointed defendant No. 2, an adult member of a third illam, to be manager and heir of their illam and to marry and raise up issue for it. The mother and father of defendants Nos. 1 and 2, respectively, were brother and sister:—*Held*, (1) that Nambūdrī Brahmans are governed by Hindu law, as modified by special customs adopted by them since their settlement in Malabar; (2) that defendant No. 2 had no right to the property of the illam independently of the appointment of 1872; (3) that the property of the illam was not the sūdāyika of defendant No. 1, and as such at her absolute disposal; (4) that a Nambūdrī widow, who is the sole surviving member of her illam, is not at liberty to alienate the property of the illam at her pleasure; (5) that there was sufficient evidence of a custom that a Nambūdrī widow can adopt or appoint an heir in order to perpetuate her illam in the absence of dayadies with ten or three days' pollution; and the appointment of defendant No. 2 was valid against the Crown. *Quære*.—Whether in such appointment of an heir, it is necessary to direct that he should marry for the illam to which he is appointed as heir.

Vasudevan v. The Secretary of State for India

6. ——— 157

See CIVIL PROCEDURE CODE, 9.

MORTGAGE:

See TRANSFER OF PROPERTY ACT, 5.

2. ——— BY CO-WIDOWS—*Suit to redeem moiety;*
See HINDU LAW, 16.

3. ——— *Presumption that person paying off a mortgage intends to keep the security alive—Power of court to order refund of money wrongfully paid out of court in another suit—Limitation Act, sch. II, art. 29:*

In 1861 B. granted a lease of his zamindari to A. for 30 years, A. undertaking to pay off all debts then due by B. B. died in 1882 and his successors sued A. and obtained a decree that on payment of Rs. 1,20,000 A. should give up possession of the zamindari. This sum having been paid into Court, A. lost possession of the zamindari. On January 5th, 1875, A. had mortgaged the whole zamindari, which consisted of 22 villages, to M. to secure a loan of Rs. 1,00,000 borrowed by A. to pay off the debts of B. which A. undertook to pay in 1881. On June 27th, 1879, A. being indebted to M. in the sum of Rs. 1,73,000 paid M. Rs. 1,00,000 and undertook to pay the balance out of the income of the estate, M. releasing the 22 villages from the mortgage of January 5th, 1875. On June 28th, 1879, A. executed a mortgage of Rs. 1,30,000 to L. to secure repayment of Rs. 1,30,000. Of this sum, Rs. 1,00,000 was borrowed to pay M. and Rs. 30,000 was a prior debt due by A. to L. Of the Rs. 1,00,000 paid to M. Rs. 27,000 was specially applied to discharge so much of the charge created by the mortgage of January 5th, 1875. On January 30th, 1875, A. borrowed from S. Rs. 43,000 and mortgaged to her 10 of the 22 villages of the zamindari. In 1885 S. sued L. to have her debt declared a first charge on the money paid into court by the zamindar. The Subordinate Judge held that L. had a prior claim on the fund and dismissed the suit:—*Held*, on appeal, following the principle of decision in *Gokaldas v. Puranmal* (L.R., 11 I.A., 123) that L. was entitled to a first charge on the fund to the extent of Rs. 27,000 which had been applied to pay off the mortgage of January 5th, 1875. In the suit brought by B.'s successor against A. to recover the zamindari L. was a party, but S. was not. In that suit L. obtained an order for payment of Rs. 1,00,000 of the sum paid into Court by the zamindar. It was contended by L. that S. could have no decree for repayment of this sum, and (2) that if the money was wrongly paid under the order of the Court to L. it was wrongfully seized within the meaning of art. 29 of sch. II of the Indian Limitation Act:—*Held*, that the Court had power to order a refund and that art. 29 of sch. II of the Limitation Act was not applicable.

Rupabai v. Audimulam 345

- MUHAMMADAN LAW—*Marriage—Suit by husband for restitution of conjugal rights—Duty of wife to cohabit with husband—Plea of non-payment of dower bad:*

Suit by a Muhammadan to recover possession of his wife, the defendant. Defendant pleaded that she was not bound to return to plaintiff until plaintiff paid Rs. 42, prompt for dower, which plaintiff promised to pay by the marriage contract and had not paid. The lower Courts following *Eidan v. Mazhar Husain* (I.L.R., 1 All., 483) dismissed the suit:—*Held*, on appeal that defendant could not refuse cohabitation on the plea that her dower had not been paid—*Abdul Kadir v. Salima* (I.L.R., 8 All., 149) followed.

Kunhi v. Moidin 327

- NAIKIN OR DANCING GIRL 393

- NAMBUDRI WIDOW—*Power of:*

See MALABAR LAW, 5.

- NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 3, 9—*Suit to recover money due on a promissory note by assignee of rights of payee not being endorsee:*

K. executed a promissory note on demand for Rs. 6,000 in favor of S. in 1882. In 1884 S., by an agreement in writing assigned all her property, including the promissory note, to M., but did not endorse over the promissory note to M. M. assigned his rights in the promissory note to a bank in payment of a debt. In a suit by M., and the bank against K. and S. to recover the principal and interest due under the note:—*Held*, that the plaintiffs could not maintain the suit.

Pattat Ambadi Marar v. Krishnan 290

OCCUPANCY RIGHT—*Permanent cultivator—Paracudi—Burden of proof—Form of suit:*

The defendants' ancestors or predecessors in title were the cultivating tenants of the lands of a certain temple from a date not later than 1827, in which year they were so described in the paimish accounts. In 1830, they executed a muchalká to the Collector, who then managed the temple, whereby they agreed among other things to pay certain dues. They were described in the muchalká as *paracudi*. In 1857, the plaintiff's predecessors took over the management of the temple from, and executed a muchalká to, the Collector, whereby he agreed among other things not to eject the raiyats as long as they paid kist. In 1882, the dues (which were payable separately), having fallen into arrear, the manager of the temple sued to eject the defendants:—*Held*, (1) that the suit was not bad for misjoinder; (2) that the burden of proving the permanent character of the tenure set up by the defendants lay on them; (3) that there was nothing to show that the defendants were more than tenants from year to year. *Chockalinga Pillai v. Vythealinga Pandara Sannady*, 6 M.H.C.R., 161, and *Krishnasami v. Paradaraja*, 1 I.L.R., 5 Mad., 345, discussed and distinguished.

Thiagaraja v. Gityana Sambandha Pandara Sannadhi

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PENAL CODE, s. 224—*Criminal Procedure Code, s. 59—Escape from legal custody:*

The accused was arrested in the act of stealing and was handed over to the village magistrate, who forwarded him in custody of the village servants to a police station. The accused escaped on the way. He was convicted under s. 224 of the Penal Code. On appeal the conviction was reversed on the ground that the custody was not legal:—*Held*, that the conviction was right. Section 59 of the Code of Criminal Procedure which requires a private person who arrests a thief in the act to take the thief to the nearest police station, is sufficiently complied by sending the offender in custody of a servant.

Queen-Empress v. Potadi

480

2. —, s. 225—*Criminal Procedure Code, ss. 59, 239, 535, and 537—Arrest of thief—Rescue from custody of private person—Irregular procedure:*

To support a conviction under s. 225 of the Indian Penal Code, it is not necessary that the custody from which the offender is rescued should be that of a police man: it is enough that the custody is one which is authorised by law:—*Held*, therefore, that rescue from the custody of a private person who had arrested a thief in the act of stealing was an offence. A magistrate tried A for theft and Band C for rescuing A from lawful custody and convicted A, B, and C in one trial. A appealed, and B and C appealed separately. No objection was taken in the petitions of appeal to the procedure of the magistrate:—*Held*, on revision, that the convictions might stand.

Queen-Empress v. Kutti

441

3. —, s. 330—*Causing hurt to constrain a person to satisfy a demand:*

E.B., in order to constrain his wife to satisfy his demand that she should return to his house, voluntarily caused hurt to her. He was convicted under s. 330 of the Indian Penal Code:—*Held*, on appeal, that the conviction under that section was bad.

Queen-Empress v. Ella Boyan

257

4. —, s. 372

401

5. —, ss. 403, 429—*Bull dedicated to an idol:*

A bull dedicated to an idol and allowed to roam at large is not *fera bestia* and therefore *res nullius*, but *prima facie*, the trustee of the temple, where the idol is worshipped, has the rights and liabilities attaching to its ownership.

Queen-Empress v. Nalla

155

6. —, s. 471—*Using a forged document—Fabrication of a receipt as a voucher to cover a contemporaneous embezzlement:*

A Postmaster misappropriated a certain sum of money, and at the same time made a false document purporting to be a receipt signed by the person

to whom the money was payable. He was convicted of using a forged document under s. 471 of the Indian Penal Code. It was contended that no forgery had been committed, because the receipt was made merely to cover the embezzlement. *Empress of India v. Jivanand* (I.L.R., 5 All., 222):—*Held*, that the conviction was right. A debtor, who fabricates a release to screen himself from liability to pay the debt, cannot be said not to be guilty of forgery, because he intended by the fabrication to cover a dishonest purpose.

Queen-Empress v. Sabapati

411

7. —, s. 500—*Statement by witness—Privilege absolute:*

M.S. was convicted under s. 500 of the Indian Penal Code of defaming S.S. by making a certain statement when under cross-examination as a witness before a court of criminal jurisdiction:—*Held*, that the conviction was bad. The statements of witnesses are privileged; if false, the remedy is by indictment for perjury and not for defamation.

Manjaya v. Sesha Shetti

477

PENALTY:

See CONTRACT ACT, 4.

PENSIONS ACT, 1871, s. 4—*Religious Endowments Act, 1863, ss. 14, 15—Yaumia granted to mosque—Suit against co-trustee for declaration of right:*

Section 4 of the Pensions Act, 1871, provides that no Civil Court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made by the British or any former government, whatever may have been the consideration for any such pension or grant and whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted:—*Held*, that a yaumia allowance or grant may have been substituted:—*Held*, that a yaumia allowance granted to a religious institution did not fall within the purview of the Pensions Act. Where a trustee of a Muhammadan mosque sued for a declaration of his title as against a co-trustee:—*Held*, that ss. 14 and 15 of the Religious Endowments Act, 1863, were not applicable to the suit.

Atharulla v. Gouse

283

PROMISSORY NOTE—*Suit on, by assignee not endorsee*

290

PUBLIC RIGHT—*Civil Procedure Code, ss. 31, 53—Amendment of plaint:*

The fact that the other raiyats of the village have similar rights does not make A's right a public right in the sense that no action can be brought upon it unless special damage is proved.

Venkatdchala v. Kuppusami

42

REGULATION XXIX OF 1802, s. 7—*Karnam in zamindari village—Title to office:*

The holder of a karnam's office in a zamindari village being incapacitated, resigned the office in 1863, leaving a minor son, the plaintiff. The brother of the late holder was then appointed to the office, and held it till 1877, when he died. Plaintiff was then nominated by the zamindar, but did not enter on the office. In 1879, the zamindar being dead, defendant No. 2 was appointed by the zamindar's widow and entered on the office:—*Held*, that under Regulation XXIX of 1802, s. 7, defendant No. 2 being the heir of the last holder was the lawful holder of the office.

Subbarayudu v. Gangaraju

196

2. —, V, 1804, s. 8

309

3. —, IV, 1816—*Power of Village Munsif to administer oath to witness—Criminal Procedure Code, s. 193—Sanction for prosecution of witness for perjury by Village Munsif:*

V. was tried and convicted under s. 193 of the Penal Code for giving false evidence before the court of a village munsif in a suit in which V. was defendant. The village munsif sanctioned the prosecution of V. under s. 193 of the Code of Criminal Procedure. On appeal the Sessions Judge acquitted V. on the grounds that a village munsif had no power to administer oath

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to V. (the case not being one in which either party was willing to allow the cause to be settled by the oath of the other) and because s. 195 of the Code of Criminal Procedure did not apply:— <i>Held</i> , that both objections to the conviction were bad in law.	
<i>Queen-Empress v. Venkayya</i>	375
REGISTRATION ACT, 1866, s. 49	206
REGISTRATION ACT, 1877, s. 34 — <i>Criminal Procedure Code, s. 195—Sanction to prosecute—Forged document registered by Sub-Registrar:</i>	
A Sub-Registrar acting under s. 34 of the Registration Act, 1877, is not a "Court" within the meaning of s. 195 of the Code of Criminal Procedure.	
<i>Queen-Empress v. Subba</i>	3
2., ss. 82, 83— <i>Criminal Procedure Code, s. 195—Sanction:</i>	
Certain persons were charged with offences falling under s. 82 of the Indian Registration Act, 1877, and also with forgery of a document presented to, and registered by, a Sub-Registrar; the Sub-Registrar having granted sanction to prosecute the persons concerned without holding any enquiry, the Sessions Judge referred the case to the High Court under s. 215 of the Code of Criminal Procedure, in order that the commitment might be quashed on the ground that there was no legal sanction:— <i>Held</i> , that no sanction was necessary as to the charge of forgery, and that the provisions of s. 195 of the Code of Criminal Procedure were not applicable.	
<i>Queen-Empress v. Pythilinga</i>	600
RELIGIOUS ENDOWMENTS ACT, s. 10 — <i>Appellate jurisdiction—Order of District Judge filling vacancy on committee not appealable:</i>	
It is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by the enacted law, or equivalent authority. The High Court has no jurisdiction to hear an appeal from the order of a District Judge made by him on petition pursuant to s. 10 of Act XX of 1863 (Religious Endowments), appointing a member to fill a vacancy in a committee. Neither that Act, nor the general law, gives any right of appeal, which therefore does not exist, from such an order. In a cause which a Judge is competent to try, if the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground of irregularities, which, if objected to at the proper time, might have led to the dismissal of the suit. But when the Judge has no jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process. <i>Ledgard v. Bull</i> , L.R., 13 L.A., 135, referred to and followed.	
<i>Minakshi v. Subramanya</i>	26
2., ss. 14, 15	283
3., ss. 14, 18	148
RENT RECOVERY ACT, 1865 :	264
2., ss. 3, 9, 79, 80— <i>Yeomiah lands—Unregistered holder rendering service and granting pattas—Estoppel by acquiescence of person entitled to the yeomiah holding:</i>	
A yeomiahdar died leaving a brother who was then out of India. Shortly before his death, he made an invalid assignment of his holding to a third person who performed the service, and granted pattas of the land. The holding was resumable on failure of the service. The brother of the late yeomiahdar returned after three years and obtained registration of his title. He now filed this suit to enforce acceptance of pattas tendered by him to the raiyats who had already accepted pattas from and executed muchalkas to the assignee:— <i>Held</i> , that the suit was not maintainable, as under the circumstances the plaintiff's conduct justified the tenant's belief that the assignee was	

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entitled to collect rent from them until the assignment was questioned by the plaintiff and notice of his title given to them.	
<i>Khadar v. Subramanya</i>	12
3., s. 4— <i>Patta—Uncertainty as to amount of rent:</i>	
An agreement in a patta to pay whatever rent the landlord may impose for any land not assessed which the tenant may take up is bad for uncertainty.	
<i>Ramasami v. Rajagopala</i>	200
4., s. 9— <i>Joint shrotriyamdars—Distinct contract by tenant in respect of a share:</i>	
The plaintiff was one of two joint shrotriyamdars. In fasli 1288 the defendant accepted a patta from and executed a muchalka to him in respect of the half share of the plaintiff. The plaintiff sued to enforce acceptance of a patta and execution of a muchalka for fasli 1290 and for arrears of rent:— <i>Held</i> , that the suit lay without joinder of the other joint shrotriyamdar.	
<i>Purushottama v. Raju</i>	11
5., ss. 9, 10, 11:	
A summary suit by a landlord to enforce the acceptance of a patta under the Madras Rent Recovery Act should not be dismissed on a finding by the Appellate Court that the patta tendered was not a proper patta. The Appellate Court ought to pass the decree which the Court of First Instance should have passed.	
<i>Nagaraja v. Kdsimsa</i>	23
REVENUE RECOVERY ACT, s. 35 — <i>Contract Act, ss. 69, 70—Right to contribution where part owner pays revenue due on whole estate to save his own interests:</i>	
In 1881 while the patta of certain land held on raiyatwari tenure stood in the name of defendant No. 1, the real owner being defendant No. 2, the revenue fell into arrear. Subsequently plaintiff and defendant No. 3 each bought a portion of the land, and defendant No. 3 sold his portion to defendant No. 4. After this, the land in plaintiff's possession was attached for the said arrears of revenue, and plaintiff paid the whole amount to prevent a sale. Plaintiff sued to recover from defendants 1 to 4 a portion of the arrears paid by him. He also prayed that the land in the possession of defendant No. 4 might be held liable. The claim was decreed, but on appeal by defendants 3 and 4, the suit was dismissed as against them. Plaintiff appealed, making defendant No. 4 alone respondent:— <i>Held</i> , that plaintiff was entitled to a decree for contribution against defendant No. 4 and to a charge on the land in his possession.	
<i>Seshagiri v. Pichu</i>	452
2., ss. 41, 42— <i>Sale for arrears of Revenue—Land subject to kanam—Purchaser's title not subject to kanam holder's rights:</i>	
Where land subject to a kanam was sold for arrears of revenue due by the pattadar and owner and the kanam holder claimed to retain possession as against the purchaser on the ground that his rights were not affected by the sale:— <i>Held</i> , that reading ss. 41 and 42 of Madras Act II of 1864 together, the purchaser's title was not subject to the kanam. The contracts referred to in s. 41 of the Act are those which do not create a charge on the proprietary right in the land sold.	
<i>Kelan v. Manikam</i>	330
REPRESENTATIVE—Suit against:	
See HINDU LAW, 14.	
RESCISSION:	
See CONTRACT TO SELL LAND.	
RES JUDICATA:	
See CIVIL PROCEDURE CODE, 2.	

SALE—Exchange—Trade usage—Proof of—Contract Act, ss. 40, 77, 92, 151 :

According to mercantile usage in the cotton trade in Tuticorin, where a dealer delivers cotton to the owner of a cotton press, not in pursuance of any special contract, the property in the cotton vests in the owner of the cotton press who is bound to give the merchant in exchange cotton of like quantity and quality. The transaction is not a sale but an agreement for exchange. Where therefore cotton thus delivered was accidentally destroyed by fire:—*Held*, that the loss fell on the owner of the press.

Volkart Brothers v. Vettivelu Nadan

459

SMALL CAUSE COURTS ACT, 1865

269

2. —————, ss. 20, 21

130

8. —————, Rent Recovery Act, 1865—Suit to recover movable property :

A suit to recover movable property attached under colour of the Rent Recovery Act (Madras Act VIII of 1865) is cognizable by a Court of Small Causes constituted under Act XI of 1865.

David Beg v. Kullappa

261

4. ————— (ACT IX OF 1887), sch. II, art. 38—Jurisdiction—Suit for maintenance based on a family arrangement—Malabar law :

A suit for maintenance based on a family arrangement is within the jurisdiction of a Mofussil Small Cause Court. A karnavan is not entitled of his own authority to set aside a family arrangement made on behalf of all the members of the tarwad.

Komu v. Krishna

134

SPECIFIC RELIEF ACT, s. 42

116

STAMP ACT, s. 2 (13)—Specified property—Sch. 1, art. 25—Declaration of trust—Sch. I, art. 5 (c)—Agreement :

An agreement was made between certain persons to transfer the future surplus profits of their respective trades to a trustee, in order that the trustee should hold the fund so to be created on certain trusts declared in the agreement:—*Held* that the agreement was liable to stamp duty as a declaration of trust under the Indian Stamp Act, 1879, sch. I, art. 25, and as an agreement under art. 5 (c):—*Held*, also, that the fund intended to be created under the agreement was not "specified property" within the meaning of s. 2 (13) of the said Act.

Reference under Stamp Act, s. 46

216

2. ————— s. 3, cl. 13—Mortgage—Indemnity bond :

An agreement entered into by the Secretary of State and a salt contractor recited that the contractor has deposited certain promissory notes to secure the due fulfilment of the contract and provided that the promissory notes should be returned on the due fulfilment of the contract:—*Held* that the agreement was a mortgage as defined by the Stamp Act.

Reference under Stamp Act, s. 46

39

3. —————, ss. 3(10) 55, 57—Duly stamped—Document issued without endorsement required by rules passed and published under ss. 55 and 57 :

The omission of a stamp under to endorse on a stamped paper the particulars required by rule (9) of the revised rules published under ss. 55 and 57 of the Indian Stamp Act, 1879 by the Government of Madras, with the approval of the Governor-General in Council, does not render a document "not duly stamped" within the meaning of s. 3 (10) of the Indian Stamp Act, 1879.

Reference under Stamp Act, s. 46

377

4. —————, ss. 3, 31, 51 :

Allowance for spoiled stamps may be made under s. 51 of the Stamp Act when a stamped instrument has been endorsed by the Collector under s. 31.

Reference under Stamp Act, s. 46

37

5. —————, ss. 5, 14, 35, 37, 39 :

A deed of release was endorsed on a deed of conveyance for Rs. 100. The conveyance bore an impressed stamp for one rupee, but the endorsement was unstamped:—*Held* that the conveyance was valid and that the release could be validated on payment of the deficient stamp duty and the penalty under s. 39 of the Stamp Act.

Reference under Stamp Act, s. 46

40

6. —————, s. 49 :

A bail-bond was executed to a District Munsif, who expressed no doubt as to the amount of duty to be paid and made no application to have the case referred. The District Judge referred the case to the High Court:—*Held* that the District Judge was not authorized to make the reference.

Reference under Stamp Act, s. 49

38

7. —————, s. 61—Acknowledgment of receipt of cheque by letter, not stamped, an offence :

M. acknowledged receipt of a cheque for Rs. 100 by letter. The letter was not stamped:—*Held*, that M. was properly convicted under s. 61 of the Indian Stamp Act, 1879.

Queen-Empress v. Muttrilandi

329

SUMMONS—Service of

137

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, ss. 1, 67, 86—89—Usufructuary mortgage, dated 20th April 1882, sued on in 1884—Form of decree :

In a suit filed in 1884 on a usufructuary mortgage, dated 20th April 1882, a decree was passed for the payment of the mortgage money, or in default for the sale of the mortgage property:—*Held*, (semble under the Transfer of Property Act) that the decree for sale was the right decree.

Venkatadami v. Subramanya

83

2. —————, ss. 2, 130, 135, 136, 137—Limitation Act—Act XV of 1877, sch. II, art. 116—Apportionment :

A sued as assignee of a bond (payable in 1872), hypothecating land in the mofussil. B, A's assignor, was a vakil practising in the High Court. B had obtained an assignment of the obligee's interest in the bond sued on, and also another bond for Rs. 3,000 between the same parties after the 1st July 1882, for Rs. 4,500. B had previously purchased the two bonds at a sale in execution of the decree of a Mofussil Court for Rs. 5 each. A's assignment from B purported to be made to A in payment of certain debts owed to him by B. No interest has been paid on the bond and no tender had been made to the plaintiff:—*Held* that the creditor's personal remedy was passed by art. 116 and on the evidence, that there was no consideration for the bond sued on or that it had failed. *Per cur.*—The true construction of s. 136 of the Transfer of Property Act appears to us to be that the officers mentioned in it habitually exercising their functions in a particular court are precluded from buying any actionable claim cognizable by that court. We are referred to no evidence on the record as showing that B practised as a pleader regularly in the Subordinate Court at Negapatam, and we must, therefore, overrule the contention that the assignment to him is inoperative altogether. There is, however, no doubt that the assignments to him and by him are governed by s. 135, and that under s. 137 the person to whom a debt is transferred takes it subject to the liabilities to which the transfer was subject at the date of the transfer. Upon the facts of the case B was clearly not entitled to recover more than Rs. 4,500, whatever might be due on the document. As he was the purchaser of an actionable claim, s. 135 of the Transfer of Property Act applied to him, and he could not recover more than the price he paid and the interest due thereon. There is no foundation for the sugges-

tion that, where two actionable bonds are brought together for Rs. 4,500 and only Rs. 950 are recovered upon one of them, the assignee is precluded from recovering the difference, but that he must submit to a loss arising from an apportionment.

Rathnasami v. Subramanya 56

3. —————, s. 60:

The breach of a condition in a mortgage deed to the effect that on default of payment on a certain date, the mortgage shall be deemed an absolute sale, does not amount to an extinguishment of the right of redemption by act of the parties within the meaning of the proviso to s. 60 of the Transfer of Property Act, 1882.

Perayya v. Venkata 403

4. —————, ss. 67, 83, 84—*Suit by mortgagee instituted before payment into Court—Right of mortgagee to a decree and to full costs:*

In a suit to recover money due on a mortgage, defendant paid the money into Court and a notice was issued to the mortgagee under s. 83 of the Transfer of Property Act. The mortgagee filed his suit before notice was served on him, and it was not proved that the mortgagor was aware of the fact of the payment into Court when he filed his suit:—*Held*, that the plaintiff was not debarred by s. 67 of the Transfer of Property Act from obtaining a decree, and that under the rules of Court the pleader's fee was properly assessed as in a contested suit and not as in a case where there is a confession of judgment.

Sitaramayya v. Venkatramanna 371

5. —————, s. 69 (1)—*Mortgage—Invalid condition as to notice of sale—Sale valid:*

In a deed of mortgage of property, situate within the town of Madras, it was provided that a power of sale might be exercised after fifteen days' notice. The property was sold:—*Held* that, (s. 69 of the Transfer of Property Act, 1882, requiring three months' notice before such a power of sale shall be exercised), the condition as to notice was invalid, but that the sale was nevertheless valid.

The Madras Deposit and Benefit Society v. Pannanba 201

6. —————, s. 136—*Purchase of elephant with authority to recover the same from a stranger:*

The owner of certain land in consideration of a sum of money, transferred to the plaintiff, a pleader, the right to elephants caught in pits in the owner's land, and the right to sue for the recovery of such elephants from any person in possession of them. The plaintiff sued the defendants to recover possession of an elephant which had been trapped and was in defendant's possession at the time of the transfer to plaintiff. The suit was dismissed on the ground that the plaintiff had bought an actionable claim within the meaning of s. 136 of the Transfer of Property Act, 1882:—*Held*, that the section was not applicable.

Ramakrishna v. Kurikal 445

7. —————, s. 136—*Purchase of actionable claim by officer of Court—Jurisdiction, meaning of term:*

Section 136 of Transfer of Property Act, 1882, provides that no officer connected with a Court of Justice can by an actionable claim falling under the jurisdiction of the Court in which such officer exercises his functions. The plaintiff, an officer in a District Court, having purchased the rights of the mortgagee in a bond sued to recover Rs. 2,225 due upon it in the Court of the District Munsif:—*Held*, that as the claim did not fall under the immediate jurisdiction of the District Court, s. 136 was not applicable.

Singarachalu v. Sivabai 498

TRUST—*Improvements of estate—Rights of tenant for life and remainder man as to sums expended:*

A testator conveyed his property which consisted of extensive coffee estates to trustees upon trust as to part thereof for certain persons for life and then upon trust for their children absolutely. A suit having been filed for the administration of the trusts of the will a receiver was appointed. On the application of the receiver, and with the consent of all parties, the Court sanctioned the extension of the estate. This was done by raising a loan on pledge of the profits of the estate, out of which, when realised, the loan was paid off. By the will, the trustees were empowered to raise money for the purpose of managing the estate at their absolute discretion, either by using the profits, or by pledging or selling the corpus. The tenants for life claimed that the loan might be declared a charge on the estate:—*Held*, that the extension was within the powers of the trustees, but that as between the life-tenants and the remainder men, the former were entitled to have the sums expended on the improvements charged on the corpus, they keeping down the interest.

Ouchterlony v. Ouchterlony 360

USAGE, trade 459

WILL—*Construction* 258

ZAMINDARI, Impartibility 39.

THE
INDIAN LAW REPORTS,
Madras Series.

APPELLATE CIVIL.

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

LAKSHMANAN (PETITIONER), APPELLANT,
and

MUTTIA AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Civil Procedure Code, ss. 345, 352—Insolvency—Procedure on claim made
by creditor—Proof of debt.*

1887.
April 15.

It is open to a creditor, at any time while the assets of an insolvent are undistributed, to produce evidence of his debt and to apply to be admitted on the schedule under s. 352 of the Code of Civil Procedure.

APPEAL against the order of T. Weir, District Judge of Madura, on civil miscellaneous petition No. 441 of 1886.

This was an application in the insolvency of one Lakshmanan Chetti by a scheduled creditor, who had been *ex parte* throughout the proceedings and had not up to the date of the present application taken any steps to prove his debt.

Bhāshyam Ayyangār for appellant.

Respondents were not represented.

The further facts of this case and the arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Kernan, J.).

JUDGMENT.—In this case the appellant is stated in the application of the insolvent, under section 345, to be a creditor, and

* Appeal against Order 10 of 1887.

LAKSHMANAN
v.
MUTTIA.

the amount due to him is stated in that application. A receiver was appointed, and there are assets to divide. The appellant applied to be paid, either by dividend or in full, which is not stated, but it is not material. The Judge held that the appellant is out of court, because he did not prove his debt. No doubt section 352 requires creditors to "produce evidence of the amount and particulars of their pecuniary claims." But the Act does not fix any special time for making such affidavit. Section 352 says the creditors shall then, that is, after, but not necessarily immediately after, the court declares the applicant insolvent, produce such evidence. The Court does not appear to have fixed any time to determine under section 352 who the creditors are, nor does it appear that any schedule was framed under that such section. But if such schedule was framed, it is still open to the creditor at any time while the assets are undistributed, to produce the evidence of his debt and apply to be admitted on the schedule under section 352. This is the course in all bankruptcy and insolvency proceedings. Section 356 of course is to be read with the other sections. The Judge should have, on the appellant's application, directed him to produce evidence of the particulars and amount of his debt within a reasonable time. If the appellant did not do so, then he need not be named as a creditor on the schedule under section 352. The appellant is an admitted creditor. We reverse the order of the District Judge and direct him to proceed on the application of the creditor according to the above directions. Appellant should apply, as soon as possible, to the District Judge for liberty to produce his evidence on a day to be fixed, and that his name be placed on the schedule, and for payment.

No costs of this application are granted.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

against

SUBBA AND OTHERS.*

1884.
August 22.

*Criminal Procedure Code, s. 195—Sanction to prosecute—Registration Act, 1877—
Act III of 1877, s. 34—Forged document registered by Sub-Registrar.*

A Sub-Registrar acting under s. 34 of the Registration Act, 1877, is not a "Court" within the meaning of s. 195 of the Code of Criminal Procedure.

CASE reported for the orders of the High Court under s. 438 of the Code of Criminal Procedure by the Acting Sessions Judge of Coimbatore.

The case was stated as follows:—

"The complaint was one of forgery under s. 467 of the Indian Penal Code. The document had been duly registered by the Sub-Registrar of Kangayam, but had not been filed in any Civil, Criminal, or Revenue Court. The Acting Joint Magistrate held that he had no jurisdiction to entertain the complaint since sanction had not been granted by the Sub-Registrar under s. 195 of the Code of Criminal Procedure.

"Section 195, clause (c) of the Code of Criminal Procedure, provides that no Court shall take cognizance of such offence without previous sanction, 'when such offence has been committed by a party to any proceedings in any Court in respect of a document given in evidence in such proceedings.' The questions, therefore, are (1) whether the Sub-Registrar is a Court? (2) and whether the document was given in evidence in any proceeding?

"The Acting Joint Magistrate points out that, under the old Procedure Code (Act X of 1872), s. 469, the offence must have been committed in a Civil or Criminal Court, whereas the wording of s. 195 of the present Code 'any Court' is much wider. Taking the definition of the word 'Code' as defined in

* Criminal Revision Case 362 of 1884.

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s. 3 of the Evidence Act, he holds that the Sub-Registrar is a 'Court,' being a person legally authorized to take evidence.

"In High Court Proceedings of 12th May 1881, No. 962 (*vide* Weir's Criminal Rulings, page 400), it was held that a Registrar acting under ss. 73, 74 and 75 of the Registration Act was a 'Court' within the meaning of s. 469 of the old Criminal Procedure Code, but that the Sub-Registrar was not. The Indian Evidence Act was in force at the date of that ruling, and it must be supposed that the Judges had in view the definition of 'Court' in s. 3 of that Act. The Judges there point out that the Registrar is a Judge, because he determines a question between the parties and the document is given in evidence before him as to its being executed.

"The duties of a registering officer are defined in s. 34 of the Indian Registration Act. Even supposing a Sub-Registrar to be a 'Court' within the meaning of s. 3 of the Evidence Act, I doubt if the document can be said to be 'given in evidence in any proceeding before him.' The Sub-Registrar has only to inquire upon certain points. If execution be denied, he cannot register and has no power to take evidence whether or not the document was really executed, but he may examine witnesses (s. 35) as to the identity of the parties before him, but on no other point. He cannot, therefore, take any evidence with respect to the document itself, and I doubt, therefore, whether the document can be said to be 'given in evidence in a proceeding before him.'

"On these grounds it appears to me that the sanction of the Sub-Registrar was not necessary for the entertainment of the complaint, and as the point is one of importance, I refer the matter for the orders of the High Court."

Rāmā Rāu for the accused.

The Court (Turner, C.J., and Hutchins, J.) delivered the following

JUDGMENT:—The Sub-Registrar is not a Court.

For certain purpose it has been declared that the term "Judicial proceedings" shall include proceedings before Registering officers, namely, in order to bring those proceedings within the purview of s. 228, Indian Penal Code; and for other similar purposes it has been declared that Registrars are and that Sub-Registrars are not to be deemed a Court, namely, to extend to the Registrar the power of punishing for contempt. These provisions

do not constitute Registering officers "Courts" generally, and, on the other hand, they would be unnecessary if the legislature regarded such officers as "Courts." The Joint Magistrate's order is set aside and he is directed to proceed with the inquiry.

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APPELLATE CIVIL—FULL BENCH.

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

GOVINDAYYAR (PLAINTIFF No. 2), APPELLANT,
and

DORASĀMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1884.
October 9.
1887.
April 29.

Hindū Law—Adoption among Brahmans—Datta Homam, when it may be dispensed with.

The ceremony of Datta Homam is not essential to a valid adoption among Brahmans in Southern India, when the adoptive father and son belong to the same gotra. *Singamma v. Ramanuja Charlu*(1) approved and followed. *Shoshinath Ghose v. Krishnasunderi Dasi*(2) considered.

SECOND appeal from the decree of H. Wigram, District Judge of Coimbatore, in Appeal Suit No. 279 of 1883, affirming the decree of T. Ramasāmi Ayyangār, District Munsif of Coimbatore, in Original Suit No. 579 of 1882.

This was a suit by the plaintiffs for the recovery of certain lands conveyed to them by defendant No. 4, the widow of one Sālūr Subba Ayyar, deceased. Defendant No. 1 contended that he was the heir of the deceased Sālūr Subba Ayyar, being his son by adoption. The parties were Brahmans; and defendant No. 1 belonged previously to his adoption to the same gotra as the late Sālūr Subba Ayyar.

The Lower Courts found that the adoption of defendant No. 1 was valid, although the ceremony of Datta Homam had not been performed.

The plaintiffs preferred this second appeal.

This second appeal came on for hearing before Collins, C.J., and Kernan, J., who referred to the Full Bench the question of the validity of the adoption of defendant No. 1.

* Second Appeal No. 405 of 1884. (1) 4 M.H.C.R., 165. (2) I.L.R., 6 Cal., 381.

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Bhāshyam Ayyangār and Désika Chāryar for appellant.
The Acting Advocate-General (Hon. Mr. J. H. Spring Branson)
and *Rámá Ráu* for respondents.

The arguments adduced on the second appeal appear sufficiently
for the purposes of this report from the judgment of the Court.

The Full Bench (Collins, C.J., Kernan, Muttusāmi Ayyar,
Brandt and Parker, JJ.) delivered the following

JUDGMENT:—The question which is referred to the Full Bench
in this second appeal is whether Datta Homam is an imperative
part of a valid adoption in Southern India. That ceremonial
adoption is not indispensable among Sudras may now be taken to
be concluded by authority. So it was held by the Privy Council
in 1879 in regard to Bengal, in *Indromoni Chowdhurani v. Behari
Lal Mullick*(1) and by the late Supreme Court of Madras in the case
of *Veeraperumall Pillay v. Narrain Pillay*(2); *Singamma v. Rama-
nuja Charlu*(3), decided by the High Court of Madras in 1868,
is also an authority, and in *Chandramala v. Muktamala*(4), the only
doubt appeared to be if it was correct law in regard to the three
higher classes only. In support of the course of decisions, there is
also the fact that Sudras are incompetent to recite Vedic texts
and that such texts are prescribed for the performance of Datta
Homam.

Thus, giving and taking, evidenced by an overt act, are the
only elements of a legal adoption among Sudras, but it must
be observed that any overt act is not sufficient. In *Shoshinath
Ghose v. Krishnasunderi Dasi*(5), the Judicial Committee ob-
served as follows:—"All that has been decided is that among
"Sudras no ceremonies are necessary in addition to the giving
"and taking a child in adoption. The mode of giving and taking
"a child in adoption continues to stand on Hindú law and on
"Hindú usage, and it is perfectly clear that amongst the twice-
"born classes, there could be no such adoption by deed, because
"certain religious ceremonies, the Datta Homam in particular, are
"in their case requisite. The system of adoption seems to have
"been borrowed by the Sudras from these twice-born classes,
"whom in practice, as appears by several of the cases, they
"imitate as much as they can, adopting those purely ceremonial

"and religious services which, it is now decided, are not essential
"for them in addition to the giving and taking in adoption." "It
"would seem, therefore, that according to Hindú usage which the
"Courts should accept as governing the law, the giving and taking
"in adoption ought to take place by the father handing over the
"child to the adoptive mother and the adoptive mother declaring
"that she accepts the child in adoption." The contest in that
case was whether a mere execution of deeds was an overt act
sufficient to constitute an adoption, and the decision is an authority
for the proposition that any overt act is not sufficient, but that
there must be corporeal delivery of the child by a person com-
petent to give, to a person competent to take, accompanied by the
declaration on the one side, I give the child in adoption, and on
the other, I take the child in adoption.

Although the parties to the case before the Privy Council were
Sudras, whilst the parties to the case before us are Brahmans, the
rule as laid down by the Privy Council in 1880 clears a good deal
of the way to a correct decision, and so far as it goes, it is equally
applicable to Brahmans. It shows further that in laying down the
rules, the Judicial Committee had before them what actually takes
place when a formal adoption is made with ceremonies, and that
they rejected as superfluous the merely ceremonial observances as
contra-distinguished from the specific secular act and declaration
which constitute the form in which the intention to give and to
take is manifested during the ceremonial. The matter in contest
then with special reference to Brahmans is this, viz., whether the
omission to perform Datta Homam invalidates an adoption which
is good in other respects.

The first question for consideration is whether we should now
depart from the decision in *Singamma v. Ramanuja Charlu* which
was passed in 1868. Adoption, it is conceded, is a religious act at
least among Brahmans, and the object with which it is made is in
part to secure a son in order to prevent the extinction of the
spiritual benefit which is believed to arise from the performance
by a son of funeral and annual obsequies. It is desirable in a
matter like this that there should be no divergence between the
custom obtaining in the country and the law laid down by Courts
of Justice. Again, some doubt has been thrown upon the case
cited, by the observation of the Judicial Committee in their latest
decision, that Datta Homam is requisite in the case of Brahmans.

(1) L.R., 7 I.A., 24. (2) Strange's Notes of Cases, 117.
(3) 4 M.H.O.R., 165. (4) I.L.R., 6 Mad., 20. (5) I.L.R., 6 Cal., 388-389.

GOVINDAYYAR Further, in *Venkata v. Subhadra*(1) decide by a Division Bench of his Court in 1888, it was considered that among Brahmans Datta Homam was essential and that the decision of the High Court at Calcutta(2) on the point was probably right. It should be remembered that in *Singamma v. Ramanuja Charlu* the point was not argued on both sides, and that Jagannada who was cited in that case is no authority in Southern India. Adverting to his opinion as to whether an adoption by purchase is valid, Colebrooke observed as follows :—"The Pundits in Southern India, I perceive, make great use of the authority of Jagannada, the compiler of the digest which was translated by me. We have not here the same veneration when he speaks in his own name or steps beyond the strict limits of the compiler's duty, and as his doctrines which are commonly taken from the Bengal School or sometimes originate with himself differ very frequently from the authorities which heretofore prevailed in the South of India, I am sorry that the Pundits should have been furnished with means of adopting in their answers whatever doctrines may happen to be best accommodated to the bias they may have contracted; and I should regret that Jagannada's authority should supersede that of the much abler authors of the *Mitakshará*, *Smriti Chandrika* and *Madhavya*." (See *Strange's Hindú Law* of the edition of 1830, page 178.) As to early English writers on Sanskrit law they were guarded in the expression of an opinion as to whether Datta Homam was necessary among Brahmans. Sir Thomas Strange said that, even with regard to the sacrifice by fire, important as it may be deemed in a spiritual point of view, it is so with regard to the Brahmans only. (*Strange's Hindú Law*, Vol. I, page 95.) As to Colebrooke, he thought that an inadvertent omission of some of the ceremonies ought not to invalidate an adoption, but a wilful disregard of them all might. (Vol. II, *Strange's Hindú Law*, page 155.) As to Ellis, he thought that Datta Homam, though proper in all cases, was not indispensable if the person adopting and the boy adopted, were of the same gotra, and "if of different gotra, it was necessary." (Vol. II, *Strange's Hindú Law*, page 104.) In these circumstances and in the face of so much conflict of opinion, it might

(1) I.L.R., 7 Mad., 548.

(2) The case alluded to was probably *Bhairabnath Syy v. Mahes Chandra Bhadury*, 4 Beng. L.R.A.J. 162 (Reporter's note).

be desirable to direct an inquiry as to actual usage and deal with the question with reference to the result of such inquiry.

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Another question is whether there is enough in the texts current in this Presidency to warrant an inquiry as to usage. The two leading treatises on adoption which are often referred to in this Presidency are the *Dattaka Mimamsa* and the *Dattaka Chandrika*, though when there is a conflict between them, the latter is accepted as binding in preference to the former. But on the point now under consideration, both commentaries agree as to the necessity for observing the prescribed form. In section II, sloka 17 of *Dattaka Chandriká*(1), the commentator says that, in case no form as propounded should be observed, the adopted son is entitled only to assets sufficient for marriage. In section V, sloka 56, *Dattaka Mimamsa*(2), the commentator observes that "the filial relation is occasioned only by ceremonies, and that, of gift, acceptance, burnt sacrament, and so forth, should either be wanting, the filial relation even fails." Again, in II, *Strange's Hindú Law*, pages 120-122, *Vidiaranayana*, the celebrated author of the *Madhavya*, is referred to as speaking of two kinds of adoption, viz., *Nitya Datta* (permanent or regular adoption) and *Anitya Datta* (temporary adoption) and of the former as consisting in the regular adoption made with the prescribed ceremonies, and of the latter as an adoption made without those formalities. This conveys the impression that, where a complete change of paternity and family is intended to be brought about by adoption, the adoption should be of the kind called *Nitya Datta*.

The Smritis and Sutras usually cited are those of *Caunakha*, *Vasishta* and *Baudhayana*. *Caunakha's* is quoted in *Dattaka Mimamsa*, section V, sloka 1, and a burnt offering is part of the form prescribed by him for adoption. The same is the case with the procedure enjoined by the others. (See *Vasishta*, Chapter 15, sloka 6; *Parisista Prasna*, 7th Adhyaya; or *Baudhyana*, Vol. XVII, *Sacred Books of the East*.) Both *Manu* and *Caunakha* declare that one who is eligible for adoption should be the reflection or have the resemblance of a son, and the commentators apparently thought that as adoption is made partly to secure spiritual benefit arising from the performance of obsequies, the prescribed ceremony was necessary to ensure to the adopted son competency to perform

(1) *Stokes' Hindú Law Books*, p. 640.

(2) *Id.*, p. 698.

GOVINDAYYAR those obsequies with efficacy. The original texts convey the impression that Datta Homam may probably be an essential part of a valid adoption as a general rule and that in a proper case there is sufficient ground for directing an inquiry as to usage.

Although the general rule may be as indicated above, there is reason to think that there are exceptions to it. There is a text of Manu to the effect that, if among several brothers, one has a son, that son is the son of all. The translation by Ellis of the ritual of Datta Homam which will be found in Vol. II, Strange's Hindú Law, page 218, may also be here referred to; the author of the ritual, it is observed by Ellis, states that regard is had to adoption from a different gotra; and as already remarked, Ellis considers the performance of Datta Homam, though proper in every case, to be not necessary when the adopted child is of the same gotra. Seeing that when the gotra is the same the person adopted belongs before adoption to the same general family and, as being descended from the same original ancestor, is in a sense already a member of the adopter's family, he may be regarded as fit to be affiliated by gift and acceptance without any ceremony, for in his case adoption operates only to transfer him from one to another line of descent from the common original ancestor. Again, it may also be necessary to exact nothing more than a *bona fide* observance of the ceremonial in compliance with the prescribed procedure, and to avoid complicating the law of adoption with the subtleties of ceremonial law. To this extent we may adhere safely to the decision in *Singamma v. Ramanuja Charlu*.

In the case before us the adopted son was, prior to the adoption, a dayadi of Súlúr Subba Ayyar and therefore of the same gotra. It appears further that defendant No. 4 waived her right to object to the adoption under a special agreement and the plaintiff is not the reversioner but a purchaser from her. On these special grounds, we dispose of the second appeal, which will be dismissed with costs.

APPELLATE CIVIL.

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

PURUSHOTTAMA (PLAINTIFF), APPELLANT,

and

RAJU (DEFENDANT), RESPONDENT.*

1887.
July 16.

*Rent Recovery Act (Madras)—Act VIII of 1865, s. 9—Joint shrotriyamdárs—
Distinct contract by tenant in respect of a share.*

The plaintiff was one of two joint shrotriyamdárs. In fasli 1288 the defendant accepted a pattá from and executed a muchalká to him in respect of the half share of the plaintiff. The plaintiff sued to enforce acceptance of a pattá and execution of a muchalká for fasli 1290 and for arrears of rent:

Held, that the suit lay without joinder of the other joint shrotriyamdár.

SECOND appeal against the decree of S. T. MacCarthy, District Judge of Chingleput, in Appeal Suit No. 18 of 1886 reversing the decree of V. Kuppasámi Ayyar, Additional District Munsif of Poonamalle, in Original Suit No. 30 of 1885.

This was a suit to enforce the acceptance by the defendant of a pattá tendered to him by the plaintiff, and the execution by the defendant of a muchalká for fasli 1290 and to recover Rs. 267-2-7, being the amount of ayan tirvai and road-cess and interest for the same fasli.

The plaintiff alleged that he was shrotriyamdár of a moiety of the village of Súnampett and that the defendant was a mirasi tenant holding under him. The defendant pleaded *inter alia* that he was not bound to execute a muchalká, and that the pattá tendered was not a proper one, and further denied the plaintiff's title.

The Court of first instance passed a decree in favor of the plaintiff, but this decree was reversed on appeal by the District Judge on the ground that the plaintiff could not sue alone.

The plaintiff preferred this second appeal.

Rámasámi Mudaliar for appellant.

The two shrotriyamdárs have been receiving their shares of tirvai from the raiyats separately, and in fact there was an agree-

* Second Appeal 919 of 1886.

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ment by the defendant to pay the plaintiff his moiety of the tirvai now sued for.

Srirangacharyár for respondent.

The two shrotriyamdárs constitute one landlord under the Rent Recovery Act and one of them is not entitled to enforce acceptance of a pattá by the tenants in respect of the proportionate rent payable to him. *Krishnama v. Gangaráu*(1).

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

JUDGMENT:—It is urged by the appellant's pleader and admitted for the respondent that for fasli 1288 the respondent accepted a pattá from the appellant, and executed a muchalká in respect of the half share of the shrotriyam claimed in the present suit. This being so, there was a distinct contract and holding in respect of that share, and all that was decided in the case reported in *Krishnama v. Gangaráu*(1) was that where the tenant held the land under several shrotriyamdárs and under a joint contract, and the shrotriyamdárs might be regarded as a single landlord, then none of the shrotriyamdárs could tender a pattá for acceptance otherwise than in conjunction with the others.

We set aside the decree of the Lower Appellate Court and remand the appeal for rehearing. Costs of this second appeal will abide and follow the result.

APPELLATE CIVIL.

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

KHADAR (PLAINTIFF), APPELLANT,

and

SUBRAMANYA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

*Rent Recovery Act (Madras)—Act VIII of 1865, ss. 3, 9, 79, 80—Yeomiah lands—
Unregistered holder rendering service and granting pattás—Estoppel by acquiescence
of person entitled to the yeomiah holding.*

A yeomiahdár died leaving a brother who was then out of India. Shortly before his death, he made an invalid assignment of his holding to a third person who performed the service, and granted pattás of the land. The holding was resumable

(1) I.L.R., 5 Mad., 229.

* Second Appeal No. 2 of 1886.

on failure of the service. The brother of the late yeomiahdár returned after three years and obtained registration of his title. He now filed this suit to enforce acceptance of pattás tendered by him to the raiyats who had already accepted pattás from and executed muchalkás to the assignee:

Held, that the suit was not maintainable, as under the circumstances the plaintiff's conduct justified the tenant's belief that the assignee was entitled to collect rent from them until the assignment was questioned by the plaintiff and notice of his title given to them.

SECOND appeal against the decree of J. Hope, District Judge of South Arcot, in Appeal Suit No. 71 of 1885, reversing the decree of W. S. Meyer, Acting Head Assistant Collector of South Arcot, in Summary Suit No. 3 of 1884.

This was a summary suit by the landlord under s. 9 of the Rent Recovery Act to enforce the acceptance of a pattá. The tenants defended the suit alleging *inter alia* that they had previously accepted a pattá for the same fasli from one Khadar Moidin.

The land in question was service yeomiah, which was held till 1881 by the plaintiff's brother. Shortly before his death in that year, the late yeomiahdár executed a deed of assignment to Khadar Moidin, which, however, was now held to be invalid. The plaintiff was at Singapore when the death of the late yeomiahdár took place; Khadar Moidin accordingly entered into possession and performed the yeomiah service to Government and granted pattás to tenants, but he never got a registered title. The plaintiff returned from Singapore and the yeomiah was registered in his name on 2nd April 1884; in May the tender of the pattás by the plaintiff to the defendants took place, the refusal of which occasioned the present suit.

The Court of first instance passed a decree in favor of the plaintiff: but this decree was reversed by the District Judge who observed:—"There was no *de jure* yeomiahdár at all prior to April 1884, but there was a *de facto* one to whom all the raiyats paid their kist and it would be a great hardship if they had to pay them over again."

The plaintiff preferred this second appeal.

Rámá Ráu for appellant.

Seshagiri Ayyar for respondents.

The 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.).

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JUDGMENT.—The appellant is the registered holder of a service yeomiah at Bhuvanigiri in the district of South Arcot, and the respondents are raiyats holding some of the yeomiah lands and are as such under an obligation to pay the assessment due to Government to the yeomiahdár. The yeomiah was formerly held by the appellant's brother, Mohammad Ali Bibi, and he died in April 1881 when the appellant was in Singapore. The service was since performed for some time by the deceased's brother-in-law, Khadar Moidin Sahab, apparently under a deed of assignment which was executed in his favor, but the yeomiah was never registered in his name. For fasli 1283, the respondents accepted a pattá from him, executed a muchalká in his favor, and paid him the assessment due by them. On the 2nd April 1884, the yeomiah was registered in the appellant's name under the Proceedings of the Board of Revenue, No. 1202, and on the 22nd May 1884, the appellant tendered the pattá F, but the respondents refused to accept it on two grounds, viz., that they had previously accepted a pattá from Khadar Moidin for the same fasli, and that the village cess should not be included in the pattá and the road-cess payable by them was half an anna and not one anna in the rupee as entered in the pattá. The Head Assistant Collector disallowed the first objection and decreed the acceptance of the pattá with the modification that the charge on account of the road-cess was half an anna instead of one anna in the rupee. On appeal, the Judge held that the first ground of defence was good in law and observed that the kist due for fasli 1283 had been paid to Khadar Moidin before May 1884 in pursuance of an arrangement which had been in force for three years, and which Government had not seen fit to question. The only ground argued in support of the second appeal is that the previous acceptance of a pattá from one who was neither a registered yeomiahdár nor lawfully entitled to the yeomiah was no valid defence as against the appellant, the lawful owner. It is conceded that the kist payable to Government was originally assigned to a former yeomiahdár. It is also not disputed that as between the appellant and Khadar Moidin, the former is the lawful owner. We take the finding of the Judge to be in substance that the assignment in favor of Khadar Moidin was, in the special circumstances of the case, only voidable by the appellant, and that until it was avoided by him and notice of his claim was given to the respondents, they were

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entitled to treat the assignee, in the absence of any interference on the part of Government as a person entitled to recover rent from them either under s. 79 or s. 80 of Act VIII of 1865. It was held by the majority of the Judges of this Court in *Gouse v. Sundara* (1) that the term inamdár or landholder, as defined in s. 3, includes his heirs or legal representatives and assignees in cases in which the assignment amounts to a valid transfer of the assignor's entire interest. The yeomiah in question was a service yeomiah liable to be resumed by Government on discontinuance of the service. The performance of the service first by the appellant's brother during his life and after his death by Khadar Moidin until the appellant returned from Singapore and insisted on his right as lawful owner was an act beneficial to him; otherwise the Crown might have resumed the yeomiah. It is not alleged that the appellant made any arrangement for the enjoyment of the yeomiah or the performance of the service during his stay at Singapore and gave notice of it to the respondents either when his brother or Khadar Moidin entered into possession or until he returned from Singapore. There is reasonable ground for the inference that the appellant intended to allow the assignment to continue in force in his own interest until he should be able to return from Singapore and to render the service which he was bound to render. We cannot say that the Judge was in error in holding that the appellant's own conduct was such as to justify the respondents' belief that the assignee was authorized to collect rent from them until the assignment was questioned by the appellant and a notice of his title was given to them. We dismiss the second appeal with costs.

(1) I.L.R., 8 Mad., 394.

APPELLATE CIVIL.

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

1887.
April 19.
July 11.

PERUMAL AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,
and
RAMASÁMI CHETTI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

*Indian Easement Act—Act V of 1882, ss. 6, 7, 17—Natural streams—Surface water—
Rights of riparian owners.*

The owners of a tank fed by natural streams, which depended for their supply on natural rainfall and surface water, sued for an injunction to restrain superior riparian owners from damming the streams or interfering with the supply of water, over which the plaintiffs claimed a right of easement. The issue as to the ownership of the land on which the streams rose was undecided:

Held, (1) The Easement Act only declared the existing law as to easement over water;

(2) An easement can therefore be acquired in regard to the water of the rainfall. But surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise is not a subject of easement by prescription, though it may be the subject of an express grant or contract;

(3) It is the natural right of every owner of land to collect or dispose of all water on the surface which does not pass in a defined channel;

(4) Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture, subject to the conditions (i) that the use is reasonable, (ii) that it is required for their purposes as owners of the land, and (iii) that it does not destroy or render useless or materially diminish or affect the application of the water by riparian owners below the stream in the exercise either of their natural right or their right of easement if any;

(5) It was therefore necessary to ascertain where the streams rose, and the course, source and length of their tributaries.

SECOND appeal against the decree of A. J. Mungalam Pillai, Subordinate Judge of Madura (West), in Appeal Suit No. 366 of 1885, modifying the decree of T. A. Krishnasami Ayyar, District Munsif of Sivaganga, in Original Suit No. 227 of 1883.

The plaintiffs are the trustees of a certain temple, and, as such, the owners of a tank fed by two natural streams, which are supplied

by the natural rainfall and surface water of the district. The plaintiff prayed for a decree directing the removal of an embankment erected across the streams by the defendants and for a perpetual injunction restraining the defendants from interfering with the flow of water to the plaintiffs' tank. Both the lower courts held that the plaintiffs had acquired a right of easement from immemorial user of the water in the streams and decreed as prayed.

The defendants preferred this second appeal.

Subramania Ayyar and *Bhāshyam Ayyangār* for appellants argued that the Indian Easements Act reproduced the English law on the subject and cited *Madras Railway Company v. Zemindār of Carvatenagarum*(1) and *Angell on Water Courses*, ed. 6th, p. 142.

Rāmd Rāu for respondents argued that s. 6 of the Indian Easements Act created a departure from English law and relied on *Arni Jagirdār v. Secretary of State for India*(2), *Rayappan v. Virabhadra*(3), *Ramessur Persad Narain Sing v. Koonj Behari Pattuk*(4), *Khoorshed Hossein v. Teknarain Sing*(5).

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 plaintiffs are the trustees of the Ariyakudi temple in the district of Madura and defendants Nos. 1 and 2 are the managers of another temple, called Iluppagudi temple, in the same district. The Dharmasanam village of Ariyakudi belongs to the former and the village of Kurichiyendal, which adjoins it on the north, belongs to the latter. The tank A of Ariyakudi in the Commissioner's plan is supplied by channels C and D, which take their rise in the tract of land lying between 1 and G2 and G3 and flow in a defined course, first, through Kurichiyendal, then through Ariyakudi, and, after uniting together, fall into the Ariyakudi tank, being fed on their way by small channels, C1, C2, D1 and D2, which rise also in the same tract of land. The rain annually falling on this tract flows into the tributaries and the main channels C and D and constitutes the source from which the Ariyakudi tank receives its supply. It is found by the courts below that these channels have existed for more than thirty years, in fact from time immemorial, and that they are natural streams,

(1) L.R., 1 I.A., 385.

(2) I.L.R., 5 Mad., 226.

(3) I.L.R., 7 Mad., 530.

(4) I.L.R., 4 Cal., 633.

(5) 2 Cal. L. Rep., 141.

* Second Appeal No. 966 of 1885.

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which have had a continuous and defined course, until they terminated in the tank A. The District Munsif found further that the land, in which the streams originate, is wholly included in the village of Kurichiyendal and does not belong, as alleged by the plaintiffs, partly to Ariyakudi and partly to Kurichiyendal. On this question, however, the Subordinate Judge considered it unnecessary to record a finding. Both courts concurred in the opinion that the plaintiffs had acquired a right of easement from immemorial enjoyment and decreed the claim. The decrees appealed against declared and directed (i) that channels C and D in the plan annexed belong to the plaintiffs; (ii) that defendants should in no way interfere with the said channels; (iii) that defendants Nos. 1 and 2 do remove the bund G2 and G3, which prevents water from flowing into channels C and D; (iv) that the portions of the said channels, which were filled up with earth by defendants, be dug again and restored to their former position; (v) that defendants Nos. 1 and 2 do pay the expenses, which may be incurred in removing the bund and digging the channel as aforesaid; (vi) that they be restrained from interfering either with the rain water that continues to flow into channels C and D or with the flow of water into the Ariyakudi tank by means of those channels; (vii) that they do pay to plaintiffs their costs; and (viii) that defendants do bear their own costs. From these decrees, defendants Nos. 1 and 2 have preferred this second appeal.

The first objection argued before us is that the supply of water, which the plaintiffs claim, is only casual, intermittent, and exclusively dependent upon the rainfall on the defendants' land and that the plaintiffs' claim cannot be supported. It is undoubtedly the natural right of every owner of land to collect and dispose of all water on the surface which does not pass in a defined channel. Assuming that an easement may be acquired in regard to such right (and we shall presently consider whether it may be acquired), we are of opinion that it is perfectly immaterial whether the supply is permanent or intermittent or dependent on springs which never fail, or on casual or periodical rainfall. It would be altogether unreasonable to hold in this country, many parts of which depend upon annual rainfall for their irrigation, that no right of easement can be acquired in relation to it, because there may be failure of rain in particular years or during the time of cultivation, and to that extent the supply may be precarious or casual.

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It is explained in the Easement Act—Act V of 1882,—which only declared the law administered in this country on the subject, that a natural stream is a stream whether *permanent* or *intermittent*, tidal or tideless, on the surface of the land or underground, which flows by the operation of nature only and in a natural and known course. We must, therefore, overrule the objection that no easement can be acquired in regard to the water of the rainfall.

The next objection urged upon us is that the first, second, and third items of relief decreed to the plaintiffs are in excess of the right of easement, which is found to have been acquired by them. The accustomed user of that right is according to the finding confined to the uninterrupted flow of rain water that falls on the tract of land between HH and G2, G3 into channels C and D and their tributaries, and then through the former to the Ariyakudi tank A in their usual course. As an easement is a limiting right or a right in *alieno solo*, the relief awarded should certainly not be more extensive than what is necessary to its beneficial enjoyment. As riparian owners, defendants Nos. 1 and 2 are entitled to use and consume the water of the streams C and D for drinking and household purposes, for watering their cattle, and even for irrigating their land, or for purposes of manufacture, provided they exercise their right subject to the conditions, viz., (i) that the use is reasonable; (ii) that it is required for their purposes as owners of the land; and (iii) that it does not destroy or render useless or materially diminish or affect the application of the water by riparian owners below the stream in the exercise either of their natural right or right of easement, if any—*Embrey v. Owen*(1).—The first and second items of relief decreed to the plaintiffs should, therefore, be modified, so as to save the first and second defendants' natural rights as riparian owners. The direction that the embankment G2, G3 be removed, because it is now, goes likewise beyond the necessity of the case. All that the plaintiffs are entitled to claim is that so much of the embankment as prevents the flow of water in its accustomed course to the Ariyakudi tank across the bund should be removed. Any other direction is in excess of the plaintiffs' right and bad in law. In this respect also the decree must be modified.

The next objection which is urged in support of this appeal

(1) 6 Exch., 353.

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refers to the principle that no easement can be acquired, unless the user is of *right* and *not in pursuance of an agreement* with or by permission of the dominant owner, express or implied, which negatives the existence of a right or subjects it to a condition on the fulfilment of which it ceases.

In the case before us there was no express agreement between the dominant and the servient owners, but it is suggested that a conditional agreement may and ought to be implied from the facts found, viz., that, from time immemorial, there had been no wet cultivation at all in Kurichiyendal, until a few years ago, that, though during the last few years, there has been some wet cultivation, it has not been considerable, and that defendants Nos. 1 and 2 now desire to extend such cultivation by running up the bund G2, G3, and thereby diverting the streams C and D into the Kurichiyendal tank. The user which the plaintiffs and their predecessors have had from time immemorial, under these circumstances, must, it is contended, be treated as limited to the period during which the defendants and their predecessors did not choose to extend their wet cultivation. It is also said that the owners of Kurichiyendal could never have intended not to extend their wet cultivation for all time to come, and that it is reasonable to infer that the user was originally permitted only so long as they did not convert their dry land into wet cultivation; but it is conceded that, if the channels C and D took their rise beyond the land of defendants Nos. 1 and 2 and then flowed through it to the Ariyakudi tank, no such inference can be drawn, because appropriation of the water by a riparian owner lower down from time immemorial would deprive a riparian owner who holds land higher up of the natural advantages arising from the situation of his land. This is inconsistent with the contention that immemorial enjoyment may be presumed to be permissive; for, if the user must be taken to be not of right in the one case, because the owner of the upper land recently desired to irrigate it for the first time, it must be equally so in the other. The appellants' pleader overlooks the fact that, in order that such inference may be drawn, there must be some evidence, apart from a recent desire to extend wet cultivation, indicating a mutual understanding, when the user originated, and during its continuance that it was only permissive and not of right. It must be borne in mind that the enjoyment for purposes of irrigation of water flowing in a natural stream by a riparian

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owner of lower land from time immemorial stands upon a different footing from the enjoyment of water flowing in an artificial stream originating in the mode of occupation or cultivation of a person's property and from the very nature of the case presumably of a temporary character and liable to variation. On this point we may refer to *Arkwright v. Gell*(1), in which the stream in dispute was an artificial water-course, which was made with the sole object of getting rid of a nuisance to certain mines and enabling their owners to get at the ore, which lay within the mineral field drained by it. It was pointed out in that case that the flow of water through that water-course was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine owners required it; that, in the ordinary course, it would most probably cease when the mineral ore above its level should have been reached; and that the right of user was, therefore, intended to endure only so long as the water-course continued there. In *Mason v. Hill*(2) on the other hand, in which the water-course in dispute was a natural stream, it was observed that the first title to water was a gift from nature, and that it was to be tried by ascertaining in the first place where, by the laws of nature, the water would flow, and, if a secondary title to it be claimed, whether there has been such a user of it from which grant may be presumed. The user must no doubt have been by a party claiming a right thereto not by stealth nor by permission nor in any other way which would negative a 'grant. Upon the facts found in this case, the user cannot be said to have been otherwise than under a claim of right. With reference to the contention that the right to flowing water is *publici juris*, and that the first person who can get possession of the stream and apply it to a useful purpose has a good title against all the world, it was held in *Mason v. Hill*(2) that it was true only in the sense that neither the owner of the land below can pen back the water nor the owner of the land above divert it to his prejudice. As it is found in the case before us that channels C and D are natural streams and that the plaintiffs have used them from time immemorial for irrigating their land, there can be no doubt that defendants can neither prevent nor diminish the flow of such water as enters the channel in its accustomed course.

(1) 5 M. & W., 203, 231.

(2) 5 B and Ad., 17.

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It is then urged that the defendants are entitled to use the rain water falling upon the surface of their land for any purpose useful to them, and that any right which the plaintiffs have acquired by prescription must be taken to have been acquired subject to such right. It is contended on the other hand that the plaintiffs' right extends to all the rain water which falls on the defendants' land mentioned above and percolates into or otherwise enters the channels C and D. It is provided by s. 17, cl. c of the Indian Easements Act V of 1882 that no easement can be acquired by prescription to surface water not flowing in a stream and not permanently collected in a pool, tank, or otherwise. In *Rawston v. Taylor*(1) it was held that the plaintiff, who claimed a right of easement by prescription, had no right to surface water which had no defined course, for the plaintiff had no right to water in *alieno solo*, and natural water-courses were like ways of necessity, and the right to have a stream running in its natural direction did not depend on a supposed grant, but was *jure naturae*. *Broadbent v. Ramsbotham*(2) was decided on the same ground. *Chasemore v. Richards*(3) decided that in the case of rain water sinking into the ground to various depths and then flowing and percolating through underground strata in courses which were not defined but continually varied was not the subject of an easement by prescription. In *Robinson v. Krishnama Cháriyár*(4), decided in 1870, this court considered the principles laid down in the English cases were applicable to this country and the Easement Act has adopted them. According, therefore, both to decision and legislation it is clear that surface water not flowing in a stream and not permanently collected in a pool, tank, or otherwise is not a subject of easement by prescription.

It may, however, be a subject of express grant or other contract as mentioned in s. 7, illustration (g). The reason why underground water not running in a defined stream is not a subject of prescription is that there is no visible means of knowing to what extent, if any at all, the supply to the plaintiffs' tank would be affected by water percolating in and out of defendants' land, and the reason why surface water not running in a stream or collected in a pool tank, or otherwise is not a subject of prescriptive right is that there is no right of water in *alieno solo*, except to the extent that the right

(1) 11 Exch., 382.
(3) 7 H. and Cas., 349.

(2) 11 Exch., 602.
(4) 7 M.H.C.R., 44.

to the uninterrupted flow of a natural stream in its usual defined course is *jure naturae*. While it is clear, therefore, on the one hand, that this right would extend to all the minor channels which run into the main channels C and D in defined courses forming their feeders or tributaries, it is equally clear, on the other that it will extend no further. The declaration that the defendants Nos. 1 and 2 are not entitled at all to the rain water falling on the surface of their land between HH and G2, G3 before it enters or percolates into the channels C and D or their feeders and becomes thereby part of them cannot be supported. In the view, however, which we take of the case, it is necessary to direct the Subordinate Judge to return a finding on the fifth issue, and also to show on the plan annexed to the decree the name, if any, of the source, the course, and the lengths of each of the several tributaries or minor channels, which are visible and flow into the channels C and D across the land of defendants Nos. 1 and 2.

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APPELLATE CIVIL.

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

NÁGARAJA (PLAINTIFF), APPELLANT,
and

KÁSIMSÁ AND OTHERS (DEFENDANTS), RESPONDENTS.*

Rent Recovery Act—Madras Act VIII of 1865, ss. 9, 10, 11.

A summary suit by a landlord to enforce the acceptance of a pattá under the Madras Rent Recovery Act should not be dismissed on a finding by the Appellate Court that the pattá tendered was not a proper pattá. The Appellate Court ought to pass the decree which the Court of First Instance should have passed.

SECOND appeal against the decree of J. A. Davies, Acting District Judge of Tanjore, in Appeal Suit No. 499 of 1884, reversing the decree of P. W. Moore, Acting Sub-Collector of Tanjore, in Summary Suit No. 51 of 1884.

This was a summary suit under s. 9 of the Madras Rent Recovery Act to enforce the acceptance of a pattá by the defendant from the plaintiff. The defence to the suit was that the

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* Second Appeals Nos. 384 to 386 of 1886.

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defendant was by custom liable to pay for his nanjai lands a fixed grain rent and not according to amáni, and that if he was to pay by varam, the landlord's share should be so fixed as not to exceed on an average the fixed grain rent paid hitherto.

The Sub-Collector passed a decree in favor of the plaintiff, but his decree was reversed and the suit dismissed on appeal by the District Judge on the ground that there was evidence of a customary payment of a fixed grain rent.

Rámá Ráu for appellant.

Mr. Norton, Venkatram Ayyar and Seshagiri Ayyar for respondents.

The further facts of this case and the arguments adduced on appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.).

JUDGMENT.—Two questions are argued in support of this second appeal. The first is that the Judge is in error in dismissing the suit on the ground that the pattá tendered was not a proper pattá, and we consider this objection to be well founded. It is provided by s. 10, cl. 3, Act VIII of 1865, that "if the Collector shall be of opinion that the pattá tendered is not a proper one, he shall decide what pattá ought to be offered and shall then pass a judgment ordering the defendant to accept such pattá and to execute a muchalká in accordance with it." As the appellate authority reversing the decree of the Court of First Instance, the Judge ought to have passed the decree which the first Court should have passed upon the facts found by him. The decree must, therefore, be amended so as to bring it into conformity with the provision of law indicated above.

The next objection taken to the decree is that the rate of rent is not ascertained by the Judge in accordance with the rules contained in s. 11 of the Act. Although the Sub-Collector found that no contract was proved to pay a fixed grain rent, the Judge considered that there was evidence of customary payment of a fixed amount of grain per pangu. We entertain, no doubt, that the Judge intended to find that a contract to pay grain rent was evidenced by custom. It is then said that the evidence on record only shows that when the whole village was rented, the total rent in grain was fixed at 11 kalams per pangu for nanjai and that it is not sufficient for inferring a contract with each raiyat to accept rent at the average rate. It appears that in Summary Suit No. 15 of 1874, 65 per cent. of the nett outturn was

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taken to represent the melvaram by the Assistant Collector, Mr. Forbes, and by the Judge on appeal. It is stated in the judgment then recorded that the defendant, Kasim Rowthen, agreed to be bound by the rate collected when the village was previously under amáni management for several years. Again, there was another summary suit in 1875 against a different tenant, and the decision as to the rate appears to have been the same as in 1874. In the lease granted to certain raiyats in September 1876 for ten years, there is a provision that the rate of 11 kalams per pangu is payable only during the time the lease is in force, and that on the expiration of the lease, the lands may be taken under amáni *as per custom observed* during the time of management by the late maharajah and during attachment by Government. Further, in 1882, similar suits were brought against some raiyats, and the amáni rate was adopted. It is no doubt true that the defendant was not a party to any of these suits, but they negative a general custom in the village to pay 11 kalams per pangu for nanjai and show that if that rate was ever paid by particular raiyats, it was paid under a special agreement on the understanding that on the expiration of the period fixed by the agreement, the amáni system was to be reverted to according to custom. It is not clear then on what specific custom the Judge relies, what was its duration, and whether it affords a reasonable ground for presuming that there was a contract with the defendant to accept rent at 11 kalams per pangu. We are not prepared to hold that if an average rate per pangu were accepted only in the event of the whole village being taken on lease, it would preclude the landlord from claiming more than the average rent when he has to make a separate settlement with each raiyat in respect of his holding. We shall therefore refer the following issues for trial:—

Whether it was the amáni or the ijará system that was the customary system of management in the village prior to 1874, and what was the rate of melvaram paid under each system?

Whether the rate of 11 kalams per pangu was ever paid when the entire village was not rented out, and if so, for how many years? The finding will be returned in three months, when ten days will be allowed for filing objections. Each party will be at liberty to adduce fresh evidence.

PRIVY COUNCIL.

1887.
June 16.

MINAKSHI NAIDU (DEPENDANT), APPELLANT,

and

SUBRAMANYA SASTRI (PETITIONER), RESPONDENT.*

[On appeal from the High Court of Madras.]

Act XX of 1863 (Religious Endowments), s. 10 Appellate jurisdiction—Order of District Judge filling vacancy on committee not appealable.

It is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by the enacted law, or equivalent authority.

The High Court has no jurisdiction to hear an appeal from the order of a District Judge made by him on petition pursuant to s. 10 of Act XX of 1863 (Religious Endowments), appointing a member to fill a vacancy in a committee. Neither that Act, nor the general law, gives any right of appeal, which therefore does not exist, from such an order.

In a cause which a Judge is competent to try, if the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground of irregularities, which, if objected to at the proper time, might have led to the dismissal of the suit. But when the Judge has no jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process.

Lodgard v. Bull(1) referred to and followed.

APPEAL from an order (11th November 1881) of the High Court, affecting to reverse an order (10th February 1881) of the District Court of Madura, made under s. 10 of Act XX of 1863, an Act “to enable the Government to divest itself of the management of religious endowments.”

The order of the District Court of Madura, to which this appeal related, appointed a member to fill a vacancy in the committee managing the Minakshi Sundraswar Devasthanam in Madura, that being a religious endowment within the scope of Act XX of 1863, of which s. 10 is as follows:—

“Whenever any vacancy shall occur among the members of a committee appointed as above, a new member shall be elected to fill the vacancy by the persons interested as above provided. The

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

(1) L.R., 13 L.A., 134 : I.L.R., 9 All., 191.

remaining members of the committee shall as soon as possible give public notice of such vacancy, and shall fix a day which shall not be later than three months from the date of such vacancy for an election of a new member by the persons interested as above provided under rules for elections which shall be framed by the Local Government, and whoever shall be then elected under the said rules shall be a member of the committee to fill such vacancy. If any vacancy as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the Civil Court on the application of any person whatever may appoint a person to fill the vacancy, or may order that the vacancy be forthwith filled up by the remaining members of the committee, with which order it shall then be the duty of such remaining members to comply, and if this order be not complied with the Civil Court may appoint a member to fill the said vacancy.”

On the 8th December 1880 Ponnambalam Pillai and twenty-three other inhabitants of Madura informed Mr. P. P. Hutchins, District Judge, by petition, that Gurusami Sastryal, one of the five members of the committee, had died on the 5th September preceding, and that the surviving members had taken no steps to fill up the vacancy.

The following order was consequently made on the 10th February 1881:—

A vacancy occurred some months ago on the committee of the Minakshi Sundraswar Devasthanam by the decease of Gurusami Sastryal. The committee failed to fill it up within the allotted period, and petitions were presented to this court to take the matter into its own hands. I sent for the lists of voters, and, as a preliminary step for my own satisfaction, I endeavoured to ascertain the wishes of the public by appointing a date for the registration of votes.

The election was held on the 28th December last.

The tellers recorded 300 votes for Minakshi Naik; 141 for Subbaragava Sastry, son of the late Gurusami Sastry; 13 for Vakil Dorasami Aiyar; and 8 for Ramia Munian, a Patnúl Chetti.

Subsequently, I heard Mr. Scott for the last-named candidate, Mr. French for the second, and Mr. Pole for the first. I at once intimated that I should not appoint the second, as I thought him too young, nor the third, because apart from other objections, it would not be becoming for me to put a second wakil of my own

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SUBRAMANYA. court on the committee. The remaining candidates were Minakshi Náik and Ramia Munian Chetti, and I said that I should probably appoint the former, unless the pamphlet referred to by Mr. French, as subversive of the worship of Siva and as bearing Minakshi Náik's signature, should show that he would not be a proper person for the office. I find nothing whatever in that publication which can possibly be construed into hostility to the worship of Siva.

Mr. Scott has repudiated the election as an indication of the popular opinion, and perhaps it may be so. Very probably, the result is more due to better party organization than to real public feeling. But I am quite satisfied that some of the complaints were groundless and that the Patnúl Chetti's adherents had free access both into the palace and to the tellers' tables, and that the proceedings were conducted in a perfectly impartial way—at all events, the election is sufficient to support the preference which I should naturally give to one with whose qualifications I am personally acquainted than to one of whom I know nothing except that he cannot read Tamil. I say this without intending to cast the slightest slur on Ramia Munian Chetti's character which seems to be well guaranteed, and notwithstanding my natural desire that so large a section of the population as the silk-weavers should be represented on the committee.

Since hearing the argument, another candidate has come forward in Mr. Rama Row, the Treasury Deputy Collector. I at once wrote to him that I should be glad to appoint him if he was about to retire, as I felt sure that his official habits and experience would be of great benefit to the institution. He is, however, unable to assure me that he will retire very shortly, and I do not think it desirable that a public official of his standing, and far less a magistrate, should be on the committee.

I have read the Tinnevely judgment, but it does not support the objections to the appointment of a Vishnuvite. The great Tirumal Náik himself, to whom the pagoda owes its chief grandeur, was, I believe, of that sect. The two members last elected held the same opinions, and so have many others entrusted with great authority by the committee. They all worship Siva as well as Vishnu.

It is accordingly ordered that Minakshi Naidu be and he hereby is appointed to be a member of the committee for the

management of the Minakshi Sundraswrar Devasthanam of Madura *vice* Gurusámi Sastryal deceased. MINAKSHI
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On the 21st April 1881 the respondent presented a petition to the High Court of Madras praying that the order of the Civil Judge might be rescinded, that one G. Subramanya Sastry might be appointed, or that a new election might take place.

On the 8th August the respondent presented a petition to the successor in office of the District Judge of Madura, praying that he would take further evidence in the matter for submission to the High Court, or would cancel the order of his predecessor. Upon this the District Judge passed the following order:—

"Looking to the wording of Mr. Hutchins' order, I find it to be perfectly clear that this is not an election under the Act with which I could exercise any interference. Mr. Hutchins was exercising his power under s. 10 of the Act, and, for his own satisfaction, held an election as a test of the wishes of the people; his order was, no doubt, passed in consideration of the wishes of the people as expressed in the election, but it can only be upset by an appeal to the High Court. The petition is dismissed."

On the 11th November 1881, the High Court (Turner, C.J., and Muttusámi Ayyar, J.), made an order cancelling the appointment of this appellant, and directing the District Judge to make a new appointment guided by the observations contained in the following judgment:—

"The institution is admittedly, at present, devoted to the worship of Siva, and in accordance with the letter and spirit of the Act its concerns should be directed by persons of the same persuasions—persons whose religious convictions will be enlisted in support of their fiduciary office. We shall set aside the appointment made by the Judge, not because we entertain any doubt of the fitness of the gentleman selected on the score of integrity and reputation, but because he has pronounced himself actively in favor of the cult of Vishnu.

"We shall not, however, take it upon ourselves to make an appointment, but shall direct the Judge to do so, having regard to the consideration we have mentioned. Each party will bear his own costs of this appeal."

The same Judges, on the 20th September 1882, rejected a petition of review under s. 623 of the Code.

Minakshi Naidu then applied under s. 600 of the Code for

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SUBRAMANYA. a certificate in order to appeal to Her Majesty in Council, making it the first of his grounds that the order of the District Court of Madura was final. On 20th April 1883 the Judges holding that they could not give leave to appeal in this case, rejected the application. However, on the 9th February 1884, he obtained special leave to appeal.

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

Mr. *R. V. Dayne* for the respondent.

For the appellant, it was argued that the High Court was wholly without jurisdiction to reverse or vary the order of the Civil Court. By s. 10 of Act XX of 1863, the Civil Court, meaning the officer holding the post of District Judge, was directed to appoint, upon default of an appointment having been made by the remaining members of the committee. In conforming to the Act, he was not acting as Judge of a court vested with a jurisdiction in a suit of any kind, nor did he recognize a right. He was only in this manner a *persona designata*. No jurisdiction to the High Court, or to any court, was given to hear an appeal from an order made under s. 10; nor was there a jurisdiction given by the general law.

Reference was made to s. 2 of Act X of 1877, the code then in force, where "decree" was defined; also to s. 11, explaining "civil suit" to be where a right is contested; also ss. 588 and 622. The amendment of the latter section by s. 92 of Act XII of 1879 and its appearance as amended in the present Code (Act XIV of 1882) was also referred to.

Reference was also made to *Rajah Amir Hassan Khan v. Sheo Baksh Singh*(1), *Maharaja Dhiraj Mahtab Chaud Bahadur of Bardwan*, in re(2), *Sankar Dobay*, in re(3), and *Anthony v. Dupont*(4). In the last case the Madras High Court had interfered under s. 622, but there was no other precedent for such a course. In *re Venkateswara*(5); that an appeal does not exist in the nature of things and that a right to appeal from any decision of any tribunal must be given by express enactment appeared in *Sandback Charity Trustees v. North Staffordshire Railway Company*(6); and by the Indian law, appeals were allowed in suits of a civil

nature, where they were not disallowed, but a suit there must be; in other words, there must be parties, there must be a right presented to a court, and a decision thereupon. All these elements were wanting here. Lastly, it could not be concluded that the objection to the jurisdiction had been waived. As the High Court had no jurisdiction to entertain the appeal, no waiver in that court could operate. Neither express, nor implied, consent of the parties could give jurisdiction to a court which did not possess it by law—*Ledgard v. Bull*(1):

Mr. *R. V. Dayne* was called upon only in reference to the question of jurisdiction, which, it was intimated, would be disposed of before the order would be discussed on its merits.

For the respondent, Mr. *R. V. Dayne* contended that under the general powers of superintendence which the High Court possessed as the successor of the Sudr Diwani Adalat, the jurisdiction to hear the appeal had been duly exercised, and that such authority having really existed in the court, the objection as to the jurisdiction was now taken too late; an argument to which was added that the appellant by applying for a review had himself invoked it.

Reference was made to Regulation V of 1802, preamble; Charter Act, 24 & 25 Vic., c. 104, ss. 9 and 15; Letters Patent of 1865, clauses 15 and 16; Code of Civil Procedure, Act X of 1877, s. 622.

An application might be distinguished from a suit, but the order of the Judge when made fell under s. 622, not being such an order as was excluded from appeal by s. 588, which gave an appeal from specified orders, excluding other orders of a similar class. The appointment, however, amounted to a decree within the meaning of the definition in the code; and it was hardly correct to apply the expression that unless an Act creating a right gave an appeal there could be none, inasmuch as the superintending power of the High Court made it rather that there would be an appeal, unless it had been expressly taken away.

Counsel for the appellant was not called upon to reply.

Their Lordships' judgment was delivered by

SIR RICHARD BAGGALLAY.—This is an appeal against an order of the High Court of Madras, which cancelled an order of the

(1) L.R., 11 I.A., 237.

(3) 4 B.L.R., 65; see also 5 B.L.R., app. 59.

(4) I.L.R., 4 Mad., 217.

(6) L.R., 3 Q.B.Div., 1, at p. 4.

(2) 2 B.L.R., 217; see also pp. 181 & 301.

(5) I.L.R., 10 Mad., 98.

(1) L.R., 13 I.A., 134, and I.L.R., 9 All., 191.

MUNAKSHI District Judge of Madura appointing the present appellant to
v. fill up a vacancy in the committee of a pagoda in the Madras
SUBRAMANYA. Presidency.

The appointment was made by the District Judge under the provisions of s. 10 of Act XX of 1863, entitled "An Act to enable the Government to divest itself of the management of Religious Endowments," and commonly known as *the Pagoda Act*. By that Act it was provided that the local Government should appoint one or more committees in every division or district to take the place, and to exercise the powers of, the Board of Revenue and the local agents, under the regulations thereby repealed, that the members of such committees should be appointed from among persons professing the religion for the purposes of which the temple, or other religious establishment, was founded or should be maintained, and in accordance, so far as could be ascertained, with the general wishes of those who were interested in the maintenance of such temple or religious establishment, and that the appointments should be for life; s. 10 provided for supplying vacancies in the following terms: "Whenever any vacancy shall occur among the members of a committee appointed as above, a new member shall be elected to fill the vacancy by the persons interested as above provided. The remaining members of the committee shall, as soon as possible, give public notice of such vacancy, and shall fix a day, which shall not be later than three months from the date of such vacancy, for an election of a new member by the persons interested, as above provided, under rules for elections which shall be framed by the local Government, and whoever shall be then elected under the said rules shall be a member of the committee to fill such vacancy. If any vacancy as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred the Civil Court, on the application of any person whatever, may appoint a person to fill the vacancy, or may order that the vacancy be forthwith filled up by the remaining members of the committee, with which order it shall then be the duty of such remaining members to comply; and if this order be not complied with, the Civil Court may appoint a member to fill the said vacancy."

The interpretation clause provided that the expression "Civil Court" should mean the principal Court of Original Civil Jurisdiction in the district in which the temple was situated.

The committees appointed under the Act, appear to have varied in number; in the case under consideration a committee of five was originally appointed. There had been changes from time to time, and, on the 5th September 1880, Gurusami, one of the then five members of the committee, died.

The period of three months expired on the 6th December 1880, and several applications were thereupon made to the District Judge at Madura to take such course as he might deem advisable. He accordingly issued a notice that, unless an election was held before the end of the year, he would take the matter into his own hands. An election did in fact take place on the 28th December 1880, and at such election, tellers, appointed by the District Judge, attended and reported to him the result; the present appellant obtained the largest number of votes, and by an order of the District Judge, dated 10th February 1881, was appointed to fill the vacancy in the committee. As the three months from the death of Gurusami had expired before the election, the power and the duty of appointing his successor had devolved upon the District Judge; the object of the Judge, in permitting an election to take place after the expiration of the three months, was, as he states, to satisfy his own mind as to who would be the proper person for him to select.

The Judge having appointed the appellant on the 10th of February 1881, a petition of appeal was presented to the High Court by persons, who were either interested as candidates, or were in favor of other candidates. The substantial grounds of the appeal were that the Madura temple was devoted to the worship of Siva, and that the present appellant was a Vishnuvite. The High Court agreeing with the petitioners, discharged the order of the District Judge.

From that order of the High Court the present appeal is brought, and the question has now been, for the first time, raised whether the High Court had jurisdiction to deal by way of appeal with the order of the District Judge. It should be mentioned that after the High Court had decided adversely to the present appellant, a petition of review was brought before that court, and they declined to further interfere. During the proceedings in the High Court it was never suggested that that court had no jurisdiction to deal with the question until an application was made for leave to appeal to the Queen in Council, when it was

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On the 4th March 1884, leave was given to the appellant by Her Majesty in Council to enter and prosecute his present appeal.

When the appeal was opened, it appeared to their Lordships desirable that the question of the jurisdiction of the High Court to entertain an appeal from the order of the District Judge should be first taken into consideration, as, if that objection should prevail, it would be unnecessary to go into the disputed questions by which the merits of the case were surrounded; and with the question of jurisdiction alone their Lordships now proposed to deal.

In approaching the consideration of this question, their Lordships cannot assume that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by statute, or by some authority equivalent to a statute. The first question which arises in the present case is whether any right of appeal is given by the Pagoda Act itself. There is nothing in the Act which would suggest it, unless it is to be found in s. 10, to the terms of which their Lordships have already referred. Sections 14 to 20 of the Act provide for the interference of the court by way of suit in certain cases, but they are entirely limited to cases which may be classified as breaches of trust or neglect of duty. There is no other provision whatever for the institution of suits in the Pagoda Act itself. In the opinion of their Lordships the tenth section places the right of appointing a member of the committee in the Civil Court not as a matter of ordinary civil jurisdiction, but because the officer who constitutes the Civil Court is sure to be one of weight and authority, and with the best means of knowing the movements of local opinion and feeling, and one can hardly imagine a case in which it would be more desirable that the discretion should be exercised by a person acquainted with the district and with all the surroundings. The exercise of the discretion being so placed in the District Judge their Lordships are unable to find anything in the tenth section which confers a right of appeal.

It has however been suggested that, though there may be no right of appeal under the Pagoda Act itself, yet a right of appeal must be found in the general law, and their Lordships' attention has been particularly directed to s. 540 of Act X of 1877, which

gives a general right of appeal from decrees of courts exercising original jurisdiction; the jurisdiction conferred by the code (s. 10) is to try suits of a civil nature. The Act of 1877 contained, in its interpretation clause, a declaration of the meaning of the word "decree," as used in that Act, but this interpretation was modified by Act XII of 1879, and, as modified, the interpretation is as follows:—

"'Decree' means a formal expression of an adjudication upon any right, claim, or defence, set up in a Civil Court where such adjudication decides the suit or the appeal." In the opinion of their Lordships there was no civil suit respecting the appointment, and it would be impossible to bring an order made by the District Judge pursuant to s. 10 of the Pagoda Act within the definition of a decree as contained in the code, and no other general law has been suggested. Mr. Doyne, in the course of his argument, contended that if a person, very improper and unfit by reason of his religious qualifications, or moral conduct, was appointed, there must be a right, either by appeal against the Judge's order, or by suit, or in some other way, to remove the person so appointed. There is force in this argument, but whether a person so improperly appointed could, as has been suggested, be removed by proceedings equivalent to proceedings by *quo warranto* in England, or whether, upon a full consideration of the merits, the appellant could be considered as a person improperly appointed, are questions upon which their Lordships are not called upon to express an opinion. In their opinion it is clear that there is no appeal from that which was a pure discretion vested in the District Judge.

It has been suggested, and it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present appellants in the High Court, they have waived the right which they might otherwise have had, to raise the question of want of jurisdiction. But this view appears to their Lordships to be untenable. No amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists. Upon this point, it may be convenient to refer to the judgment of their Lordships delivered by Lord Watson in the comparatively recent case of *Ledgard v. Bull*(1), as it in very concise terms deals with the circumstances under which there can be a waiver of a right to

(1) L.R., 12 I.A., 144; s.c. I.L.R., 9 All., 203.

MINAKSHI complain of a want of jurisdiction. Their Lordships say :—" The defendant pleads that there was no jurisdiction in respect that the suit¹ was instituted before a Court incompetent to entertain it; and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit if it were competently brought; and their Lordships do not doubt that in a such case a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbitrator, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit." In the present case there was an inherent incompetency in the High Court to deal with the question brought before it, and no consent could have conferred upon the High Court that jurisdiction which it never possessed.

Having regard to all the circumstances of the case, their Lordships will humbly advise Her Majesty to allow the appeal, to discharge the order of the High Court, and to dismiss the appeal to the High Court without costs. There will be no costs of the present appeal.

Solicitors for the appellant—*Messrs. Gregory, Rowcliffes & Co.*
Solicitor for the respondent—*Mr. R. T. Tasker.*

APPELLATE CIVIL—FULL BENCH.

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

REFERENCE BY THE BOARD OF REVENUE UNDER s. 46
OF THE INDIAN STAMP ACT, 1879.*

Stamp Act—Act I of 1879, ss. 3, 31, 51.

Allowance for spoiled stamps may be made under s. 51 of the Stamp Act when a stamped instrument has been endorsed by the Collector under s. 31.

CASE referred to the High Court by the Board of Revenue under s. 46 of the Stamp Act—Act I of 1879.

The reference was made as follows :—

"On the 15th April last Mr. Straith, on behalf of the North Travancore Land Planting Society, forwarded two deeds of transfer to the Collector of Madras, and applied, under s. 30 of the Stamp Act, for adjudication of the stamp-duty leviable upon them. The Collector adjudicated; the amount, Rs. 40, was levied from Mr. Straith, and payment of the full duty was certified to under s. 31.

"A clerical error was subsequently discovered in the deeds, and the instruments having thereby become useless, Mr. Straith now asks for a refund of the Rs. 40, so levied from him and certified to under s. 51.

"The Board therefore beg to submit the following question for the orders of the High Court :—

"Can a refund of stamp-duty levied and certified to under s. 31 of the Stamp Act, be claimed under the provisions of s. 51?"

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

The Full Bench (Collins, C.J., Kernan, Muttusami Ayyar, Brandt and Parker, JJ.) delivered the following

JUDGMENT :—Section 31 of the Stamp Act provides that any instrument upon which an endorsement has been made under that section shall be deemed to be "duly stamped," and may be acted upon as if it had been originally duly stamped. Under s. 3,

* Referred Case No. 1 of 1887.

REFERENCE
UNDER STAMP
ACT, s. 46.

clause 10, "duly stamped" as applied to an instrument means stamped or written upon an impressed stamp in accordance with the law in force in British India when such instrument was executed or first executed.

Our answer, therefore, is that allowance may be made under s. 51 of the Stamp Act for instruments endorsed under s. 31 of that Act.

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.
July 29.

REFERENCE UNDER s. 49 OF THE INDIAN STAMP ACT, 1879.*

Stamp Act—Act I of 1879, s. 49.

A bail-bond was executed to a District Munsif, who expressed no doubt as to the amount of duty to be paid and made no application to have the case referred. The District Judge referred the case to the High Court:

Held, that the District Judge was not authorised to make the reference.

CASE stated to be referred for the decision of the High Court by J. D. Goldingham, District Judge of Bellary, under s. 49 of the Stamp Act, in the matter of a bail-bond executed to the District Munsif of Naraindeverkerry. The District Munsif expressed no doubt as to the amount of duty to be paid, and made no application to have the case referred to the High Court.

Counsel were not instructed.

The Full Bench (Collins, C.J., Kernan, Muttusámi Ayyar, Brandt, and Parker, JJ.) delivered the following

JUDGMENT:—It is not explained how this reference comes to be made by the District Judge: it should have been made, if at all, by the District Munsif through the District Judge; but it does not clearly appear that there are grounds for such a reference under s. 49. The District Munsif had apparently no doubt as to the amount of stamp duty payable on the instrument; and it is in such case only that a Court is authorized to make a reference under s. 49 of the Stamp Act.

The reference is therefore returned to the District Judge.

* Referred Case No. 3 of 1887.

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.

REFERENCE BY THE BOARD OF REVENUE UNDER s. 46 OF THE
INDIAN STAMP ACT, 1879.*

1887.
July 29.

Stamp Act—Act I of 1879, s. 3, cl. 13—Mortgage—Indemnity bond.

An agreement entered into by the Secretary of State and a salt contractor recited that the contractor has deposited certain promissory notes to secure the due fulfilment of the contract and provided that the promissory notes should be returned on the due fulfilment of the contract:

Held, that the agreement was a mortgage as defined by the Stamp Act.

CASE referred to the High Court by the Board of Revenue under s. 46 of the Stamp Act.

The reference was made as follows:—

"The Assistant Commissioner of Salt and Abkari Revenue, Tinnevely division, impounded under s. 33 of Act I of 1879, and forwarded to the Collector, a document, purporting to be a mortgage with possession of property valued at Rs. 2,000. The agreement was drawn on a stamp of the value of Rs. 10.

"The Collector considering the document to be a mortgage and also an indemnity bond for a further (indefinite) amount, ruled that it should be stamped with aggregate duty, viz., Rs. 20 + Rs. 5, or Rs. 25 in all.

"The Board are of opinion that the document is a mortgage-deed and should have a stamp of Rs. 20, but that the indemnity clause being incidental to all mortgage-deeds is not liable to a separate duty—*vide Reference by the Board of Revenue*(1).

"The Board have refunded the proportionate penalty levied on the indemnity clause of the document under s. 42, but have no power under the Act to revise the adjudication as to the stamp duty and to order a refund of the duty improperly levied. They have, therefore, resolved to refer the case to the High Court under s. 46, and will, in case of the judgment of the High Court being in accordance with their opinion, order a refund of the excess duty levied."

* Referred Case No. 4 of 1887.

(1) I.L.R., 1 Mad., 133.

REFERENCE
UNDER STAMP
ACT, s. 46.

The agreement in question, to which the Secretary of State for India in Council and Rozario Fernando therein called the contractor were parties, related to the carriage of salt. It was, *inter alia*, recited that "the contractor has lodged in the treasury of Salt Circle office Government promissory notes . . . as security for the due and faithful performance by the contractor of this, his contract;" and it was, *inter alia*, witnessed that "upon the completion of this contract to the satisfaction of the Deputy Commissioner, the Deputy Commissioner will cause to be returned and delivered up to the contractor the said promissory notes to the value of Rs. 2,000, so deposited by the contractor as security for the due and faithful performance of this, his contract."

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

The Full Bench (Collins, C.J., Kernan, Muttusámi Ayyar, Brandt, and Parker, JJ.) delivered the following

JUDGMENT:—The judgment of the High Court is in accordance with the opinion of the Board of Revenue.

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.
July 29.

REFERENCE BY THE BOARD OF REVENUE UNDER s. 46 OF THE
INDIAN STAMP ACT, 1879.*

Stamp Act—Act I of 1879, ss. 5, 14, 35, 37, 39.

A deed of release was endorsed on a deed of conveyance for Rs. 100. The conveyance bore an impressed stamp for one rupee, but the endorsement was unstamped:

Held, that the conveyance was valid and that the release could be validated on payment of the deficient stamp duty and the penalty under s. 39 of the Stamp Act.

CASE referred to the High Court under s. 46 of the Stamp Act.

The reference was made as follows:—

"The Sub-Registrar, Ootacamund, impounded, under s. 35, c. 2 of the Indian Stamp Act, and forwarded to the Collector,

* Referred Case No. 5 of 1887.

REFERENCE
UNDER STAMP
ACT, s. 46.

a document purporting to contain two instruments, one a conveyance written on the face of the paper and one a release written on the back of the paper. The document bore a stamp of one rupee.

"The Collector considered that the conveyance required a stamp of one rupee, and that therefore the release is not entitled to the benefit of the proviso to s. 37, being written not only in contravention of s. 13, but also in contravention of s. 5 of the Act. The Collector doubted whether he could validate the release by a certificate under s. 39 on payment of deficient stamp duty and penalty, or whether he should order the release to be executed over again on a stamped paper.

"The Board feel doubt on the following points:—

- (a) Whether the first instrument should be considered to have been written, executed, and stamped according to law. The Board think that it should, and would regard s. 14 of the Act as only invalidating the second instrument. The first instrument was duly stamped and written in accordance with the terms of s. 12; and the existence of the second instrument on the back does not appear to invalidate the first.
- (b) Whether the second instrument can be validated on payment of the deficient stamp duty and the penalty under s. 39.

"The Board think it can, though obviously it might be very inconvenient that it should be possible that two valid instruments should be written, the one on the face and the other on the back of a stamped paper.

"The Board, feeling some doubts on the case, have resolved to refer it to the High Court."

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

The Full Bench (Collins, C.J., Kernan, Muttusámi Ayyar, Brandt, and Parker, JJ.) delivered the following

JUDGMENT:—As to both questions, the High Court agrees in the view expressed by the Board.

APPELLATE CIVIL.

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

VENKATÁCHALA (DEFENDANT NO. 1), APPELLANT,

and

KUPPUSÁMI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, ss. 31, 53—Public right—Amendment of plaint.

A sued for an injunction to restrain interference with his right to graze cattle on the bed of a certain tank. The other raiyats of the village in whom the same right vested were originally joined as plaintiffs, but the plaint was amended under s. 53 of the Code of Civil Procedure, and their names were struck off the record. A proved no special damage:

Held, (1) that the fact that the other raiyats of the village have similar rights does not make A's right a public right in the sense that no action can be brought upon it unless special damage is proved;

(2) that the right claimed vests in A severally as well as jointly with the other raiyats, and the amendment of the plaint was not contrary to the provisions of s. 31 or 53 of the Code of Civil Procedure.

SECOND appeal against the decree of D. Irvine, District Judge of Trichinopoly, in Appeal Suit No. 69 of 1885, confirming the decree of W. Gopalácharyár, District Munsif of Kulitalai, in Original Suit No. 472 of 1884.

This was a suit for an injunction to restrain defendants from interfering with plaintiff's right to graze his cattle and cut trees for agricultural purposes in the bed of the Peraiyeri (big tank) of Toraiyur. The plaintiff was one of the raiyats and the first defendant was the Zamindár of Toraiyur. The plaintiff first brought the suit in conjunction with other raiyats, but on the objection of the first defendant that the suit was bad for misjoinder, the Court directed the amendment of the plaint by striking out the names of the other plaintiffs. The suit was then gone into on the merits, and a decree was passed by the District Munsif in favor of the plaintiff which was confirmed on appeal by the District Judge.

Defendant No. 1 preferred this second appeal.

Rámachandra Ráu Saheb for appellant.

Mr. Parthasaradhi Ayyangár for respondent.

The further facts of the case and the 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.).

VENKATÁ-
CHALA
v.
KUPPUSÁMI.

JUDGMENT.—Three objections are taken to the decree of the Judge, and the first of them is that the right which is the subject of the present suit is a public right, and that in the absence of special damage no suit ought to have been brought upon it. The respondent's case was that as a raiyat of the village of Toraiyur, he was entitled to graze his cattle on the tank bed and the fact that the other raiyats of the village have similar rights does not make his right a public right in the sense that no action can be brought upon it unless special damage is proved. As observed by the Judge, the right in contest is one which vests in the respondent and the other raiyats jointly and severally. The next objection taken in appeal is that the respondent ought not to have been permitted to amend the plaint and that his suit ought to have been dismissed. The amendment allowed consisted in striking out the names of nine other persons which appeared in the original plaint as those of co-plaintiffs and allowing the plaint to stand as one framed for the purpose of establishing the respondent's right alone. The right claimed vests, as already observed, severally as well as jointly in the respondent and the other raiyats, and the amendment made is not in our judgment contrary to the provisions either of s. 31 or 53.

As to the merits, we see no reason to interfere, and upon the facts found, the decision is right.

We dismiss this second appeal with costs.

APPELLATE CIVIL.

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

NARÁYANASÁMI AND OTHERS (DEFENDANTS), APPELLANTS,

and

KUPPUSÁMI (PLAINTIFF), RESPONDENT.*

Hindú Law—Adoption—Only son given in adoption by widow.

A widow is competent to give in adoption whenever the husband is legally competent to give, and when there is no express prohibition from him.

1886.
October 22.
1887.
April 19.

* Appeal No. 96 of 1886.

NÁRÁYANA-
SÁMI
v.
KUPPUSÁMI.

Three principles appear to regulate the power to give in adoption: (1) the son is the joint property of the father and the mother for the purposes of a gift in adoption, (2) when there is a competition between the father and the mother, the former has the predominant interest or a potential voice, and (3) after the father's death the property survives to the mother.

The adoption of an only son is not invalid—*Chinna Gaundam v. Kumara Gaundam* (1), followed.

APPEAL against the decree of R. Vasudeva Ráu, Subordinate Judge of Negapatam, in Original Suit No. 46 of 1883.

This was a suit to recover family property brought by Kuppusámi, who claimed as the adoptive son of Nagalinga Pillai. Náráyanasámi, defendant No. 3, claimed to hold the property in dispute as the adoptive son of an undivided brother of Nagalinga Pillai. Both adoptions were put in issue; and it was contended that the adoption of Kuppusámi could not be valid in that he was an only son, and that his father was dead at the time when the adoption was alleged to have taken place. The Subordinate Judge found that both the adoptions set up were valid and decreed accordingly.

Against this decree the defendants appealed and the plaintiff filed a Memorandum of Objections.

Bhāshyam Ayyangār and *Désikachāryār* for appellants.

Subramanya Ayyar and *Kaliāyanarāma Ayyar* for respondents.

The further facts of the case and the arguments adduced on the appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.).

JUDGMENT.—There were two brothers at Negapatam, Sattiya Pillai and Nagalinga Pillai, who constituted together a joint Hindú family owning the property now in litigation. Each of the brothers married several wives, but neither of them had any male issue. Nagalinga, the younger brother, died about the 10th November 1876, leaving him surviving two widows, Subbu Lakshmi and Sundaram; and Sattiya Pillai's branch of the family consisted of Sattiya Pillai and his two wives, Parvati and Sornam, and a daughter named Annam. The real parties to this appeal are two minors named Kuppusámi, the plaintiff, and Náráyanasámi, defendant No. 3. It was alleged for the former, that, about 15 days prior to his death, Nagalinga Pillai adopted him, that he had since lived in coparcenary with Sattiya Pillai, that Sattiya Pillai died on the 21st January 1883 without male issue, natural

or adopted, and that, as the only surviving male coparcener of the joint Hindú family, he was solely entitled to the property now in dispute. The *factum* and validity of the adoption were denied for and by the appellants. The two brothers had a sister named Ponnammal, who had four sons named (1) Appadorai Pillai, (2) Govinda Pillai, (3) Singaravelu Pillai and (4) Kayarogana Pillai, who had formed together another joint Hindú family, which, according to Subbu Lakshmi's evidence was possessed of property of 70,000 or 80,000 rupees value. Of these four brothers, Govinda Pillai died first, Appadorai Pillai died in 1875, Singaravelu died in 1881, and Kayaroganam died in 1883. In this family, none of the brothers, except Appadorai Pillai, had male issue and even he had an only son—the respondent—when he died in 1875. In advertence to this circumstance, the appellants contended that the respondent's adoption, even if true, was invalid for two reasons, viz., first because he was the only son of his father and as such not eligible for adoption, and, secondly, for the reason that, assuming that a father was competent to give his only son in adoption so as to validate it when it was made, the mother was certainly not entitled to do the same either with or without the consent of his kinsmen in the absence of his permission. Apart from denying the respondent's adoption, the appellants alleged that Náráyanasámi was adopted by Sattiya Pillai the day previous to his death, viz., 20th January 1883, and that, by virtue of such adoption, he was entitled to the property in suit. We may also mention that the respondent's natural mother Vedam is the sister of Nagalinga Pillai and that the third defendant's natural father, Ramasami Pillai, is Sattiya Pillai's first cousin on the mother's side and a cousin in the second degree on the father's side. The questions raised for decision in the suit were, whether the alleged adoptions or either of them were or was true, and whether the respondent's adoption was invalid on either of the grounds suggested on behalf of the appellants.

The Subordinate Judge has found that both adoptions are true and valid and decreed to each of the rival claimants a moiety of the property in dispute. To this decree, both parties object, the appellants, so far as it upholds the respondent's adoption, and the latter, so far as it recognizes the adoption of the third appellant. We shall consider first whether the appeal can be supported and then deal with the Memorandum of Objections.

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SAMI
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[Their Lordships here set out and discuss the evidence as to the adoption of the respondent. The judgment then proceeds as follows :—]

Upon considering the whole evidence, we are not prepared to hold that the Subordinate Judge was wrong in considering the respondent's adoption as sufficiently proved.

The next contention is that the adoption is invalid either because the respondent was the only son of his father or because there was an implied prohibition, which rendered his mother incompetent to give him in adoption. As to the first ground of objection, it was not pressed and we are content to hold by decided cases. The question was considered in this Presidency in 1862, and after consideration the High Court then came to the conclusion that it was concluded by authority, *Chinna Gaundan v. Kumara Gaundan*(1). In Regular Appeal 70 of 1882, this decision was followed. Again, the Judicial Committee referred to the decision in 1862 and to the decision in *Raje V. A. Nimbalkar v. Jayavantrav M. Ranadive*(2), as showing that the maxim "*Quod fieri non debuit factum valet*" had received a limited application in Southern and Western India, in *Srimati Uma Deyi v. Gokoolanund Das Mahapatra*(3). We are not prepared to depart from the course of decisions in this Presidency, and we hold then that the adoption of an only son, if actually made, is valid, however sinful the act may be on strict religious considerations.

As to the second ground of objection, according to the original texts of Hindú Law, the prohibition of the adoption of an only son is made in order that the family of the giver may not thereby become extinct, but not with reference to any distinction between the power of the father and after his death of the mother to give an only son in adoption. As was contended by the pleader for the respondent, the texts suggest a disqualification rendering one ineligible for adoption whether he is given by the father or the mother. Vasishta says "an only son let no man give or take; for he is destined to prolong the line of his ancestors" (*Dattaka Chandriká*, s. 1, sloka 29)(4). Caunaka says, "By no man having an only son is the gift of a son ever to be made. By a man having several sons such gift is to be anxiously made," (*Dattaka*

(1) 1 M.H.C.R., 54.
(3) L.R., 5 I.A., p. 53.

(2) 4 B.H.C.R., A.C., 191.
(4) Stokes' Hindú Law Books, p. 636.

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Chandriká, ss. 1-29). The texts contain a suggestion as to who ought not to be adopted and therefore either given or taken in adoption. If the husband then can give an only son in adoption on the ground that the texts are only directory or rest on theological considerations, the same reasoning applies by whomsoever that son is given. The general rule is, as suggested in *Dattaka Chandriká*, s. 1, slokas 31 and 32, that the mother can give whenever the father can legally give, for what is not expressly prohibited by him is tacitly permitted by him. Three principles appear to regulate the power to give: (1) a son is the joint property of the father and the mother for the purposes of a gift in adoption; (2) when there is a competition between the father and the mother, the former has a predominant interest or a potential voice; and (3) after the father's death, the property survives to the mother.

According to *Manu*, chap. IX, p. 168(1), the father or the mother may give. According to *Yājñavalkya* who is followed in *Dattaka Chandriká*, he, whom his father or mother gives, is a son given. According to *Vasishta*—"let not a woman either give or take a son, unless with the consent of the husband." The author of the *Dattaka Chandriká* interprets this text with reference to that of *Yājñavalkya* and deduces the theory of implied consent in the absence of express prohibition. According to the *Mitákshará*, chap. I, s. XI(2), he, whom his father or mother gives for adoption, shall be considered as a son given. In the note to *Mitákshará*, chap. I, s. XI, several interpretations of the passage "whom his father or mother gives" are noticed by the translator. According to the *Mitákshará*, the particle "Cha" in the original text is conjunctive and both the father and the mother must join in the gift. According to *Bulambatta*, the particle is used in a disjunctive sense. According to *Smṛiti Chandriká*, he, whom his father or mother affectionately gives as a son, is a given son or *dattama* (*Smṛiti Chandriká*, chap. X, 3)(3).

According to *Dattaka Chandriká*, where there is no express prohibition, women are considered to be independent on the authority of *Yājñavalkya*. The theory of implied prohibition in the absence of express authority cannot then be supported in

(1) *Institute of Manu* by Jones, Ed. 4, p. 252.
(2) Stokes, p. 415; *Mandlik*, p. 468. (3) Ed. by *Krishnaswamy Iyer*, p.

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principle in regard to the gift of a son in adoption. We are then referred to the decision of the Bombay High Court in *Lakshmappa v. Ramava*(1) and in *Somasekhara Raja v. Subhadra Maji*(2). In Western India, Dattaka Mimamsa is a binding authority and according to it no adoption can be made for the husband after his death without his express authority.

The Mayukha Kaustubha and other treatises of special authority in Bombay introduced the theory of implied authority, on the ground that an adoption by a widow was a meritorious act, which, unless forbidden by the husband, might be taken to have been sanctioned. As a limitation of the theory founded on the character of adoption as a meritorious act, they held that the adoption of an only son was a sinful act and that it did not come within the rule of implied authority. It followed then that in the absence of express authority from the husband, a widow can neither give nor take an only son in adoption. In Southern India, however, the theory of implied authority from the husband to adopt has not been recognized. There must be either the express permission of the husband, or what is equivalent to it the authority of his sapindas; otherwise the widow is not competent to adopt. The meritorious character of an adoption as a religious act was not accepted as the basis of a general presumption of law and the limitation suggested in connection with it has likewise no application in this Presidency. We must hold then on the authority of Dattaka Chandrika, and Yajñavalkya that the widow is competent to give whenever the husband is legally competent to give and when there is no express prohibition from him. The result is that this appeal must fail, and we accordingly dismiss it with costs.

[The Memorandum of Objections was also dismissed with costs, their Lordships having ruled that the Subordinate Judge was right in holding that appellant No. 3 had been duly adopted as alleged.]

(1) 12 B.H.C.R., 364.

(2) I.L.R., 6 Bom., 524.

APPELLATE CIVIL—FULL BENCH.

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

MINAKSHI AND ANOTHER (DEFENDANTS), APPELLANTS,

and

RAMANADÁ (PLAINTIFF'S REPRESENTATIVE), RESPONDENT.*

Hindú Law—Adoption—Dattaka Mimamsa, s. V, slokas 16-20—Dattaka Chandrika, s. II, sloka 7—Yajñavalkya, chap. II, verse 128—Mitakshara, chap. I, s. XI, paragraph 1—Smriti Chandrika, 152.

It is a general rule of Hindú Law that there can be no valid adoption unless a legal marriage is possible between the person for whom the adoption is made and the mother of the boy who is adopted, in her maiden state.

SECOND appeal against the decree of J. Hope, District Judge of Chingleput, in Appeal Suit No. 98 of 1879, reversing the decree of the District Munsif of Trivellore, in Original Suit No. 677 of 1878.

This was a suit to set aside an adoption.

A widow acting under the authority of her deceased husband adopted a boy with whose mother he could not have contracted a legal marriage.

The father of the deceased man brought this suit against the widow and the adoptive son to have the adoption set aside as invalid, on the ground of affinity between the natural mother and the adoptive father. The District Munsif dismissed the suit on the ground that the adoption contravened no rule of Hindú Law, but his decree was reversed on appeal by the District Judge.

The defendants preferred this second appeal.

Mr. Shephard for appellants.

Bhaskyam Ayyangar for respondent.

The second appeal came on for hearing before (Kernan and Muttusami Ayyar, JJ.), who made the following

ORDER:—Mr. Shephard maintains that there has been a mis-translation of some of the important texts, and that the cases in this Court adopting the general rule, viz., "that a boy cannot be legally adopted whose mother the adopter could not have married,"

* Second Appeal No. 267 of 1882.

1886.
Sept. 8.
1887.
April 29.

MINAKSHI
v.
RAMANADA. is not only not absolute but has no legal foundation. We refer the decision of this appeal to a Full Bench.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court.

The *Acting Advocate-General* (Hon. J. H. Spring Branson), *Anandachari* and *Ramasami Ayyangar* for appellants.

Bhashyam Ayyangar and *Subba Rao* for respondent.

JUDGMENT.—The suit, which is the subject of this second appeal, was brought by one Appa Sastri to set aside an adoption. Appa Sastri had two sons: Kachappa Sastri was the elder and Krishna Sastri was the younger. On the 19th September 1876, Krishna Sastri died, leaving a widow named Minakshi Ammal; and Kachappa Sastri died in June 1877, leaving a minor son. In August 1877 Minakshi Ammal adopted defendant No. 2, Chinappien. It is admitted that his mother was a sagotra of Krishna Sastri and it is found by the Courts below that Krishna Sastri authorized his wife to adopt, that the plaintiff gave his sanction to the adoption, and that defendant No. 2 was accordingly adopted by defendant No. 1. The plaintiff's case was that, as no legal marriage was possible between Krishna Sastri and the mother of defendant No. 2 in her maiden state, the adoption was invalid. The District Munsif held that the Hindú Law contains no such prohibition as is mentioned above and upheld the adoption; but, on appeal, the District Judge set aside the adoption on the ground that the plaintiff's contention was well founded. The defendants preferred this second appeal, and the question referred to the Full Bench is whether it is a rule of Hindú Law that there can be no valid adoption unless a legal marriage is possible between the person for whom the adoption is made and the mother of the boy who is adopted, in her maiden state. It is conceded that among Brahmans marriage is prohibited between persons of the same gotram. In Caunaka's text cited in Dattaka Mimánsá, sec. V, sloka 16(1), and in Dattaka Chandriká, sec. II, sloka 7(2), it is stated that, in order that one may be eligible for adoption, one should bear "the reflection of a son." This phrase was interpreted by both commentators to denote the capability to have been begotten by the adopter through appointment and so forth; Dattaka Mimánsá, sec. V, verse 16, and Dattaka Chandriká, sec. II, sloka 8. In

(1) Stokes' Hindú Law Books, p. 590.

(2) *Id.*, p. 638.

sloka 17, the author of the Dattaka Mimánsá observes that the brother, paternal and maternal uncles, the daughter's son and the sister's son are excluded, and in sloka 18, he states that prohibited connection is common to them all, and reiterates the proposition that prohibited connection exists whenever there is unfitness to be begotten by the individual himself by appointment. In the next paragraph he says that when the mutual relation between a bride and a bridegroom bears analogy to that of father or mother, such marriage is a prohibited connection; and in support of that proposition, he cites a passage from Grihyaparisista describing prohibited connection in the case of marriage. That passage is as follows:—"The mutual relation between a couple being analogous to the one being the father or mother of the other, connection is forbidden; as for instance, the daughter of the wife's sister and the sister of the paternal uncle's wife." In sloka 20, the commentator states that, "in the same manner as in the above text of the Grihyaparisista prohibited connection is excepted in the case of marriage, so in the case in question (one who, if begotten by the adopter, would have been the son of) a prohibited connection must be excepted, in other words, such person is to be adopted as with the mother of whom the adopter might have carnal knowledge." The Sanskrit words which are rendered carnal knowledge are "Patiyogam."

The contention in support of this second appeal is that these words are not correctly translated and that the original Smriti contain no allusion to the possibility of a legal marriage or to fitness to be begotten through appointment.

There is a learned criticism on this point in Mandlik's translation of Yájñavalkya, pages 478-486; and the arguments adduced by the appellants' pleader were similar to those to be found in that book. The first contention is that the interpretation placed by the commentators on the original Smritis is not warranted. The words in those Smritis are "Putra Sadrisa" and "Putra Cháyávaham," and their literal meaning is that the child taken in adoption should be one that is like a son born, or that is the reflection of such son. The authors of those Smritis, Caunaka and Manu, did not explain in what respect there should be a likeness or resemblance, and the commentators supplied the omission by analogy. In doing so, they took as a guide the ancient Hindú Law which regulated "niyoga" or the practice of begetting a child

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by appointment, and considered that the likeness or resemblance consisted in "fitness to be begotten by self through niyoga." There is this justification for the analogy, viz., that the object in permitting niyoga to the extent to which it was recognized by the ancient law, was to provide a substitute for the son of the body and thereby to prevent the extinction of that spiritual benefit which was believed to arise from the performance by a son of funeral and annual obsequies. It cannot be denied that niyoga, howmuchsoever it was censured by Manu and others, prevailed in former times and was recognized by ancient Hindū Law as a cause of filiation, though it was considerably restricted. Of the twelve descriptions of sons, Kshētraja was one and such a son ranked in the ancient law above the given son. See Mītāksharā, chaps. I, XI, paragraph 1(1) and Smṛiti Chandrikā, chap. X, s. 4(2).

The suggestion made by the appellants' pleader that we should now see whether the commentator's interpretation by analogy was justifiable cannot be adopted. It should be remembered that in several instances the commentaries themselves have become new law-sources, owing to the adoption of the opinion expressed therein by the people as part of the customary law. It is not possible to say beforehand, except by reference to actual usage, whether the opinion of the commentator on any particular point is part of the Hindū Law as received by the people; and the only course open to Courts of Justice is, as pointed out by Muttusāmi Ayyar, J., in the Sivaganga case—*Muttu Vaduganatha Tēvar v. Dora Singha Tēvar*(3) to take the commentaries which are accepted generally as authoritative as containing the law applicable to the parties, unless they show by clear evidence that in some special matter the usage of the people is not in accord with them.

Another argument is that in Dattaka Mīmāṃsā, sec. II, śloka 20, there is mistranslation. Though the correct translation is as suggested by Mandlik, and though the Sanskrit words in the original mean no doubt "with the mother with whom niyoga is "possible" instead of "with the mother of whom the adopter might have had carnal knowledge," we do not consider that the rule as laid down by Sutherland(4) has led to any substantial error. According to the commentaries, the rule is that niyoga must be

possible between the adoptive father and the mother of the child taken in adoption; but according to the inference drawn by Sutherland, it is equivalent to saying that legal marriage must be possible. Prohibited connection in the case of marriage has reference to the relationship in which the couple between whom marriage is proposed stand irrespective of marriage and when the girl selected for marriage is a maiden. But prohibited connection in the case of niyoga has reference to the relationship between a married woman and the person who is appointed to beget a child upon her. In comparing the law of prohibited connection in the one case with that in the other, it is necessary to bear in mind the theory that by marriage a woman passes into her husband's family, or, as the writers on Hindū Law say, her gotram becomes that of her husband. It should also be remembered that the rules of prohibited connection had a common object in both cases, viz., the prevention of incest.

In the case of marriage, there are three prohibitions, viz.—

- (i) The couple between whom marriage is proposed should not be sapindas;
- (ii) They should not be sagotras; and
- (iii) There should be no Viruddha Sambandha or contrary relationship, that is, such relationship as would render sexual connection between them incestuous.

This contrary relationship is defined as consisting in the couple being so related to each other that by analogy the one is the father or the mother of the other, as for instance, the daughter of the wife's sister and the sister of the paternal uncle's wife. Now the rules as to the person eligible for appointment to beget a child are to the following effect:—According to Manu, chap. IX, verse 59(1), a brother or a sapinda relation can alone be appointed. The brother or sapinda mentioned is the brother or sapinda of the woman's husband who by reason of marriage is in law her own brother or sapinda. As a sapinda his gotram must be the same as that of her husband, and as the marriage between her and her husband must be taken to have been in accordance with the law as to prohibited relationship, she could not have been in her maiden state a sapinda of the person declared eligible for appointment. There is, therefore, no conflict between the law of marriage and

(1) Stokes' Hindū Law Books, p. 410.

(2) Edition by Kristnasawmy Iyer, pp. 139-140. (3) I.L.R., 3 Mad., 339.

(4) Sutherland's Law of Adoption, p. 223 (Synopsis).

(1) Institutes of Manu by Jones, Ed. 4, p. 238.

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the rule prescribed by Manu as to niyoga. Yājñavalkya declares in chap. II, verse 128(1), that a sapinda or sagotra or some other person may be appointed to beget issue. In Mitāksharā, chap. I, sec. XI, verse 1(2), the son of the wife is defined to be one begotten on a wife by a kinsman of her husband or some other relative. In Dattaka Mimānsā, sec. V, verse 16(3), the commentator says the person appointed may be a brother, a near or distant kinsman and so forth, and, as a justification for introducing the words "so forth," he observes as follows:—"Nor is such appointment of one unconnected impossible, for the invitation of such may take place under this text." "For the sake of seed, let some Brāhmana be invited by wealth." As to the sapinda or sagotra of her husband, he could not have been her sapinda or sagotra when she was a maiden, as already explained. As to some other person, the proper construction is, some person like the others previously specified, in the sense that sexual intercourse with him would not be incestuous under the marriage law. Thus, there is no conflict between the law of appointment as to the person eligible for appointment and the law of marriage as to the person eligible for marriage. The object in both was that the sexual intercourse authorized by law should not be incestuous, and the religious foundation for the rule is that the offspring of incest is outcaste and not competent to offer funeral or annual oblations with efficacy. The point in the analogy consists in securing a son competent to perform those oblations and the analogy holds good whether it is considered in connection with the law of appointment or the law of marriage. Marriage, niyoga and adoption were alike ordained from a religious point of view by ancient writers on Hindú Law for the production of a son competent to offer annual and funeral oblations with efficacy, and Sutherland referred to the law of marriage as to what is and is not incestuous connection, probably because it is the law now in force; whilst the commentators referred to the law of appointment and explained it by reference to the law of marriage because the object common to marriage and niyoga was alike to prevent incest. It does not seem to us that in substance there is any error whether the rule of prohibited connection which is taken as a guide is taken from the one or other, provided special cases of

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deviation from the rule referable to other ancient practices are recognized as exceptions to the general rule when they are proved by usage. As to the argument that the expression "Viruddha Sambandha" or contrary relationship or prohibited connection is applied by writers on Hindú marriage to relationship other than sapinda or sagotra relationship,—it is perfectly true; but it does not follow that sapinda and sagotra relationship does not render the connection equally incestuous. It would be monstrous to say, and there is no authority for the statement, that a brother might be appointed to beget a child upon his sister for her husband; and marriage is prohibited among Brahmans in Southern India between a girl and a boy who are of the same gotra, because they stand to one another in the relation of brother and sister as being descended from the same paternal ancestor.

Another objection is that, according to this rule, the adoption of a daughter's son, of a sister's son, and of a brother is not permitted, whilst according to usage it is permitted. In the case of the two former, the special usage is referable to the ancient law of Putrika Putra; and in the case of a brother, if a special usage is proved, it may be referable to the ancient practice of regarding the eldest brother as a father. On this point, however, we do not consider it necessary to express any opinion in the absence of evidence as to usage. But these special cases do not seem to us to negative the applicability of the rule under consideration to us as a general rule. The case before us is not one referable to any authorized ancient practice or text; nor was there any plea or evidence of a special usage. We are therefore of opinion that this second appeal cannot be supported and that it must be dismissed with costs.

(1) Mandlik pp. 218-219. (2) Stokes' Hindú Law Books, p. 410. (3) *Id.*, p. 590.

APPELLATE CIVIL.

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

RATHNASAMI AND OTHERS (DEFENDANTS), APPELLANTS,
and

SUBRAMANYA (PLAINTIFF), RESPONDENT.*

*Transfer of Property Act—Act IV of 1882, ss. 130, 135, 136, 137. Limitation
Act—Act XV of 1877, sch. II, art. 116—Apportionment.*

A sued as assignee of a registered bond (payable in 1872) hypothecating land in the mofussil.

B, A's assignor, was a vakíl practising in the High Court. B had obtained an assignment of the obligee's interest in the bond sued on and also another bond for Rs. 3,000 between the same parties, after the 1st July 1882 for Rs. 4,500. B had previously purchased the two bonds at a sale in execution of the decree of a Mofussil Court for Rs. 5 each. A's assignment from B purported to be made to A in payment of certain debts owed to him by B. No interest has been paid on the bond and no tender had been made to the plaintiff.

Held,—That the creditor's personal remedy was passed by art. 116 (1); and on the evidence, that there was no consideration for the bond sued on or that it had failed.

Per cur.—The true construction of s. 136 of the Transfer of Property Act appears to us to be that the officers mentioned in it habitually exercising their functions in a particular Court are precluded from buying any actionable claim cognizable by that Court. . . . We are referred to no evidence on the record as showing that B practised as a pleader regularly in the Subordinate Court at Negapatam, and we must therefore overrule the contention that the assignment to him is inoperative altogether. There is, however, no doubt that the assignments to him and by him are governed by s. 135, and that under s. 137 the person to whom a debt is transferred takes it subject to the liabilities to which the transfer was subject at the date of the transfer.

Upon the facts of the case B was clearly not entitled to recover more than Rs. 4,500, whatever might be due on the document (2). As he was the purchaser of an actionable claim, s. 135 of the Transfer of Property Act applied to him, and he could not recover more than the price he paid and the interest due thereon.

There is no foundation for the suggestion that where two actionable bonds are brought together for Rs. 4,500, and only Rs. 950 are recovered upon one of them the assignee is precluded from recovering the difference, but that he must submit to a loss arising from an apportionment.

APPEAL against the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in Original Suit No. 35 of 1884.

* Appeal No. 37 of 1886.

(1) See also Seshayya v. Annamma, I.L.R., 10 Mad., 100 (Reporter's note).
(2) See Subbammal v. Venkatarama, I.L.R., 10 Mad., 289 (Reporter's note).

This was a suit by the assignee of a registered hypothecation bond for Rs. 7,250 (filed as exhibit A), dated 22nd April 1871, and payable on 30th June 1872. The land hypothecated belonged to the defendants and was situated in the mofussil. RATHNASAMI
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The obligee of exhibit A assigned it under exhibit B, dated 22nd November 1871, to Namaswaya Mudali, who, in turn, assigned it together with another bond under exhibit C, dated 8th July 1882, for Rs. 4,500 to Arunachala Chetti, benamsee for Dorasámi Ayyar, a vakíl practising in the High Court. Arunachala Chetti and Dorasámi Ayyar assigned it again together with other bonds to the plaintiff under exhibit D, dated 22nd July 1884, the transfer being professedly made in discharge of previous debts owing by Dorasámi Ayyar to the assignee. The original deeds were not handed over on these assignments, and before the date of exhibit C, Dorasámi Ayyar had purchased exhibit A, together with another bond for the sum of Rs. 3,000 made between the same parties as exhibit A, and mentioned in it as still outstanding, at a Court sale held in execution of a decree. The purchase money paid by Dorasámi Ayyar was Rs. 5 for each bond. On the bond for Rs. 3,000 Dorasámi Ayyar recovered in 1880, as a compromise, the sum of Rs. 950. No interest had been paid on the bond A and no tender had been made to the plaintiff before action.

The Subordinate Judge passed a decree in favor of the plaintiff for the full amount sued for, declaring the defendants personally liable.

Defendants Nos. 2, 3 and 4 preferred this appeal.

Bhāshyam Ayyangár and Désikacharyár for appellants.

Mr. K. Brown and Rámá Ráu for respondent.

The followed cases were among those cited in the argument:
Rajanikanth Nag Rai Chowdhuri v. Hari Mohan Guha(1), Modun Mohun Dut v. Futtarunnissa(2), Grish Chandra v. Kashisauri Debi(3).

The rest of the 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.—One Aiyavu Nayak, deceased, his nephew, defendant No. 1, and his grand nephew, defendant No. 2, formed

(1) I.L.R., 12 Cal., 470.

(2) I.L.R., 13 Cal., 297.

(3) I.L.R., 13 Cal., 145.

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SUBRAMANYA. together a joint Hindú family which owned in 1871, among other property, some 12 velies of land in the village of Keelaperambur situated in the district of Tanjore. The decree which is the subject of this appeal purports to enforce a hypothecation bond (exhibit A) which Aiyavu Nayak, the defendant No. 1, and the mother and guardian of defendant No. 2 executed in favor of one Velayuda Udayan for Rs. 7,250 on the 22nd April 1871. That bond secured the debt on the land mentioned above and provided for its repayment before the 30th June 1872 with interest at 9 per cent. per annum. The consideration, as recited in the document, consisted of three distinct items, viz., Rs. 2,000 and Rs. 752½, principal and interest due on a prior hypothecation bond (exhibit A1), which was executed by Aiyavu Nayak in favor of the obligee on the 25th September 1867, and Rs. 4,497½ received for the purposes of paying off a debt owing to the Branch Bank of Madras at Negapatam, and discharging the assessment due to Government by the joint family.

In the bond (exhibit A) which is the subject of the present litigation, allusion is made to another hypothecation bond for Rs. 3,000 which was executed on the 10th December 1865 in regard to some six velies of land belonging to Aiyavu Nayak's family in the village of Velanpuducoddy, still as outstanding. Document A was transferred first by the obligee to one Namaswaya Mudali on the 23rd November 1871, again by Namaswaya to one Arunachala Chetti, *benamsee* for Dorasámi Ayyar, on the 8th July 1882, and lastly by Arunachala and Dorasámi to the respondent—the plaintiff—on the 22nd June 1884 by exhibits B, C, and D. The property under hypothecation is partly in the possession of the second defendant or first appellant who obtained a decree for a third share of the property belonging to his family in the partition suit No. 153 of 1876 on the file of the Sub-Court, and partly in the possession of defendants Nos. 3 to 5, who claim to have purchased the hypothecated land on the 9th December 1874. The respondent brought the present suit to recover Rs. 17,151, being principal and interest said to be due to him as the last assignee of the hypothecation bond (exhibit A). His case was that the several transactions evidenced by exhibits A to D were real and binding on the defendants, and the Subordinate Judge decreed the claim, disallowing, however, so much of the interest as exceeded the principal. By his decree he made defendants Nos.

1 and 2, and all their property responsible for the claim, and directed the sale of the 12 velies of land under hypothecation in default of payment; and defendants Nos. 2, 3, and 5 have preferred this appeal. The objections urged in its support are (1) that there was no consideration for exhibit A, or that there was a failure of consideration, if any; (2) that the document is not binding on the first appellant who was a minor in 1871; (3) that the claim to a personal decree is barred by limitation; (4) that exhibits B to D were merely speculative, and the consideration alleged for them was either nominal or fictitious; and (5) that the claim is invalid under Act IV of 1882, or at all events in respect of more than the proportionate amount paid by the respondent's assignor with reference to the two hypothecation bonds which formed the subject of the assignment (exhibit C) in his favor.

As to the preliminary objection, that the claim to recover the debt otherwise than by the sale of the property under hypothecation is barred by limitation, we are of opinion that it must prevail. The bond A was payable on or before the 30th June 1872, and the present suit was brought in June 1884, a few days before the expiration of 12 years, whilst the statutory period prescribed by art. 116 of the second schedule of the Limitation Act for a suit to recover the debt due on a registered bond like A is six years. Article 132 applies only to the remedy against the hypothecated property. So it was held by the Privy Council with reference to the corresponding article in the second schedule of Act IX of 1871 in *Ramdin v. Kalka Pershad* (1). The words used in that Act are, "For money charged upon immovable property," whilst the words used in art. 132 of Act XV of 1877 are "To enforce payment of money charged upon immovable property," and the language employed in both appears to refer to suits in which the plaintiff seeks to enforce the charge. The case of *Pestonji Bexonji v. Abdool Rahiman Bin Shaik Budoo* (2) decided that art. 132 in Act XV of 1877 applied only to the remedy against immovable property and not to every remedy which the instrument carried with it. It is no doubt provided by s. 43, Act X of 1877, that a person entitled to more than one remedy in respect of the same cause of action may sue for all or any of the remedies, that if he omits (except with the leave of the

(1) L.R., 12 I.A., 14.

(2) I.L.R., 5 Bom., 463.

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Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted, and that for the purposes of that section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action. But it does not necessarily follow from this that the same period of limitation was intended to be prescribed for the enforcement of both remedies, and the intention was to prevent several suits for several remedies unless there was some special cause in which case liberty was reserved for the party concerned to obtain leave of the Court to institute different suits. The decree appealed against cannot then be supported so far as it makes the first and second defendants and their general property liable for the claim.

The next objection taken in appeal is that assuming that there was consideration to support documents A to D, the claim is bad in whole or in part under Act IV of 1882. This Act came into force on the 1st July 1882 and it cannot apply either to the assignment B, which is dated November 1871, or to the purchase by Dorásami, the respondent's assignor, of the hypothecation bond A for Rs. 5 at the Court sale held in execution of the decree in Original Suit No. 15 of 1873, on the 2nd March 1878. It is then argued that the assignment (exhibit C), dated the 8th July 1882, was made for the benefit of Dorásami, though ostensibly in the name of Arunachala, and that as Dorásami was a vakíl of the High Court, the assignment of an actionable claim in his favor was contrary to the provisions of s. 136 of Act IV of 1882. That section provides that "no Judge, Pleader, Mukhtar, Clerk, Bailiff or other officer connected with Courts of Justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions." An actionable claim is defined by s. 130 to be "a claim which the Civil Courts recognize as affording grounds for relief whether a suit for its enforcement is or is not actually pending or likely to become necessary." The Subordinate Judge confines this prohibition to cases where bonds which are actionable are attached and sold in execution of decrees of Courts of Justice, but we do not consider that such is the proper scope of the section. The words "falling under the jurisdiction of the Court" do not mean "*in execution of decrees.*" Nor is there anything in s. 136 to suggest that the sale contemplated by it is only a Court sale. It is urged by the appel-

lants' pleader that a vakíl of the High Court is entitled to practise as well in every Subordinate Court as in the High Court, and that he is not at liberty to buy an actionable claim anywhere in this Presidency. But we are unable to accept this suggestion either, for it goes beyond the words "the Court in which he exercises his functions." The true construction appears to us to be that the officers mentioned in s. 136 habitually exercising their functions in a particular Court are precluded from buying any actionable claim cognizable by that Court. The intention was probably not to place them in a position in which they may be tempted to use the influence or the information which they may acquire by virtue of their possible connection with the transaction of business in the Court, to the prejudice of persons who might have to resort to it for the adjudication of actionable claims. We are referred to no evidence on the record as showing that Dorásami Ayyar practised as a pleader regularly in the Subordinate Court at Negapatam, and we must therefore overrule the contention that assignment C is inoperative altogether. There is, however, no doubt that the assignments C and D are governed by s. 135, and that under s. 137 the person to whom a debt is transferred takes it subject to the liabilities to which the transferor was subject at the date of the transfer. Assuming that the hypothecation A is a valid transaction as against the appellants, the subsequent partition and purchase on which the appellants rely must be taken to have been made subject to it. On the 22nd March 1878 Dorásami bought the hypothecation bond A and the hypothecation bond for Rs. 3,000, of the 10th December 1865, for Rs. 5 each at the Court sale held in execution of the decree in Original Suit No. 15 of 1873 on the file of the Subordinate Court. This is proved by the sale account (exhibit V) the list of attachment (exhibit VI), and Dorásami Ayyar's receipt (exhibit X), which was admitted in evidence on appeal. This being so, it must be taken that, by the Court sale, the right to recover the entire amount due to the judgment-debtor, Velayuda Udayan, under those documents passed to Dorásami Ayyar, although he paid no more than Rs. 10 for them. But it is shown by the assignment B that the two documents purchased by Dorásami were included in the four bonds assigned by the judgment-debtor Velayuda Udayan to Namaswaya alias Chokku Mudali of Peralam in November 1871. This prior assignment placed Dorásami in this

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predicament, viz., unless he showed that the prior assignment was a colorable transaction, or obtained its transfer, his purchase for Rs. 10 at the Court sale was ineffectual. He ventured, however, to institute Original Suit No. 125 of 1880 against defendants Nos. 1 and 2, and Aiyavu Nayak and three others to recover from them and by the sale of the hypothecated property Rs. 7,050, which he said was due upon the hypothecation bond for Rs. 3,000 of the 10th December 1865. But whilst that suit was pending, he entered into a compromise with the defendants therein and accepted from them Rs. 950 in full satisfaction of his claim. Thus Dorasami's speculation in regard to the hypothecation bond of December 1865 was successful to this extent, viz., that he recovered Rs. 950 upon a bond for which he had paid Rs. 5 as its price. However, in July 1882, he succeeded in obtaining from Namaswaya an assignment of the two bonds purchased at the Court sale, for, as it alleged, Rs. 4,500, whilst the amount due upon them was over Rs. 16,000. He took the transfer C not in his own name, but in the name of Arunachala, a Nattukotai merchant or money-lender with whom, it would seem, Dorasami had dealings. It is not clear why Dorasami did not take the assignment in his own name, but it was probably because of his having instituted Original Suit No. 125 of 1880 and accepted Rs. 950 in satisfaction of his claim under one of those documents. By the desire of Dorasami, Viaravan Chetty, the principal of Arunachala, instituted Original Suit No. 31 of 1883 in the Subordinate Court at Negapatam, the bond sued upon being again the hypothecation bond of the 10th December 1865, and the amount claimed therein being Rs. 5,000; but the Subordinate Judge of Negapatam dismissed the claim. It would appear that the original bond was not forthcoming at the trial of that suit and that Namaswaya handed to Dorasami only a registered copy. Dorasami's connection with the assignment C, his agreement with Arunachala that if the suit failed, Dorasami was to pay him back Rs. 4,500 advanced for C, and if the suit succeeded, the latter was to pay the excess to the former, the institution by Dorasami and the result of Original Suit No. 125 of 1880, and the suspicious character of the evidence produced at the trial to prove the loss of the original bond were referred to by the Subordinate Judge in support of his decision. Thus Dorasami's scheme of improving his position as purchaser by the assignment C failed and ended

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in a loss so far as it related to the document of the 10th December 1865. It is to be observed, however, that Dorasami purchased also document A for Rs. 5 and got it included in the two documents, of which the assignment C was taken for Rs. 4,500 in the name of Arunachala. After the dismissal of Original Suit No. 31 of 1883, Dorasami and Arunachala assigned the hypothecation bond A on the 22nd June 1884 to the respondent—plaintiff—who is Dorasami's wife's brother, and whose son is Dorasami's son-in-law. Document D, which evidences this assignment, recites, and it is the plaintiff's case, that the consideration for it was the liquidation of two prior debts amounting to Rs. 16,000 and odd.

Upon the foregoing facts Dorasami was clearly not entitled to recover more than Rs. 4,500 whatever might be the amount due upon document A. The respondent's case was that the assignment C was taken by Namaswaya *bonâ fide* and for value. That being so, as the purchaser of document A at the Court sale Dorasami bought nothing, for, the interest of Valayuda, the judgment debtor, had been transferred to Namaswaya seven years previous to the purchase. As the assignee of Namaswaya under exhibit D, he paid only Rs. 4,500 for the bond A and another document. As he was the purchaser of an actionable claim s. 135 of Act IV of 1882 applied to him, and he could not recover more than the price he paid and the interest due thereon. As to the contention that Rs. 4,500 was paid for two bonds, and that a proportionate part is alone recoverable on document A, we cannot accede to it. The intention indicated by s. 135 is to prevent traffic in actionable claims by rendering the difference between the amount of the claim and the actual price paid, irrecoverable by action, and thereby removing the motive for unconscionable dealing in such claims. There is therefore no foundation for the suggestion that when two actionable bonds are bought together for Rs. 4,500, and only Rs. 950 are recovered upon one of them, the assignee is precluded from recovering the difference, but that he must submit to a loss arising from an apportionment. The intention of the legislature was only to take away the profit or discount which might tend to encourage speculative purchases, and it is therefore reasonable to hold that the assignee may recover the whole of the difference between what he paid for the two documents and what he actually recovered upon one of them.

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It is urged for the respondent that whatever might be the sum paid by Arunachala, the respondent who accepted the assignment D, in satisfaction of prior debts, is entitled to recover what is due under document A under s. 135, clause (b). If the respondent were the first assignee, we might support the contention; but as the third assignee, he could only take what his assignor was competent to assign, viz., his right to recover what he had actually paid together with interest. In the view that documents A to D evidenced real transactions, the respondent could recover no more than Rs. 3,550 and the interest due upon it.

[Their Lordships next proceed to review the evidence in detail and conclude as follows:—]

Having regard, however, to the whole evidence, we are of opinion that no money was paid when the hypothecation bond (exhibit A) was executed, that neither Velayuda nor Namaswaya paid the debt due to the bank or to Saviri Muthu Nadan, that the consideration for exhibit A, if any, failed, and that the circumstances in which the several assignments were made and the meagre and unsatisfactory evidence as to the payment of value for them strengthen that conclusion. On this ground the respondent's claim must fail. We therefore set aside the decree of the Subordinate Judge and direct that the suit be dismissed with cost throughout.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KUNHALI BEARI (DEFENDANT NO. 10), APPELLANT,
and

KESHAVA SHANBAGA (PLAINTIFF), RESPONDENT.*

Hindú law—Decree against father—Sale of ancestral estate in execution of money decree—Son's rights and liabilities.

A purchased the half share of the judgment-debtors in certain immovable family property, at a court-sale held in execution of money decrees against B and his brother, who were members of an undivided Hindú family. B's undivided son sued A—B and the remaining members of his family being also joined as defendants—to recover a share in the land, alleging that his interest was not bound by the sale; but he did not prove that the debt for which the decrees were passed was immoral, and it appeared that A had bargained and paid for the entire estate.

* Second Appeal No. 349 of 1886.

The plaintiff was a minor at the time of the sale, and B was not the managing member of the family :

Held, that the court-sale was binding on the plaintiff's share—*Nehemi Babuasin v. Modhun Mohun* (L.R., 13 I.A., 1; a.c. I.L.R., 13 Cal., 21) discussed and followed(1).

SECOND appeal against the decree of C. Venkoba Charyár, Subordinate Judge of South Canara, in Appeal Suit, No. 19 of 1886, confirming the decree of J. P. Fernandez, District Múnsif of Kasargod, in Original Suit, No. 325 of 1884.

This was a suit by the plaintiff to recover a share of family property belonging to him and defendants Nos. 1 to 9 jointly. The plaintiff and defendants Nos. 6 to 9 are the sons, and defendants Nos. 2 and 3 are the brothers, and defendants Nos. 4 and 5 are the nephews of defendant No 1, and they constitute together with him a joint Hindú family which is governed by the Mitákshará law.

Defendant No. 10 had purchased the property in suit at a court-sale held in execution of money decrees obtained against defendants Nos. 1 and 2, and he pleaded that the decrees and sale were binding on the plaintiff. It was not shown that the debt for which the decrees were passed were immoral.

The District Múnsif decreed in favor of the plaintiff, and his decree was confirmed on appeal by the Subordinate Judge, who observed that "it is admitted that the debt was a mere personal debt of the father, and there is nothing to show why and for what purpose it was contracted," and expressed an opinion that the principles laid down in *Suraj Bansi Koer's* case(2) were not applicable to a suit brought in the lifetime of the father.

Defendant No. 10 preferred this second appeal.

Srinivása Ráu for appellant.

Gopalu Ráu for respondent.

The arguments adduced on this second appeal appear sufficiently, for the purpose of this report, from the judgment of the Court (Muttusami Ayyar and Parker, JJ.).

JUDGMENT.—The appellant (defendant No. 10) is the purchaser at a court-sale. The respondent (plaintiff) and defendants Nos. 6 to 9 are the five sons of defendant No. 1, defendants Nos. 2 and 3

(1) See also *Simbhunath Panday v. Golub Singh*, L.R., 14 I.A., 77. *Pettaohi Chettiar v. Sangili Veera Pandia*, *ib.*, p. 84. *Doulat Ram v. Mehr Chand*, *ib.*, p. 187.—(Reporter's Note).

(2) L.R., 6 I.A., 22.

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are his brothers, and defendants Nos. 4 and 5 are his brother's sons. The respondent and defendants Nos. 1 to 9 are Konkani Brahmans residing in South Canara and constituting together a joint Hindú family, which is governed by the Mitákshará law. One Kunhali Beari obtained money decrees against the defendants Nos. 1 and 2 in original suits, Nos. 176 and 177 of 1863 and No. 108 of 1865, on the file of the District Munsif of Vitla, and in their execution, the judgment-creditor brought to sale the first and second defendants' half-share of the property in suit; and one Maine Beari purchased it for Rs. 340 on the 7th March 1874 and re-sold it to the appellant in April 1876. It is conceded that the half-share was separated either under process of the court or by consent, and is now in the appellant's possession. The respondent was a minor at the time of the attachment and sale. Of the three decrees, in execution of which the sale took place, the decree in original suit 108 of 1865 was alone passed against defendants Nos. 1 and 2, and of the half-share purchased at the court-sale a moiety or a quarter-share belonged to the respondent's father, and the respondent would be entitled on partition to a sixth part therein or to twenty-fourth share of the entire family property. The respondent instituted the present suit to set aside the sale so far as it affected his undivided interest and both the courts below upheld his claim. It was not shown that the debt, for which decrees were passed, was vicious or immoral, and the contention in second appeal is that the respondent's interest also passed by the court-sale. We are of opinion that it is well-founded. The distinction, which was formerly made between a mere money decree and a decree which executed a pre-existing mortgage of ancestral property, was not considered to be sound by the Privy Council in *Nanomi Babuasin v. Modhun Mohun*(1). It was held in that case, irrespective of the distinction that, if the purchaser bargained and paid for the entire estate, including the father's and the sons' interests therein, the purchaser was at liberty to defend his title upon any ground which would have justified the sale had the sons been brought in to defend their interests in execution proceedings. It was observed that "all the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or

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the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale." In the case before us, there is no doubt that the purchaser bargained and paid for the first defendant's quarter-share which included the sons' interest also, and the debt was proved to be neither immoral nor vicious nor illusory. As ruled by this court in *Narasanna v. Gurappa*(1), which followed the decision of the Privy Council, the respondent's interest must be taken to have passed by the court-sale. It is now argued for him that the Privy Council's decision is not applicable to a case in which the father was not the managing member of the joint family. The *ratio decidendi* is not that the father was sued as the head or representative of the joint family as between him and his brother, but that the father had power to sell also the son's interest in ancestral property to pay his own antecedent debts, which are neither vicious nor immoral and which it is the son's pious duty to discharge. It is then suggested that the son's pious obligation can only arise after the father's death, and that there can be no valid sale during his lifetime. If the suggestion were adopted, it would negative the father's power to sell the son's interest at all during his life, and it is inconsistent with the course of decisions that recognize such power. Again, it is admitted that if the father is the managing member of a joint Hindú family, which consists of himself, his brothers and sons, he can then sell the son's interest for his personal debts which are not immoral or vicious, but it is not shown how he can then take advantage of the son's obligation which is to arise only after his death. The true foundation for the pious obligation is the relation between father and son as such and it is the son's pious duty to pay his debt, whether he is a managing coparcener or not at his death, or when he contracted the debt. The test is whether the father has a disposing power over the son's share, and this power he has whether he or his brother is the managing member of the joint family.

Our attention is next drawn to two decided cases, viz., *Basa Mal v. Maharaj Singh*(2) and *Jagabhai Lalubhai v. Vybhukandis Jagjivandas*(3). In the latter case the defendant obtained a money decree against two brothers, Jagjivandas Dayaram and

(1) I.L.R., 18 C., 21.

(1) I.L.R., 9 Mad., 423.

(2) I.L.R., 8 All., 218.

(3) I.L.R., 11 Bom., 67.

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Dayabhai Dayaram. Both were in possession of family property as managing members of a joint Hindú family. They had firms at Surat and Baroda, in which they were jointly interested. The business of the firms was the family business and the decree-debt was contracted in the course of that business. In execution of his decree, the defendant in that case attached some ancestral property of both the judgment-debtors; and the sons of Jagjivandas sued to set aside the attachment on the ground that by reason of their father's death before the attachment, his interest in ancestral property survived to them and ceased to be liable in their hands for the payment of his personal debts. The District Judge held that the sons' shares were not liable, but the High Court reversed the decree. Adverting to the above decision of the Privy Council in *Nanomi Babuasin v. Modhun Mohun*, West, J., observed: "By this, the disposition of the family estate or a disposal of it under proceedings taken against the father alone is made to affect the son's as well as the father's interest, except so far as the son can establish, in a proceeding taken for that purpose, that the voluntary disposal was made under circumstances which deprived the father of the disposing power, or that the enforced disposal was on account of an obligation to which the son was not subject. The father is in fact made the representative of his family, both in transactions and suits, subject only to the right of the sons to prevent the entire dissipation of the estate by particular instances of wrong-doing on the father's part." This decision then is an authority for the view that, as between the father and son, the father is the representative of his branch of the family, that, as against the son, he has a disposing power in regard to the share of the family property belonging to that branch, and that the son can only invalidate the sale in execution by showing that it was on account of an obligation to which he was not subject under Hindú law. The fact of Jagjivandas and his brother Dayabhai having been in possession of family property as managers of a joint Hindú family is referred to as one of the circumstances showing that the debt decreed in that case was a family debt. In *Basa Mal v. Maharaj Singh*, the son brought the suit to set aside the court-sale, alleging that the mortgage on which the decree was founded was executed by the father to raise money for immoral purposes. The facts found, however, were that the property which was sold was ancestral, that it was in the son's possession,

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and that a considerable portion of the money advanced was required by the father for the payment of revenue, but that the father made it necessary for him to borrow by imprudent and extravagant proceedings and that the purchaser had knowledge of the son's claim. The Subordinate Judge held that the son's share did not pass by the sale, but the High Court held that it did, observing that the son failed to show that the debt was immoral, whilst the decree and the sale certificate showed that the sale was of the entirety of the interest in the execution of a decree against the father. In its judgment, however, the court referred to the decisions of the Privy Council in *Girdharree Lall v. Kantoo Lall*(1), *Deendyal Lall v. Jugdeep Narain Singh*(2), *Suraj Bansi Koer v. Sheo Proshad Singh*(3), *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh*(4), *Muttayan Chettiar v. Sangili Vira Pandia Chinna-tambiar*(5), *Baboo Hurdey Narain Sahu v. Rooder Perkash Misser*(6), *Nanomi Babuasin v. Modhun Mohun*, and concluded as follows:—"It seems to us that two broad rules are deducible from the foregoing authorities. First, when a decree is made against the father and manager of a joint Hindú family in reference to a transaction by which he has professed to charge or sell joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property without any limitation as to the rights and interests sold, the rights and interests of all the coparceners are to be assumed to have passed to the purchaser and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was incurred for immoral purposes of the kind mentioned by Yājñavalkya, chap. II, sloka 47(7), and Manu, chap. VIII, sloka 159(8), and one which it would not be their pious duty to discharge. Next,—if, however, the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold is his right, title and interest in the joint ancestral estate, then the auction purchaser acquires no more than the

(1) L.R., 1 I.A., 321.

(3) L.R., 6 I.A., 88.

(5) L.R., 9 I.A., 128.

(7) Mandlik's Translation, p. 205.

(9) Jones' Institutes of Manu., Ed. IV., p. 198.

(2) L.R., 4 I.A., 247.

(4) L.R., 6 I.A., 233.

(6) L.R., 11 I.A., 26.

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father's individual right and interest—the right to demand partition to the extent of his share.”

The contention in the case before us is that the father must be the managing member of the joint family consisting of himself and of his brothers and that the Privy Council's decisions are otherwise not applicable; but the facts of the case last cited do not show that the father had a brother and that the question was discussed with reference to his position as managing member in relation to the brother. The term “manager” is probably used in the decision to exclude the case of a divided son. As to the Privy Council's decisions, the first case noticed by the Allahabad High Court is that of *Apporier v. Rama Subba Aiyar* (1). That case is important only as embodying the explanation by Lord Westbury of the notion of a joint Hindú family, and it is otherwise not pertinent to the question now under our consideration. The next is *Girdharee Lall v. Kantoo Lall* (2). The property in dispute in that case was acquired by one Kunhya Lal, who had two sons, Bhikari Lal, the elder, and Bujrunga Lal, the younger. Upon the death of the father, the elder son, Bhikari, became the manager of the joint Hindú family and had a son, named Kantoo Lall. The two brothers became heavily indebted, granted bonds and other charges on the property which they had inherited from their father. On being much pressed by their creditors, they sold the lands then in dispute and applied most of the sale-proceeds in discharge of their debts. About this time, the younger brother had also an infant son. Then both Kantoo Lall, the son of the elder brother Bhikari Lal, and the son of the younger brother, instituted a suit to recover the lands on the ground that the sale by their fathers was in excess of their rights under the Mitila law, which is the same as the Mitákshará law as to the son's liability. The Privy Council held that the suit must fail on the grounds that the debt was not shown to be immoral and that the ancestral property which descends to a father under the Mitákshará law is not exempted from liability to pay his debts because a son is born to him. They made no distinction between the claim of the son of the younger brother and that of Kantoo Lall, because the younger brother was not the managing member of the joint family, but dealt with both claims alike with reference to the pious duty of sons to pay their fathers' debts. In

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

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support of their opinion the Judicial Committee referred to the rule of Hindú law as stated by Lord Justice Knight Bruce, viz., the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt, and applying it to the case before them in which the debt was not shown to be immoral declined to set aside the sale in 1874. This decision is then a clear authority against the contention that the pious obligation which arises only after the father's death cannot be referred back to validate a sale by the father, and that unless the father is the managing member, the rule founded on the pious duty of the son cannot be applied.

The third case is *Muddun Thakoor's case*. He purchased at a sale in execution of a decree against the two fathers named in *Girdharee Lall v. Kantoo Lall*. The Judicial Committee upheld the sale as against Kantoo Lal and his cousin; the principle on which this decision rested being that the purchaser in execution was not bound to go behind the decree or further back than to see that there was a decree against the two fathers, that the property sold was property liable to satisfy the decree if the decree had been properly given against them, and that if he made an inquiry to that extent and then purchased the estate under an execution *bond fide* and for value, the sale was not liable to be set aside at the suit of the sons.

The fourth case was *Deendyal v. Jugdeep Narain Singh*. In that case the contest had no reference to the father's position as the managing coparcener of a joint family of brothers. The decree was against the father alone and it was in terms what is designated a money decree, though the document on which it was based was a hypothecation bond and there was an averment after decree that the debt decreed was a family debt. The Judicial Committee held that the interest which passed by the sale in execution was the right, title and interest of the father as an individual coparcener, and that that interest amounted only to a right to demand partition, and not to a specific share in any particular portion of the property of the joint family. In the result, it treated the theory of the pious obligation of the son as immaterial under the circumstances of that case, and the right of the purchaser as limited to that of the father as an individual coparcener. The principle then on which it seems to rest was

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that if a creditor had desired to make the son's interest liable, he should have made him a party to the suit, and shown in the suit that the debt was a family debt; that otherwise the right, title and interest of the judgment-debtor, which alone it was competent to him to bring to sale, must be taken to be the interest of the father as an individual,* and that it is not competent to the purchaser to go behind the decree and seek to extend the interest liable to be sold by a reference after decree and sale either to the character of the debt as a family debt or of the transaction on which the suit was founded as a hypothecation of joint family property. The decision in *Kantoo Lall's case* pointed out that the decree against the father should be given effect to with reference to the exposition of Hindú law by Lord Justice Knight Bruce that the freedom of the son from the obligation to pay his father's debt had reference to the nature of the debt and not to the nature of the property sold as ancestral or self-acquired. The decision in *Deendyal's case* proceeded on the other hand upon the view that the interest that passes by the Court sale is what is liable to be sold as the individual property of the judgment-debtor, strict regard being had to the frame of the suit, and to the terms of the decree in relation to the coparcenary law and the law of procedure.

The fifth case is *Suraj Bansi Koer's case*. In that case there was a decree against the father, and it gave effect to a mortgage executed by him. But when the mortgaged property was attached in execution, the son objected to the attachment on the ground that the debt was not binding on him. His objection was, however, overruled and he was referred to a regular suit. With notice of the son's claim the purchaser bought the property at the sale held in execution, and the contest was whether in that state of facts the sale was binding on the son. It must be remembered that one of the facts found in that case was that, if the creditor had instituted the inquiry which he was bound to have instituted as ruled in *Hunooman Persaud's case* (1), he should have seen that the necessity for the debt was the father's improper and immoral way of life which required the expenditure of funds not derivable from his regular income, and that it was conceded that the son had established against the execution creditor a case, which, if he had been the purchaser at the execution sale, would have entitled the

(1) 6 M.L.A., 424.

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son to full relief against him. The contest was thus narrowed to the point whether he was entitled to the same relief as against the purchaser, and as the latter had notice, the Judicial Committee distinguished it from *Muddun Thakoor's case* and upheld the sale only to the extent of the father's interest in the property sold. In their judgment, the Judicial Committee referred to *Kantoo Lall's case* and *Muddun Thakoor's case* and approved of the principle laid down in the former, viz., that the freedom of the son as far as regards ancestral property, from the obligation to discharge the father's debts, under Hindú law, can be successfully pleaded only by a consideration of the invalid nature of the father's debts adding, however, that that case went beyond the decision of the Sudder Dewany Adawlut in treating the son's obligation to pay his father's debts unless contracted for immoral purposes as a sufficient answer to his suit to set aside the sale. As to *Muddun Thakoor's case*, they approved of the principle on which it was decided, viz., that a purchaser at an execution was not bound to go further back than to see that there was a decree against the father, and that the property was liable to satisfy the decree, and that if he instituted inquiry on both these points and purchased *bona fide* and paid value, the entire property including the son's interest would pass by the Court sale. They deduced two propositions as established beyond doubt, viz., "(I) that when joint ancestral property had passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted; (II) that the purchasers at an execution sale, being strangers to the suit, if they had not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."

The sixth case is that of *Bissessur Lall Sahoo v. Maharajah Luckmessur Singh*. In that case the joint Hindú family consisted of two minors, Mosahab and Chuman, the sons of Ramnath Dass, the son of Nath Dass. The creditor brought three suits in respect of rent due from members of the joint family. In one, the widows of Nath Dass and Ramnath Dass were impleaded as the guardians

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of the two minors, and the rent claimed accrued due in respect of the Mouzah of Rudarpore which was leased to Nath Dass and Ramnath Dass, since deceased. A decree was passed against the minors, but it contained a direction that it was to be executed against the property of the deceased lease-holders and not against the person and self-acquired property of the judgment-debtors. In the other two suits also, decrees were passed for rent due beyond what was decreed in the first suit. A Mouzah called Muddunpore was sold in execution of all the three decrees for Rs. 35,000, and the guardians of the minors made no objection to the sale at that time. It was found that the Mouzah sold was the property of the joint family. In the second suit, one of the two sons mentioned in the first suit as minors, Mosaheb, was alone impleaded as the heir of Nath Dass and the rent claimed was in respect of the Mouzah of Ramnugger. The decree directed that it was to be executed against the property left by the deceased lease-holder of Ramnugger, Nath Dass, and not against the person or self-acquired property of the defendant. The third decree was passed in a suit in which the widow of Nath Dass was impleaded as the guardian of Mosaheb, and it contained a similar direction as to the property against which it was to be executed. The second and third decrees were informally drawn up. Three years after the sale of the Mouzah of Muddunpore, Mosaheb and Chuman sold their alleged right to recover from the purchaser the difference between the amount of the first decree, Rs. 8,000, and Rs. 35,000, for which the Mouzah of Muddunpore was sold. The contention was that that Mouzah was not liable to be sold in execution of the second and third decrees. The Privy Council held that whatever irregularity there might have been in drawing up the decrees, they were substantially decrees in respect of a joint debt of the family and against the representative of the family and may be properly executed against the family property. The principle of this decision is then that in execution proceedings, the Courts will look at the substance of the transaction and will not be disposed to set aside an execution upon mere technical grounds, when they find that it is substantially right.

The next case is *Muttayan Chettiar v. Sangili Vira Pandia*. In that case the rule laid down in *Kantu Lal's* was held to apply even when the ancestral estate affected by it was an impartible *ramindári*.

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The eighth case is that of *Hurday Narain Sahu v. Rooder Perakash Misser*. In it there was only a money decree against the father, and the Privy Council applying the principle laid down in *Deendyal's case*, held that nothing more than the right of the father to demand partition of his share passed by the Court sale. They said that the decree was an ordinary one for the payment of money and that that case was distinguishable from the cases where the father, being a member of a joint family governed by the Mitákshará law, had mortgaged the family property to secure a debt and the decree had been obtained upon the mortgage and for the realization of the debt by means of the sale of the mortgage property. Thus the decision in *Deendyal's case* was reconciled with the dictum in *Suraj Bansi Koer's case* by recognizing a distinction between a money decree and a decree which directed the sale of specific property in execution of a previous mortgage by the father.

The last case is that of *Nanomi Babuasin v. Modhun Mohun*, in which also there was only a money decree against the father and the sons were not impleaded in the suit as defendants. It was held that the debt not being immoral or vicious, the entire ancestral property which was attached and sold passed by the Court sale. The grounds on which the decision rests are (1) that the father's disposing power extended to the son's interest also if the debt was not contracted for an immoral purpose; (2) that the purchaser at the Court sale bargained and paid for the entire estate; and (3) that assuming that the sons might impeach the sale by reason of their not having been impleaded, they could only do so by showing that the debt was contracted for immoral purposes, and that as the debt was found in that case to be a family debt, their right was of no avail to them.

From the foregoing decisions it is clear that the son cannot set up his vested interest as a coparcener with his father in respect of ancestral estate for the purpose of denying the father's power to alienate it for an antecedent debt or against his creditor's remedies for his debt if such debt has not been contracted for an immoral purpose. This rule is deduced from the principle that the freedom of the son from the obligation to pay his father's debt has reference to its nature as immoral or vicious, and not to that of the estate as ancestral or otherwise. The contention that there was no family necessity for the debt or that it was only the personal debt of the

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father or that the pious obligation arose only on the father's death and that it could not be referred back to the date of the sale cannot be upheld. The answer given to it by the Privy Council is, destructive as it may be of independent coparcenary rights in the sons, the decisions have established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his creditor's remedies for their debt if not tainted with immorality.

Another proposition which is deducible is that it is immaterial whether the decree against the father is a money decree or one founded on a mortgage and containing a direction for the sale of the mortgaged property. The reason is that it being held that the father has a disposing power over ancestral property in respect of his antecedent debt which is not tainted with immorality, the Court can sell in execution whatever he can lawfully sell, and the entire property will pass by such sale. As to the contention that the son was not a party to the suit or the decree, the answer is, all the sons can claim is that not being parties to the sale or execution proceedings, they ought not to be debarred from trying the fact or the nature of the debt in a suit of their own, and it will avail them nothing unless they can prove that the debt was not such as to justify the sale.

As to the contention that the father is not the managing member of the entire joint family it is to be observed that the father's disposing power does not rest on his position as such and that in *Kantoo Lal's case* it was held to have been possessed both by Bhikari Lal and his brother, though, as between them, the former was alone the managing coparcener. The principle is that by reason of the disposing power mentioned above, the father represents his sons also in transactions and suits, provided that the power is properly exercised.

The only cases then, in which the son's interest is not affected by the Court sale are, (1) where the debt is immoral, and (2) when the purchaser does not bargain and pay for the entire estate. The reason is that in the one case the father has no disposing power at all, and in the other that power is exercised only to create a smaller interest than it extends to. The result is that the contention of the respondent's pleader in the case before us must fail. We reverse the decrees of the Courts below and dismiss the suit with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

THIAGARAJA AND OTHERS (DEFENDANTS), APPELLANTS,

and

GIYANA SAMBANDHA PANDARA SANNADHI

(PLAINTIFF), RESPONDENT.*

1887.
February 15.

Right of occupancy—Permanent cultivator—Paracudi—Burden of proof—Form of suit.

The defendants' ancestors or predecessors in title were the cultivating tenants of the lands of a certain temple from a date not later than 1827, in which year they were so described in the paimaish accounts. In 1830, they executed a muchalka to the Collector, who then managed the temple, whereby they agreed among other things to pay certain dues. They were described in the muchalka as *paracudis*. In 1857, the plaintiff's predecessors took over the management of the temple from, and executed a muchalka to, the Collector, whereby he agreed among other things not to eject the raiyats as long as they paid kist. In 1882, the dues (which were payable separately,) having fallen into arrear, the manager of the temple sued to eject the defendants:

Held, (1) that the suit was not bad for misjoinder;

(2) that the burden of proving the permanent character of the tenure set up by the defendants lay on them;

(3) that there was nothing to show that the defendants were more than tenants from year to year. *Chockalinga Pillai v. Pythealinga Pundara Sannady*, 6 M.H.C.R., 164, and *Krishnasami v. Varadaraja*, 1 I.L.R., 6 Mad., 345, discussed and distinguished.

APPEALS against the decrees of R. Vasudeva Rau, Subordinate Judge of Negapatam, in Original Suits Nos. 106 and 107 of 1880.

These were suits by the plaintiff as sole *Adhinam* trustee of a mattam to which a certain temple was attached to eject the defendants from lands in the village of Sandaputtur belonging to the temple and to recover arrears of rent, &c. The defendants or their ancestors had been in possession of the lands in question at all events since 1827, in which year they were described as cultivating raiyats in the paimaish accounts. In 1830, they had executed a muchalka for the lands to the Government, whose rights under it were subsequently transferred to the plaintiff's predecessor.

In the muchalka, the executants, therein described as *paracudis*, agreed to cultivate the lands, no term being fixed for their holding: they further agreed to pay certain sums as kist and swamibhogam,

* Appeals Nos. 106 and 107 of 1882.

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and it was provided that attachment was to be made if the payments fell into arrear. In 1857, the plaintiff's predecessor took over the management of the temple from the Collector and executed to him a muchalká, to which neither the defendants nor their ancestors were parties, agreeing among other things not to eject the raiyats as long as they paid kist, &c. In 1882, the payment having fallen into arrear, the plaintiff brought these suits.

The Subordinate Judge of North Tanjore decreed for the plaintiff and the defendants preferred this appeal.

Mr. Shaw for appellants.

Rámá Ráu for respondent.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgments of the Court (Kernan and Brandt, JJ.).

KERNAN, J.—The principal question is, are the appellants (tenants of the village of Sandaputtur) entitled to a right of permanent occupancy?

The ancestors of the defendants and after them the defendants have been in possession as cultivating raiyats since, at all events, 1827—see paimáish account, 18th May 1827. In January 1830, a muchalká (exhibit A) was executed by the tenants of the village, ancestors of the defendants, agreeing to cultivate the lands, and to pay the rents as therein reserved to the Collector on behalf of the temple.

In that muchalká no term is fixed for tenure, and the persons signing the muchalká are therein called paracudis. *Prima facie*, "paracudis" are cultivators without occupancy rights—see the description given in *Krishnasámi v. Varadarájd*(1).

By exhibit A, the parties signing agree to cultivate the wet and dry lands from fasli 1830 as per paimáish fasli 1826. The lands and the rates are specified and the period of payment and the whole kist and swamibhogam. It is provided "as we have thus agreed to pay, we will, as long as the lands are in our possession, pay the said instalments of kist and swamibhogam." It is provided that attachment is to be made if arrears accrue. Provision is made for higher rates on cultivation of betel, &c., and for payment of teerva on cultivated waste and for payment of swatantrams to village servants and for sending men daily and fortnightly to

(1) I.L.R., 5 Mad., 345.

festivals to carry articles, and that Government should remit on account of drought or flood.

There is nothing in that muchalká to lead to the conclusion that the cultivators were more than tenants from year to year.

In the year 1857, the Government delivered over to the predecessor of the plaintiff all the rights to the temple and temple lands, including of course the rights under the muchalká (exhibit A). On the 7th December 1857, a muchalká was executed by plaintiff's predecessor to the Collector. In it there is a special clause that the plaintiff's predecessor should not eject any of the raiyats so long as they paid the kist properly payable by them. The plaintiffs or those whom they represent were not parties to the muchalká of 1857, and can derive no benefit from it. They could not enforce that clause.

In *Chockalinga Pillai v. Vythealinga Pundara Sunnady*(1) and in *Krishnasámi v. Varadarájd*(2), the muchalká to the Collector contained similar clauses; yet in each case it was not considered that such clause did not operate to give the right of permanent occupancy.

The defendants' ancestors and the defendants themselves have paid swamibhogam to the temple and kist to Government from 1827.

During that period there was no large or substantial amount spent on reclamation; although it was so alleged, the evidence was insufficient to prove the allegation. No act is found to have been done in respect of the lands which would show a consciousness by the cultivators that they occupied on more than the ordinary terms of tenancy from fasli to fasli. The sale in 1880 by defendants Nos. 11 and 18 were after former suit commenced.

The tenants were bound to do service for the temple by assisting at the car procession to drag the car. But this obligation was part of their rent services.

If the cultivators were ejected by the plaintiff, they need not give their future service.

It is contended that long possession is evidence of right of occupancy. But when the right of possession or right to continue in possession is proved, as in this case, to have arisen under a written instrument which does not provide for right of permanent occupancy, then the right to possession must *prima facie* follow

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(1) 6 M.H.C.R., 168.

(2) I.L.R., 5 Mad., 345.
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the terms of the instrument in the absence of any subsequent agreement.

If the defendants rely on a right of occupancy created after that instrument, then it lies on them to prove the grant, oral or written, of such right, or circumstances from which such grant could be legally presumed. There is no such grant either alleged to have been made, nor are there any circumstances proved from which such a grant or right of occupancy could be presumed.

Whenever a tenant or raiyat gets possession of land for one year and continues in possession at the expiration of that year, he is *prima facie* held to so continue on the terms of his lease. Therefore the defendants must all be held to have continued by their ancestors or by themselves to hold each succeeding year on the terms of the muchalká of 1826. The result is that each of the cultivators is only tenant from year to year.

Krishnasami v. Varadarájd(1) is in its circumstances different from this. In that case there was no muchalká proved as here. There was an order passed by the Collector to allow the particular *paracudi* into possession to cultivate. Here the muchalká of 1826 is clearly only from year to year at the outside.

In that case defendant No. 4 and all the other defendants were members of one family. The plaintiff in that suit had previously brought a suit against defendant No. 4 to eject him, and it was decided in that suit that defendant No. 4 was entitled to a permanent right of occupation. As regards defendant No. 4, therefore, the plaintiff's right was at an end, being *res judicata*.

As regards the other defendants, it was held that the adjudication in the former suit, in which their relation succeeded in respect of a right claimed by them, and the fact that there was no muchalká produced, and the deed of transfer by the Collector to the plaintiff (in terms the same as the transfer in this case) and long possession paying rent, were circumstances which created such evidence of right of occupancy as to throw on the plaintiff the *onus* of proving that such defendants, other than defendant No. 4, were not entitled to such occupancy right.

I think that the defendants are not entitled to the occupancy right which they claim; and, inasmuch as due notice to quit was given, the plaintiff is entitled to maintain the ejectment.

(1) I.L.R., 5 Mad., 345.

The tenants of property held under a Mutt are not entitled to the protection of the Rent Act, as the plaintiff is not a land-holder within the meaning of the Act, and the defendants, however willing they may be to pay an increased rent, cannot have such rent fixed under the Rent Act.

There has been no misjoinder of defendants, as they all derived jointly under the muchalká of 1830 under which the kist and swamibhogam were reserved in fixed rates at total amounts specified.

For convenience sake each head of a family holding separate part of the demised land has had the kist and swamibhogam fixed and the amount has been paid separately by him. The tenants arranged the holding amongst themselves and there was not a separate demise of each particular lot to the separate holder.

Defendants Nos. 11, 18, 19 and 21 sold their holdings to defendants Nos. 98 and 99 respectively and should not have been made parties to this suit. As regards them, this suit should, I think, be dismissed. And inasmuch as the plaintiff insisted on retaining them as defendants after their written statements alleged that they parted with their interest, I think the plaintiff should pay their costs.

As regards the rent due, we are not able to say that the plaintiff satisfactorily proved how much rent is due. The books of the temple and accounts have not been sent up. Moreover, we think that when the plaintiff has for so long a period received swamibhogam from the several tenants separately, an account should be taken by the Subordinate Judge of the sum due by each tenant and that the decree should be modified by directing each tenant to pay the rent due by him.

Defendant No. 20 died before this suit was filed. He is named a defendant in error.

The defendants, except Nos. 11, 18, 19, 20 and 21, should pay the costs of this appeal.

No. 107 of 1882. This is a suit similar in its facts and circumstances to suit No. 106 to eject the tenants of the village of Keelavelu, and therefore the judgment in No. 106 applies of this suit.

The 36th and 37th defendants sold part of their lands to the 87th defendant and the rest of their holding to Nadaraja Padayachi before this suit was filed, and were not then in pos-

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session of the Jands. This suit is to be dismissed as against the 36th and 37th defendants with costs.

The defendants in this Court, except the 36th and 37th defendants, are to pay the plaintiff's costs of this appeal.

BRANDT, J.—The plaintiff, as sole Adhinam trustee of the temple of Vythinatha Swami at Vathur in Sheali taluk, has brought the two suits, out of which these appeals have arisen to eject the defendants, who are cultivating raiyats from the lands of two villages, which admittedly belong to the temple; and to recover arrears of swamibhogam alleged to be due to the temple. The first suit (No. 106) relates to the lands of the village of Sandaputtur and the second suit (No. 107) relates to the lands of Keelavelu.

The defendants pleaded in the first place that the suit in each case was bad for misjoinder of many defendants, each of whom paid his swamibhogam separately, and who ought to have been separately sued.

In the first suit (No. 106), defendant No. 11 alleged that he had sold his interest to one Marimuttu Padayachi, and defendants Nos. 18, 19 and 21 stated that they had sold their interest to Mun-naru Padayachi. Defendant No. 20 is said to have died. In the second suit (No. 107), defendants Nos. 36 and 37 stated that they had sold their interest to Nadaraja Padayachi and to Sornam. In each of these cases the vendees were joined as defendants to this suit. One Chinnasawmi Naik was also added as defendant to the second suit. Defendants Nos. 38 and 54 are dead and the suit was withdrawn as against some others. The defendants chiefly insisted that they had a permanent right of occupancy; that they had been in possession of the lands for a very long time and had improved them at a great expense; and they were not liable to be ejected. They further stated that very little of the swamibhogam was in arrears, and that when it was tendered, the plaintiff refused to receive it.

The judgment of the Subordinate Judge was substantially the same in both suits. In each case he found that the suit was not bad for misjoinder, because all the defendants claimed under one or two persons in each case, who had executed a muchalká in January 1830 consenting to hold the lands upon certain terms. The Subordinate Judge decided that the defendants had made no substantial improvements, and had no permanent right of occupancy, but were tenants from year to year. He therefore decreed

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that the defendants should be ejected from the lands in question in each suit; that the plaintiff should be placed in possession, with mesne profits, and arrears of rent, and costs of the suit, and that such mesne profits, arrears of rent, and costs to be paid by all the defendants in the first suit, and by certain specified defendants in the second suit.

The objection of misjoinder, though mentioned at the hearing, was not one of the original grounds of appeal. It is sufficient to say that, as all the defendants in each case claim by inheritance or by purchase or otherwise under one and the same person, or under one of two persons who executed the muchalká in each case in January 1830, the plaintiff had a common cause of action against the defendants in each case and was not obliged to sue them separately. Hence the objection of misjoinder on the ground of separate payment of swamibhogam by the several defendants cannot be allowed.

The principal question raised by these appeals is, whether the defendants had a right of permanent occupancy, or whether they were merely tenants from year to year?

Defendants rely very much on their possession of the lands by themselves, or by those under whom they claim from the 1st of January 1830, if not from a still earlier date. But mere length of tenure for any period will not give a right of permanent occupancy to a raiyat, who has been let in as a tenant from year to year. Sir Colley Scotland in *Chockalinga Pillai v. Vythelalinga Pundara Sunnady*(1) admitted that the decision in *Venkataramanier v. Ananda Chetty*(2) had gone too far in laying down too broadly a pattadar's right of occupation, and it was admitted by Turner, C.J., in *Krishnasami v. Varadarajá*(3) that the period of occupation, which should confer upon the raiyat a permanent tenure, could only be settled by legislation. In the case of *Krishnasami v. Varadarajá*(4) there were other circumstances, besides mere length of tenure, which justified the Court in throwing the burden of proof upon the plaintiff, and among other circumstances was a decision of the Sudr Court in 1861 recognizing a permanent title in defendant No. 4, to whom all the other defendants were related. In the present case no such circumstances are found, and it may

(1) 6 M.H.C.R., 171.
(3) I.L.R., 5 Mad., 357.

(2) 5 M.H.C.R., 120.
(4) I.L.R., 5 Mad., 345.

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be observed that no custom in the defendant's favor has either been alleged or proved.

The muchalká of the 1st January 1830 does not tend to show that the title of those who executed them was permanent. On the contrary, there are some expressions which favor a contrary supposition; and if there are expressions which indicate an intention that the occupation should be for more than one fasli, they are (as Sir Colley Scotland said of similar expressions in a muchalká in *Chockalinga Pillai's case*)(1) indefinite as to any period of time except that of the fasli, and clearly therefore did not bind the will of either party beyond the currency of each fasli while the tenancy remained undetermined. The defendants say that their tenancy was not created by this muchalká, but that it existed before that as a right of permanent occupancy. The defendants' predecessors in title may have been in possession before 1830. But if they had a permanent right of occupancy, they would probably have taken care to have that right expressly recognized in the muchalkás of 1830. At present the permanency of their title before 1830 has not been proved.

In the muchalká executed in favor of Government by the plaintiff's predecessor on the 7th December 1857, he promised to respect the rights and privileges of the paracudis according to the customs of the respective villages, and of the country; and that, as long as they should pay the kist properly, he would not eject them. But he did not thereby admit that the raiyats had any permanent right in the soil, or that the swamibhogam was to be the same for all ages. The passage in question amounts to little more than an engagement to respect the rights of the raiyats, whatever those rights might be.

In the result it appears to me that the defendants have not shewn that they had any higher title than that of cultivating tenants from year to year. That being their tenure, the plaintiff was at liberty (as decided in *Chockalinga Pillai's case*)(2) to enhance the rent and after due notice to eject the defendants at the end of the fasli for non-payment. Notice has now been given, and the decision of the Subordinate Judge as to the ejectment of the defendants must be upheld.

I agree that the evidence as to the alleged improvements is

(1) 6 M.H.C.R., 168.

(2) 6 M.H.C.R., 171.

unsatisfactory, and nothing can be allowed to the defendants on that account.

I agree that suit No. 106 as against the defendants Nos. 11 and 18, and his son and brother, defendants Nos. 19 and 21, who had sold their lands, should be dismissed with costs. I would make the same order as to the defendants Nos. 36 and 37 in suit No. 107.

I agree also that the Subordinate Judge should be directed to inquire how much is due from each of the defendants, and that on receipt of his return the decree should direct each tenant to pay the swamibhogam due by him.

The defendants, except those as to whom the suit has been dismissed or withdrawn, or who have died, must pay all the plaintiff's costs.

APPELLATE CIVIL.

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

SUPPU AND OTHERS (DEFENDANTS NOS. 3 TO 6), APPELLANTS,
and

GOVINDACHARYÁR (PLAINTIFF), RESPONDENT.*

*Civil Procedure Code, ss. 514, 521, 522—Award, appeal against decree in terms of—
Extension of time for presenting award—Evidence.*

Where a decree purports to have been made in terms of an award under s. 522 of the Code of Civil Procedure, an appeal lies against it if there was no award in fact or in law.

An order extending the time for the presentation of an award upon an application presented within time is not bad in law by reason of its having been made after the expiry of the term which it purports to extend.

It is not a valid objection to an award that the arbitrators have not acted in strict conformity with the rules of evidence.

APPEAL against the order of K. R. Krishna Menon, Subordinate Judge of Tinnevely.

Original Suit No. 62 of 1884, on the file of the Subordinate Court at Tinnevely, was at the instance of both parties referred to arbitration. On the 10th October 1885, after the expiry of the time fixed for making the award, an application for the extension

* Appeal No. 123 of 1886.

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of the time was granted, and the arbitrators presented their award on 20th March 1886. The defendants objected to the award as being invalid on the grounds that the extension of time was illegal, and further that the arbitrators had not proceeded according to the rules of legal evidence. The Subordinate Judge overruled these objections and passed a decree in the terms of the award. The defendants preferred this appeal.

Subramanya Ayyar for respondent objected that no appeal lay and cited *Monji Premji Set v. Maliyakel Koyassan Koya Haji*, I.L.R., 3 Mad., 59, and *Micharaya Gúruru v. Sadasira Parama Gúruru*, I.L.R., 4 Mad., 319.

Sankara Náyar for appellant.

An appeal lies in such a case as this—*Pugardin v. Moidin*—I.L.R., 6 Mad., 414. The test is whether the award was properly made, if not there is an appeal—*Lachman Das v. Brijpal*, I.L.R., 6 All., 174—The extension of time was irregular and illegal, Civil Procedure Code, ss. 514, 521, 522—*Simson v. Venkatagopal*, I.L.R., 9 Mad., 475. Another objection is that the award should have been rejected on the ground of the misconduct of the arbitrators in the improper admission of evidence—*Pareshnath Dey v. Nobin Chunder Dutt*, 12 W.R., 93.

Subramanya Ayyar for respondent.

The extension of time was not irregular, Civil Procedure Code, s. 514—*Rámáya Gaundan v. Rámaswámi Ambalam*, 7 M.H.C.R., 173—*Pugardin v. Moidin*, I.L.R., 6 Mad., 414. The Court interfered in revision in *Simson v. Venkatagopal*, I.L.R., 9 Mad., 475.

[BRANDT, J.—The Court interferes where there is no award in fact or in law.]

That is not the present case. The rules of evidence do not apply to arbitrators. Evidence Act, s. 1, *Howard v. Wilson*, I.L.R., 4 Cal., 231; Russell on Awards, sixth Edition, p. 310.

The further arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (*Muttusámi Ayyar and Brandt, JJ.*).

JUDGMENT.—The preliminary objection has been taken that no appeal lies under s. 522.

That section presupposes the existence of an award as the basis of the decree, and it cannot apply to a case in which there has been no award in law or in fact. It is urged that there was

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no award in law in this case, first, because the time originally fixed for making the award was in two instances extended after the expiration of the period previously fixed, and, secondly, because the award shows on its face that it does not rest on legal evidence. As to the first objection we see no reason to think that the order made by the Subordinate Judge upon an application for an extension of time presented within time was bad in law by reason of its being made after the expiry of the term which it purported to extend. Section 514 provides that the Court may, if it thinks fit, grant a further time, and from time to time enlarge the period for the delivery of the award, while s. 521 enacts that no award shall be set aside, except on certain specified grounds, and that no award shall be valid unless made within the period allowed by the Court.

There is then no ground for holding the award to be invalid upon the ground suggested. The case of *Simson v. Venkatagopal*(1) is only an authority for the proposition that time should not be extended so as to validate an award which the arbitrators had no jurisdiction to make when they made it. On referring to the award itself, we see no objection on the face of it such as to vitiate it. It is alleged that there is no legal evidence on which the arbitrators were entitled to recognise the plaintiff's claim to the extent to which they decreed it. But the award contains a distinct statement that the claim, so far as it was allowed, was proved to the satisfaction of the arbitrators; nor is it a valid objection to an award that the arbitrators have not acted in strict conformity to the rules of evidence. We see no reason to think that the award on which the decree appealed against rests is bad in law, and we dismiss this appeal with costs.

(1) I.L.R., 9 Mad., 475.

APPELLATE CIVIL.

Before Mr. Justice Muttusāmi Ayyar and Mr. Justice Brandt.

1887.
July 25.

VENKATASĀMI AND ANOTHER (DEFENDANTS NOS. 2 & 3), APPELLANTS,
and

SUBRAMANYA (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, ss. 1, 67, 86—89—Usufructuary mortgage, dated 20th April 1882, sued on in 1884—Form of decree.

In a suit filed in 1884 on a usufructuary mortgage, dated 20th April 1882, a decree was passed for the payment of the mortgage money, or in default for the sale of the mortgage property :

Held, (semble under the Transfer of Property Act) that the decree for sale was the right decree.

APPEAL against the decree of Mr. Justice Handley, a Judge of this High Court, in Civil Suit No. 293 of 1884.

This was a suit on a usufructuary mortgage, dated the 20th April 1882. The mortgage deed was admitted by the contending defendants who, however, argued, *inter alia*, that the plaintiff could not "obtain a decree for foreclosure or sale," as to which Handley, J., observed, "even if that would be so under the Transfer of Property Act, which I doubt, the Act does not apply to this case for the mortgage sued on is dated before it came into force." The learned Judge held that the plaintiff's case was established, and passed a decree for the sum claimed, and in default of payment in six months, for the sale of the mortgage property as prayed in the plaint.

The defendants preferred this appeal on the ground (among others) that the Transfer of Property Act was applicable and in any case the plaintiff as usufructuary mortgage was not entitled to sue for foreclosure or sale.

Mr. Subramanyam and Appadorai Mudaliar for appellants.

Anandachārlu and Visvanadha Ayyar for respondent.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (Muttusāmi Ayyar and Brandt, JJ.). Their Lordships after

discussing the evidence and expressing an opinion upon it in accordance with that of Handley, J., proceed as follows :—

JUDGMENT.—Then comes the question whether the decree under appeal is open to objection in so far as it orders a sale of the property under mortgage in default of payment in six months.

It is urged that such direction is bad in law under clause (a) of s. 67 of the Transfer of Property Act—Act IV of 1882— which provides that nothing therein contained "shall be deemed to authorize a simple mortgagee as such to institute a suit for foreclosure, or an usufructuary mortgagee as such to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale."

What is the precise effect of the limitations contained in the foregoing clause ?

The suggestion that no decree either for foreclosure or sale can be lawfully made in a suit based on a usufructuary mortgage is on the face of it absurd. The intention is to indicate the specific remedy which, in the absence of an express contract, is available in regard to each of the transactions defined by s. 58, viz., simple mortgage, mortgage by way of conditional sale, usufructuary mortgage, and English mortgage.

Section 67 provides, first, that a simple mortgagee is not at liberty to sue for foreclosure, and implies thereby that he can only ask for sale, for the contract as defined in s. 58, clause (b), provides only for sale, and discloses no intention that the property should in any event vest absolutely in the mortgagee or that the mortgagor should be divested of the estate otherwise than under a sale. Similarly, a mortgagee by conditional sale is not entitled, in the absence of an express contract, to institute a suit for sale, for the contract provides for the mortgage ripening into a sale in default of payment, and implies an intention on the part of the mortgagee to take the mortgaged property in satisfaction of the debt when that event has happened. His remedy is accordingly confined to a suit for foreclosure. Section 88, paragraph 2, excepts a mortgage by way of conditional sale from the class of cases in which the Court may pass a decree for sale in a suit for foreclosure. An usufructuary mortgagee as defined by s. 58, clause (d), may retain possession of the mortgaged property until his debt is repaid, and may appropriate the rents and profits accruing from the property, either in lieu of interest or in payment of the

* Appeal No. 22 of 1886.

VENKATASAMI principal or partly in lieu of interest and partly in payment of
SUBRAMANYA, principal.

Whether the mortgagee is at liberty to claim foreclosure as of right will depend upon the terms of the particular contract, but the contract as defined by the Act does not imply an intention that the mortgagee may at his option insist upon either remedy as in the case of an English mortgage. Section 67, clause (a), provides that the usufructuary mortgagee is not entitled as such, in the absence of an express contract to the contrary, to institute a suit for foreclosure or sale. It implies that he can sue only for the one or for the other, and not for the one or the other in the alternative. That this is the true construction is clear from ss. 86—89, the language of which and, in particular, the words in s. 86, "shall transfer the property to the defendant: and shall, if necessary, put the defendant into possession of the property," include usufructuary mortgages among transactions upon which the mortgagee may institute a suit for foreclosure or a suit for sale.

It is important to bear in mind the distinction that exists between the power of the Court to decree a sale in a suit for foreclosure, and the right of the usufructuary mortgagee as founded on the contract. The second paragraph of s. 88 deals with such power and is taken from 44 and 45 Vict. c. 41, s. 25. It was a power constantly exercised by Courts of Equity in England, and it may be that it is inserted in this Act with reference to a notion which was commonly held in this country, that a mortgage was intended to be only a security and to be always releasable. In exercising this power the Court is authorized to impose such terms as it thinks fit to prevent injustice or unfairness to the mortgagee.

The usufructuary mortgage, which is the subject of the present suit, was not in the nature of a mortgage by way of conditional sale. The decree for sale was the only one which the plaintiff was entitled to claim and the Court was at liberty to make. We must overrule the objection taken in appeal to the form in which the decree has been made, and dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

AMMAKANNU (PLAINTIFF), APPELLANT,

and

APPÚ (DEFENDANT), RESPONDENT.*

1887.
April 21.
August 16.

Hindu Law—Maintenance of son's widow—Self-acquired property.

A Hindú is under no obligation to maintain his adult son or his son's widow out of his self-acquired property. . . Thus a daughter-in-law can enforce no claim for maintenance against the self-acquired property of her father-in-law which has passed to his grandson, unless the father-in-law showed by conduct or otherwise an unequivocal intention that it should be taken subject to the obligation of providing for his support.

SECOND appeal against the decree of J. Hope, District Judge of South Arcot, in Appeal Suit No. 215 of 1885, reversing the decree of C. Sury Ayyar, District Munsif of Cuddalore, in Original Suit No. 192 of 1885.

This was a suit brought by a widow against her husband's nephew to recover maintenance out of the self-acquired property of her father-in-law now in the hands of the defendant.

The District Munsif decreed as prayed, but his decree was reversed on appeal by the District Judge.

The plaintiff preferred this second appeal.

Mahadeva Ayyar for appellant.

Rámá Ráu for respondent.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Muttusami Ayyar and Parker, JJ.).

JUDGMENT.—" The appellant, Ammakannu Ammal, is the widow of the undivided brother of Ragava Pillai, the son of one Srinivasa Pillai, and the father of the minor respondent named Appú *alias* Lokanada Pillai. The appellant's husband predeceased his father and the finding is that it was the latter who acquired the property now in the respondent's possession. The appellant's case was that as between her and the respondent the

* Second Appeal No. 784 of 1886.

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property in question was ancestral, that her father-in-law was bound to maintain her, and that she was entitled to a decree for maintenance against the respondent and to have it charged on the property in his hands. The respondent's contention was that his grandfather satisfied the appellant's claim in full during his lifetime and that, at all events, her maintenance was not a charge on the property which is in his possession. It was found that the plea of satisfaction was not proved, but the Judge was of opinion that the claim itself could not be supported under Hindú law. He observed that the property in dispute was acquired by the appellant's father-in-law, that he was under no obligation to provide for her maintenance out of his self-acquired property, and that the respondent's father and the respondent inherited it from him in regular course of succession free of such obligation. It is argued in support of this second appeal that a father-in-law is bound under Hindú law to support his widowed daughter-in-law irrespective of any ancestral or joint property vesting in him on his son's death by survivorship, and that for the purposes of the present suit the property which the respondent and his father inherited from his grandfather ought to be treated as ancestral.

"As to the first contention, we are inclined to agree with the Judge that, according to Hindú law, a father is under no legal obligation to maintain his adult son or the son's widow out of his self-acquired property. It is stated by the author of *Smriti Chandriká* (Krishnasawmi Iyer's translation, ch. XI, s. I., § 34) that the duty of maintaining a coparcener's widow, whether the survivor is a father or a brother, is dependant on his taking by survivorship coparcenary property. Again, "where there is no property but what has been self-acquired," says the *Mitákshará*, "the only parties whose maintenance out of such property is imperative are aged parents, wife and minor children" (see *Mitákshará* on Subtraction of Gift). The decisions in support of this view are collected in Mr. Mayne's learned *Treatise on Hindú Law*, §§ 375 and 376. The first contention cannot therefore be supported.

"With reference however to the second contention, it must be borne in mind that the suit which is the subject of this second appeal was brought not by the son's widow against her father-in-law but by the uncle's widow against her husband's nephew. It is not sufficient to show that the property in question was acquired by the appellant's father-in-law, that her husband had no vested

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interest in it by birth, and that as he predeceased his father he had also acquired no interest in it by inheritance, but it is necessary to go a step further and to inquire whether the property was burthened with the appellant's maintenance by her father-in-law before it descended to the respondent's father. If it was, it ceased to be self-acquired property as against the appellant on its descent from her father-in-law to her brother-in-law. If the former who acquired the property and who was competent to alienate it at his pleasure subjected it to her maintenance, either by express declaration or by conduct, the heir could only take it subject to the appointment made by the person who acquired the property. This question was not considered by the Judge, though the plea of satisfaction by the grandfather set up by the respondent, and the averment in the plaint that the appellant had lived in the family as one of its members until 1879 suggest that the parties believed that the father-in-law desired to support her. The finding therefore that the property was acquired by Srinivasa Pillai and that the appellant's husband predeceased him is not sufficient in law for the disposal of this appeal. We shall ask the Judge to try the following issue upon such evidence as the parties may adduce, and return a finding.

"Whether the respondent's grandfather manifested by his conduct or otherwise an unequivocal intention that his self-acquired property should be taken subject to the obligation of providing for the support of his widowed daughter-in-law."

[The District Judge returned a finding to the effect that no such intention had been manifested. This was accepted by their Lordships, who accordingly dismissed the second appeal.]

APPELLATE CIVIL.

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

PULAMADA AND OTHERS (DEFENDANTS), APPELLANTS,

and

RAVUTHÚ AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1887.
July 18.
August 5.

*Civil Procedure Code, ss. 50, 53—Amendment of plaint—Change in form of suit, the
cause of action being unchanged.*

The plaintiffs alleged that the defendants had encroached on the bed of a tank, raised embankments, and cultivated crops which interfered with the plaintiffs' supply of water; and they prayed for a decree ejecting the defendants from the land encroached on and restraining them from interfering with it:

Held, that the Court was not precluded by s. 53 of the Code of Civil Procedure from passing a decree declaring the plaintiffs' right to the water of the tank, directing the defendants' embankments, &c., to be removed, and regulating the cultivation of their lands; but that the defendants' liberty of cultivation should not be restricted more than was necessary to secure the plaintiffs' supply of water.

SECOND appeal against the decree of S. Gopalacháryar, Subordinate Judge of Madura (East), in Appeal Suit No. 520 of 1884, reversing the decree of P. S. Gurumúrthi Ayyar, District Múnsif of Tirumangalam, in Original Suit No. 100 of 1883.

The plaintiffs alleged that they were owners of some of the land in a certain village, and that the rest of the village belonged to, or was in the occupation of, the defendants: that the land was irrigated by a tank of which the water-spread was about 3½ gulies: that the defendants had encroached on gulies 2-4-1 and made wells and embankments and raised wet crops, and thus prevented the full accumulation of water in the tank and diminished the supply of water for the plaintiffs. The plaint prayed for a decree ejecting the defendants from, and preventing them from interfering with, the land encroached on.

The District Múnsif dismissed the suit, but the Subordinate Judge on appeal passed a decree declaring the plaintiffs' right to be supplied with water from the tank, directing that the defendants' land be restored to its former condition, and restricting its cultivation to certain specified crops.

* Second Appeal No. 611 of 1886.

The defendants preferred this second appeal.

Subramanya Ayyar for appellants.

Rámá Ráu for respondents.

The further facts of this case and the 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 suit from which this second appeal arises was in the nature of an ejectment brought by the respondents against the appellants. The plaint, as originally framed, prayed for a decree restraining the defendants from interfering with, and ejecting them from, 2-4-1 gulies of land in their possession lying in the bed of the tank in the village of Vattuvappatty in the district of Madura.

The respondents' case was that they and defendants Nos. 3, 7, 13, 19 and 20 owned wet lands under that tank; that 3½ gulies was its original area; that defendants 6-10 encroached upon it in 1285, and that by digging wells on and using the portion encroached upon as they liked, narrowed the water-spread, prevented the tank on which the respondents' land depended for irrigation from receiving its usual supply, and thereby caused to them loss of produce. The appellants who resisted the claim contended that the land in suit was their ancestral property, that it did not form part of the water-spread of the tank in question, that the respondents owned no wet land under it, and that the tank was not an old reservoir. They also denied the alleged encroachment, pleaded limitation in bar of the claim and alleged that the tank never exceeded one guli in extent.

The District Múnsif found that for more than 12 years before suit, the extent of the tank had consisted only of one and odd gulies, and that the land in dispute had not been submerged during that period, and upon that finding, he came to the conclusion that the suit was barred, and dismissed it with costs.

Thereupon the plaintiffs preferred an appeal and they urged that the nature of their claim was misapprehended by the Court of First Instance, and that they were, at all events, entitled to a declaration that defendants were not at liberty to use the land in dispute in the way they have done since fasli 1285, viz., raising garden crops, and that they were bound to raise only such crops as they used to raise prior to 1285. This contention, the appellant

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opposed on the ground that no relief should be decreed in appeal, which was not claimed in the plaint. The Subordinate Judge decided that the relief claimed before him was included in, and formed part of, the case disclosed by the plaint. On this view he remitted three issues for trial, viz., (1) whether the plaintiffs owned nunja lands depending for their water-supply on the tank in question; (2) whether the defendants interfered with the tank so as to diminish its water-spread; (3) whether the right of the defendants was only of a qualified nature as alleged by the plaintiffs, and whether the plaintiffs' claim as founded thereon was barred by limitation. On the first issue, he found that the plaintiffs owned nunja lands which were entitled to a regular supply of water from the tank through the two sluices or openings now in existence. On the second issue he found that the extent of the tank consisted originally of 3-8-3 gulies, that its water-spread extended at present only to 1-4-2 guli, that gulies 2-4-1 lying to the east of the present water-spread were submerged until 8 or 9 years before suit, and that they since ceased to be submerged, because the tank ceased to receive its usual supply in consequence of the defendants having raised the level of their lands and of the embankments erected by them subsequently to 1285. On the third issue he held that the respondents' claim was good and not barred by limitation so far as it related to the securing of the usual supply of water in the tank and to the restoration of its capacity. Upon these findings he was of opinion that it was necessary to direct defendants Nos. 6 to 10 and 21 to 24 to restore their lands to their original level, and to use them as they did before 1285, and decreed that the lands be reduced in level as specified in the decree, that no vegetation or crops other than those mentioned in exhibit F, viz., cucumber, pagal, melons, and gourds be raised, and that they might raise such crops only when they could do so without obstruction to the flow of water into the tank or retention of water by it. Defendants 8-10 and 22-24 have preferred this second appeal.

The first objection taken in support of this second appeal is that the Subordinate Judge allowed the suit as originally framed to be altered in appeal into a different suit. It is no doubt provided by the proviso to s. 50 of the Code of Civil Procedure that the plaint cannot be altered so as to convert a suit of one character into a suit of another and inconsistent character. But we observe

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that the ground of action, viz., the unauthorized diminution of the extent of the tank-bed so as to diminish its capacity and the supply of water available to the plaintiff, was throughout the same. Though the respondents' prayer for ejectment of the appellants and for an injunction restraining all interference with the lands in question on their part was not one which could be granted, this did not preclude the Subordinate Judge from decreeing a relief less than what they claimed. The specific right and its infraction alleged were not altered in appeal and we cannot therefore say that the procedure of the Subordinate Judge is in construction of the provisions of s. 53.

Another objection urged on behalf of the appellants is that the lands in suits are their private property and that the Subordinate Judge has recorded no finding to the contrary. We are not prepared to attach weight to this contention. The Subordinate Judge has distinctly found, as facts, that the extent of the tank was reduced from more than three gulies to about one guli, that though this reduction took place more than 12 years before suit, it did not prejudice the respondents' right until the appellants raised subsequently to 1285 the level of their lands and put up embankments so as to prevent the tank from receiving and retaining its usual supply of water. We cannot then say that the appellants' lands did not form part of the tank-bed, or that they were held otherwise than subject to the condition that they shall not so enjoy them as materially to diminish the capacity of the tank and diminish the supply of water available for lands depending upon such supply for their irrigation.

The third question argued in second appeal is that so long as appellants' lands continue on their former level, the restriction imposed in regard to the specific crops which the appellants are to raise and the time when they are to raise them, is an unwarranted interference with freedom of enjoyment. The respondents' pleader is unable to show that this objection is not well founded and concedes that the decree under appeal, requires to be modified. The restriction goes beyond what is necessary for the protection of the respondents' rights, and it cannot be assumed that because the appellants raised four specific crops prior to 1285, they are not at liberty to raise other crops hereafter, provided they do so without diminishing the supply of water available in the tank for the respondents' land. We therefore amend the decree of

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APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

QUEEN-EMPRESS

against

ENGADU AND OTHERS.*

1887.
Aug. 23.

Criminal Procedure Code, ss. 61, 167, 170, 344—Remand of prisoners in custody of the police.

The right construction of s. 167 of the Code of Criminal Procedure is that in proceedings before the police under chapter XIV, the period of remand cannot exceed in all fifteen days, including one or more remands.

CASE reported for the orders of the High Court under s. 438 of the Code of Criminal Procedure by G. Stokes, Acting District Magistrate of Cuddapah.

The case was reported as follows :—

“These are dacoity cases. The prisoners were remanded for fifteen days under s. 167 of the Code of Criminal Procedure. The police applied for a remand for the collection of further evidence for a further period, but the Sub-Magistrate refused to grant any further remand on the authority of the ruling of the High Court, communicated with G.O., No. 3092, dated 22nd November 1883, and directed the prisoners to be released. As the ruling in question seems to me to be highly dangerous to the administration of public justice and unnecessary, and as, with all deference, I think it founded on a mistaken view of the law, I make this reference.

“These three dacoities were committed, the first at Kallur in Chandragiry taluk, North Arcot district, the second in the limits of Srirangarajapaliem village, Pullampet taluk, *i.e.*, on the road from Rajempet to Rayachoti, and third at Ghatlu in Madanapalle taluk, Cuddapah district. The distance of the scene of offence in the first case from that in the second I am unable to state, but it can

hardly be less than three days' journey at the shortest by road and rail. The distance of that of the second from that of the third is seventy miles by road. In the first case, the persons attacked were inhabitants of Kurnool, journeying to Madras. In the second, coral merchants of the Vayalpad taluk, whose houses are as far from the scene of crime as Ghatlu. In the third they were inhabitants of Madanapalle, which is close to Ghatlu.

“The above cases came to light by some of the stolen property being found in the possession of the accused. The prisoners were arrested with property in Kadiri taluk at a place, I believe, about fifty miles from Ghatlu. The result of the ruling to which I call attention would be that the police had to get the owner of property and have it identified, had to collect all the evidence as to the commission of the offence and identity of prisoners, and to work up the case within fifteen days; but in the above cases it is at once obvious that this is quite impossible, and any one at all conversant with the detection of dacoity cases will know, that, unless it is a very unskilfully-contrived crime, it is impossible to get the evidence together much under one-and-a-half months; yet until the evidence is got together no charge sheet can be put in under the Criminal Procedure Code, and, consequently, there is no Magistrate having jurisdiction in the case who can remand for more than fifteen days. The prisoners arrested must be released with the certainty that they will not for years if ever be caught again.

“The remarks which I have now to make I desire to make with all respect to the learned Judge, who made the ruling. In my opinion, the ruling is clearly wrong. It proceeds on the contrast between the ss. 167 and 344 of the Code of Criminal Procedure. I would submit, with all deference, that the words ‘from time to time for a period not exceeding fifteen days’ mean exactly the same as the words ‘for a term not exceeding fifteen days at a time.’ That they were intended to do so I entertain no doubt, for let us consider the old law, the evil, and the remedy. The section corresponding to 167 of the former Criminal Procedure Code contained no mention of a time to which the remand was limited. The result was that a Magistrate in Bombay held that he could remand for an indefinite period. The High Court ruled on revision in *Reg. v. Surkyavalad Dhaku* (1) that remand in this case

* Criminal Revision Case, No. 289 of 1887.

(1) 5 Bom. H.C., Cr. C., 31.

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was governed by the same rule as contained in the section corresponding to s. 344 of the present Criminal Procedure Code. I submit that by the true rules of interpretation of statutes on this state of facts, the proper interpretation is that the legislature intended in adding to s. 167 of the Code of Criminal Procedure not to change but to clear the law.

"This view is, I would respectfully submit, borne out by the discussion which preceded the passing of the Code of Criminal Procedure. It will be observed that in the bill, as originally drafted, the words used were 'for a term not exceeding fifteen days in the whole.' The words 'in the whole' were struck out by the select committee, and it was stated in their report the section had been altered so as to leave the existing law intact."

Prisoners were not represented.

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

The further facts and arguments in this case appear sufficiently, for the purpose of this report, from the judgments of the Court (Kernan and Brandt, JJ.).

KERNAN, J.—The ruling of the 23rd October 1883 pronounced by a Judge sitting in the Admission Court was as follows:—"The referring officer is right. The construction of s. 167 is that in proceedings before the police under chap. XIV, the period of remand cannot exceed in all fifteen days, including one or more remands.

"In proceedings under chap. XXIV, s. 344, much larger power of remand is given, not exceeding fifteen days *at a time*."

"The contrast between the sections is very clear."

The Third-class Magistrate, on the 2nd and 6th December 1886, in two cases having recorded that the fifteen days' remand against the prisoners expired that day, and that he was not authorized to grant remand for a time exceeding fifteen days under s. 167, directed the prisoners to be set at liberty.

The Acting District Magistrate refers the case to have the above ruling considered on the ground that s. 167 authorizes the Magistrate to remand from time to time for a term not exceeding fifteen days *at a time*.

We think the ruling of 1883 is right. The Magistrate might from time to time remand, but the sum of the periods of remand cannot exceed "a term of fifteen days." The words "at a time" do not occur in s. 167 after "fifteen days." Where it was intended by

the Code that remand might be made for fifteen days "at a time," the Code expressly says so (see s. 344 in the second paragraph or proviso). The power of remand under s. 167 is given to detain the prisoners in custody while the police make the investigation, and in a proper case to prepare to commence the inquiry. Section 167 gives the Magistrate discretion (recording his reasons) to remand from time to time, but limits the period for the exercise of that discretion to fifteen days. During the period of investigation by the police, evidence usually is not brought before the Magistrate, as the inquiry has not been begun. If the construction of s. 167 is as contended for by the Magistrate, the prisoner might find himself in custody for months before any witness is confronted with him, or any evidence recorded by the Magistrate. Such construction would cause great grievance and would then be wholly unnecessary, for s. 170 authorizes the police officer, if there is evidence or reasonable ground of suspicion, to forward the accused to a Magistrate empowered to take cognizance of an offence on police report. Then, under s. 344, an application might be made for cause shown as specified there to the proper Magistrate to postpone the commencement of the inquiry and remand the prisoner.

Section 344 requires cause for the remand to be shown, whereas s. 167 gives a discretion to the Magistrate, merely directing him to record his reason and give notice to the District Magistrate. Apparently, the police officer thought there were good grounds for the charge, but he asked five days' remand to charge-sheet witnesses.

The prisoner was not forwarded under s. 170. The Third-class Magistrate, apparently, was not authorized to act on a police report, and was not authorized to make an order under s. 344. At all events, the application for remand was under s. 167 and not under s. 344. We do not agree with the Magistrate and we make no order.

BRANDT, J.—Under an order made under s. 167, Criminal Procedure Code, the accused person is detained in the custody of the police, or in such other custody as the Magistrate making the order thinks fit. Ordinarily, no doubt, he will be in the custody of the police.

Such detention is altogether different from the custody in which an accused person is kept under remand given under s. 344,

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Criminal Procedure Code, which is the custody provided by the legislature for under-trial prisoners.

In the former case, the accused is not placed before a Magistrate for trial or for the purpose of an inquiry by a Magistrate with a view to commitment, but to enable the police to complete, if possible, or, at least, to proceed with, their investigation.

The intention of the legislature—having regard to ss. 61 and 167 and to the requirements of justice generally—is that an accused person should be brought before a Magistrate competent to try or commit with as little delay as possible—*Mánikam v. The Queen*(1). There may be cases in which no evidence may be available within sixteen days from the date of an accused person's arrest, but such should be and probably are rare, and such evidence as may then be available should be placed before a Magistrate competent to hold an inquiry or try. The Magistrate has then power under s. 344, Criminal Procedure Code, to postpone without limit, (provided that the accused be not remanded for more than fifteen days at a time), the commencement of the inquiry or trial for the purpose of obtaining further evidence which it appears likely may be obtained if time is given, or for other reasonable cause, and if no such evidence is then forthcoming and if it is not shown that any is likely to be obtained, it appears only reasonable that the accused person should no longer be detained in custody; there is nothing to prevent his being re-arrested, if evidence be subsequently secured.

Reading the two ss. 167 and 344 together and having regard to the other considerations above stated, I concur in the opinion of my learned colleague.

(1) I.L.R., 6 Mad., 63.

APPELLATE CIVIL.

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

RÁJARATHNAM (DEFENDANT), APPELLANT,
and

SHEVALAYAMMAL (PLAINTIFF), RESPONDENT.*

1887.
Aug. 12.

Limitation Act (Act XV of 1877), s. 15—Period of injunction included.

A member of a firm sued for a partnership debt and obtained a decree; he died before execution. In a suit brought by his widow an injunction was issued restraining his partner from realising the partnership assets. Subsequently, a receiver was appointed for the partnership assets, and he applied for execution of the above decree:

Held that the time during which the injunction was in force was not to be excluded in computing the period of limitation.

APPEALS against the orders of C. W. W. Martin, District Judge of Salem, dated 18th March 1885, and made in Appeal Suits Nos. 98, 99, 100 of 1884, reversing the order of District Múnsif of Salem, dated 31st March 1884, and made on execution-petitions in Original Suits Nos. 131 of 1877, 20 of 1879, and 621 of 1879.

In the case, from which appeal No. 119 of 1885, was preferred, the facts were as follows:—

A and B were partners. On 6th December 1879 A obtained a decree in a suit brought by him on behalf of the partnership. A died on 31st December 1879 while the decree was unexecuted. On 4th October 1880 A's widow instituted Original Suit No. 17 of 1880, on the file of the District Court of Salem against B to wind up the partnership. On 29th October 1880, the plaintiff obtained an injunction against B, restraining him from realising the partnership assets. On 20th September 1882, a decree was passed apportioning the assets between plaintiff and defendant, and on 23rd February 1883 a receiver was appointed. On 28th May 1883, the receiver applied for the execution of the decree obtained by A on behalf of the partnership on 6th December 1879.

The facts of the other cases were similar and the Court disposed of all these cases together.

* Appeal against Order No. 119 of 1886.

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The District Munsif held that the receiver's applications were barred by limitation; but his decree was reversed, on appeal, by the District Judge, who set out the reasons for his decision as follows:—

"I am of opinion that the principles on which the judgment of the Madras High Court proceeds in *Shunmugam v. Moidin*(1), when taken with the principles on which the decision in *Kalyanbhai Dipchand v. Ghanasham Lal Jadunathji*(2) rests, make it justifiable to find that the present applications are not barred. The Madras judgment says 'an order prohibiting the collection of debts is an order prohibiting their collection by suits or otherwise.'

"The last two words include collection by execution-process, and, while that order existed, the plaintiff was not bound to proceed by execution-process any more than she was bound to proceed by suit. If she were not bound, and, if, in consequence, no laches are to be imputed to her, all the argument by which the Bombay High Court, following the decisions in *Issuree Dassie v. Abdool Khalak*(3), *Hurronath Bhunjo v. Chunnildall Ghose*(4), *Paras Ram v. Gardner*(5), has evaded the perpetration of a monstrous injustice apply to this case, i.e., that an application to execute made by a decree-holder after the removal of an obstacle is an application for the continuation of the former proceedings. Though it is argued that there were no former proceedings in this case, because the present applications are the first applications for execution, I think it unnecessary to limit the term former proceedings to proceedings in execution; the whole course of the suit from its institution to its close by satisfaction, limitation or otherwise, constitutes the proceedings in the suit, and the continuation of the proceedings is their continuation from the point at which they were brought to a standstill by the injunction.

"The ruling of the Bombay Court I regard, therefore, as holding that s. 15 of the Limitation Act only alludes to suits, because it is necessary to make a positive rule to meet cases which had not already been brought into court, while there was no such necessity after cases had been brought into court because time ceased to run with the stay of proceedings.

(1) I.L.R., 8 Mad., 229.

(3) I.L.R., 4 Cal., 415.

(2) I.L.R., 5 Bom., 29.

(4) I.L.R., 4 Cal., 877.

(5) I.L.R., 1 All., 355.

"I reverse the order of the Munsif in all these cases and remand the suits to be again restored to their original numbers in the file and to be tried on their merits *de novo*."

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The defendant preferred these appeals.

Ramasami Mudaliar for appellant in appeal against order 106.

Kistnasami Chettyar for appellant in appeals against orders 119 and 120.

Mr. Norton for respondents.

The arguments adduced on these appeals appear sufficiently, for the purpose of this report, from the judgment of the Court (*Muttusami Ayyar and Brandt, JJ.*).

JUDGMENT.—It is conceded that, if the time during which the injunction issued in Original Suit 17 of 1880 was in force could not be deducted, the applications for execution in the cases before us would be barred by limitation. The only section under which the time can be excluded is s. 15 of Act XV of 1877. That section is applicable only to suits and s. 3 declares that a suit does not include an appeal or an application. There can be no doubt that it is sch. II, art. 179, that is applicable to execution of decrees, and, even assuming that art. 138 may apply, the period must be taken, in the absence of an express statutory direction, to continue to run when the rights to apply accrues and the period once begins to run. As to the cases referred to by the District Judge, we are of opinion that they are not in point, inasmuch as there were admittedly no previous applications for execution, which those now under consideration might be taken to continue or revive.

We set aside the order of the District Judge and restore that of the District Munsif.

APPELLATE CIVIL.

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

1886.
Nov. 29.
1887.
Aug. 16.

MAHOMED (DEFENDANT NO. 50), APPELLANT,
and
KRISHNAN AND OTHERS (PLAINTIFFS AND DEFENDANT NO. 3),
RESPONDENTS.*

*Civil Procedure Code, s. 51—Amendment of plaint—Multifarious suit—
Malabar law—Stanom.*

A suit was brought by the junior members of a tarwad, which consisted of three stanoms and three tavaries, against the karnavan and others, including certain persons to whom he had alienated some tarwad property. The plaint, as originally framed, prayed (1) for the removal of the karnavan, (2) for a declaration that defendants Nos. 2 to 8, the senior anandravans, had forfeited their right of succession to him, (3) for the appointment of the plaintiff in his place, (4) for a declaration that his alienations were invalid as against the tarwad, and (5) for possession of the property alienated. Subsequently, the plaint was amended by the order of the court by striking out items 2 and 5 of the prayer, and finally the plaintiffs further amended the plaint and sued only for a declaration that the alienations in question were invalid. The lower court passed the declaratory decree prayed for:

Held, that the lower court was wrong in allowing the plaint to be amended after the first hearing, because the case on which the decree was passed was essentially different from that disclosed in the plaint; and that the appeal must be allowed accordingly.

Per cur.—The suit was not bad for multifariousness—*Vasudeva Shanbhga v. Kuleadi Narnapai* (7 M.H.C.R., 290), considered.

The plaintiffs were competent to maintain the suit as dealt with by the lower court if there was collusion between the senior anandravans and the alienees and the stani for the time being—*Rani Anund Koor v. The Court of Wards* (L.R., 8 I.A., 22), considered.

Rights of members of a stanom *inter se*, considered.

APPEALS against the decree of M. C. Gópálan Náyar, Acting Subordinate Judge of North Malabar, in Original Suit No. 3 of 1883.

This suit was originally brought by the junior members of a Náyar family in North Malabar, called the Vayoth tarwad, (1) to remove defendant No. 1 from the office of karnavan, (2) to declare that defendants Nos. 2 to 8 had forfeited their right of

succession to him, (3) to appoint plaintiff No. 1 to succeed him, (4) to declare several alienations by defendant No. 1 invalid as against the tarwad, and (5) to get possession of certain properties. MAHOMED
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The defendants pleaded, *inter alia*, that the Vayoth tarwad was not a tarwad in the ordinary acceptance of the term, but that it consisted of three stanoms and subsidiary tarwads.

The then Subordinate Judge of North Malabar (V. P. de Rozario) framed the issues which were raised by the parties on the 3rd July 1883; but his successor (Ramachandra Ayyar) was of opinion that the suit was bad for misjoinder, and on 11th February 1884 he made an order, directing that the plaint be amended. The plaintiffs, in accordance with this order, relinquished their second and fifth claims for relief; subsequently they relinquished also the first and third claims for relief and prayed only for a declaration that some of the alienations mentioned in the original plaint were invalid as against the tarwad.

It was admitted, for the purposes of the suit, that the constitution of the tarwad was as described by the defendants.

The Subordinate Judge passed a declaratory decree as prayed in the amended plaint, and against this decree some of the defendants, whose title was affected by it, filed the present appeals.

Sankara Menon for appellant in appeal 105.

Sankaran Náyar for appellant in appeal 106.

Bhāshyam Ayyangār and *Anantan Náyar* for appellants in appeal 116.

Ambrose and Gópálan Náyar for respondents.

The further facts of the case and the arguments adduced on these appeals appear sufficiently, for the purpose of this report, from the judgment of the Court (Muttusámi Ayyar and Parker, JJ.).

JUDGMENT.—The respondents are the junior members of a Náyar family in North Malabar, called the Vayoth tarwad, and the appellants are persons in possession of portions of the property in suit which were demised to them, some on kanom and others on otti by the first defendant. According to the plaint, as originally framed by the respondents, their case was that the property in litigation belonged to their tarwad and that their karnavan alienated it in the appellants' favor and in favor of others who have not appealed from the decree of the Subordinate Judge otherwise than for tarwad purposes. They alleged also that the

* Appeals Nos. 105, 106, and 116 of 1883.

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first defendant was their karnavan and that defendants Nos. 2 to 8 were, though senior anandravans, inimical to their tarwad. They prayed, first, for the removal of the first defendant from the office of karnavan, secondly, for a declaration that defendants Nos. 2 to 8 had forfeited, by hostility to their tarwad, their right of succession to management, thirdly, for the appointment of the first respondent as karnavan, fourthly, for the several alienations impeached in the plaint being declared invalid as against their tarwad, and fifthly, for possession of the properties mentioned in the schedule annexed to the plaint together with future porapad, subject, however, to compensation being made for improvements if any.

The alienations which the respondents sued to set aside were 48 in number and embraced 213 items of property. Defendants Nos. 1 to 16 were members of the tarwad and defendants 17 to 46 were alienees in possession of the property mentioned in the plaint. The respondents' claim was resisted on several grounds, and one of them was that the Vayoth tarwad was not a Malabar family in the ordinary sense of the term, but that it consisted of three stanoms and three illakur houses or subsidiary tarwads.

The plaint was filed on the 31st January 1883, and the late Subordinate Judge, Mr. de Rozario, recorded the issues which had to be determined in this case on the 3rd July 1883; but Mr. Ramachandra Ayyar, who succeeded him, considered that the suit was bad for misjoinder, and that the prayers in the plaint for a declaration that defendants 2 to 8 are not competent to succeed defendant No. 1 in management and for possession of the property in dispute rendered the claim multifarious. He held, however, on the authority of *Vasudeva Shanbhaga v. Kuleadi Narnapai*(1), that the alienees were properly impleaded as defendants, and directed on the 11th February 1884 that the two items of relief, mentioned above, be omitted and the plaint amended. On the 13th idem, the respondents put in a petition accordingly, giving up their claim to those items of relief and also to the removal of defendant No. 1 from his position as karnavan. On the 19th August and 30th September they withdrew their claim as against some of the alienees and the lands in their possession. Prior to the trial, defendants Nos. 1, 2, 4, and 5 died and defendant No. 3

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succeeded the first. As amended, the suit was altered into one for a declaration that some of the alienations mentioned in the plaint, including those in the appellants' favor, were not binding on the respondents or their tarwad, but the ground of their claim remained the same. At the conclusion of the trial, however, their pleader admitted, for the purposes of the present suit and without prejudice to their right to obtain the declaration, that the suit might be proceeded with on the assumption that "Vayoth was a stanom, and that Palliyil, Kanhirot, and Kavullatan Vidu or houses are three tavarais subordinate thereto." He conceded also that the three tavarais had been managing their affairs separately and independently for the last thirty-five years.

The Subordinate Judge considered further that it was abundantly proved that such was really the case and applying to the alienations in contest the law applicable to the disposal of stanom property, as laid down by the late Sadr Court in 1853 in *Manavicrema Nalam Rajah v. Soobramaneyem Putter and others*(1) and by the High Court in *Chemminikara Muppil Nair v. Kiliyanat Ukona Menon*(2), and *Venkatésvara Iyan v. Shekhári Varma*(3), he set aside the alienations in favor of the appellants and declared them invalid beyond the lifetime of defendant No. 1. Thus the ground of decision was that the alienations which the decree invalidated were of stanom property, and that the alienor was a stanomdar for the time being, while the respondents were members of one of the affiliated tarwads.

The appellant, in Appeal No. 105 of 1885, is defendant No. 50, who is the representative of the original defendant No. 35. On the 3rd March 1875, lands 165 to 170 were demised to him by defendant No. 1 on kanom under documents 228 and 229 for Rs. 1,500. The Subordinate Judge held that both the documents were fraudulent and collusive and declared them to be invalid.

The appellant, in Appeal No. 106 of 1885, is defendant No. 28. The respondents' claim as against him was that defendant No. 1 executed in his favor two kanom documents, 220 and 223, and that both were invalid. The Subordinate Judge upheld document 220 on the ground that it only renewed the kanom which was granted

(1) Sadr Court Decisions, 1853, p. 214.

(2) I.L.R., 1 Mad., 88.

(3) I.L.R., 3 Mad., 386; s.c. L.R., 8 I.A., 143.

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by a former stani, Imbichunni Nayar, in 1863 under document 221. He set aside however document 223, whereby defendant No. 1 demised in 1874 items of land 157 to 164 on kanom for Rs. 260-13-0, and considered that there was no prior kanom of Rs. 147-4-0 as alleged therein, and that no necessity was shown for the cash payment of Rs. 100.

The appellants, in Appeal No. 116 of 1885, are defendants Nos. 8 and 12 and as against them the respondents claimed to set aside five documents 39, 51, 52, and 54 executed in the name of defendant No. 8 and document 40 executed in the name of defendant No. 12. Document 39 is an otti executed by defendant No. 1 on 12th October 1878 for Rs. 7,300 in regard to items of land 54 to 75 for the term of thirty-six years. The Subordinate Judge upheld it as a simple kanom of Rs. 1,462-8-0 in regard to items of property 54 to 75 and declared it otherwise invalid. Document 51 is an otti of a perpetual character for Rs. 580 granted in June 1882 in respect of items of land 76 to 82. The Subordinate Judge upheld it as a simple kanom for Rs. 9-8-0 in regard to those lands and set it aside in other respects. Document 52 is a kanom for Rs. 400 granted on the 17th April 1880 in respect of items of land 83 and 84, and the Subordinate Judge upheld it as a valid kanom for Rs. 250 and cancelled it in other respects. Document 54 is a demise on kanom of paramba, No. 142, for Rs. 100 and purports to have been executed in April 1877 for the term of twenty-four years, and the Subordinate Judge set it aside as wholly invalid. Document 40 is an otti granted by defendant No. 1 for Rs. 550 on lands 85 and 120 to 123 in March 1881, and the Subordinate Judge upheld it as a kanom for Rs. 148-12-0 and declared it to be otherwise invalid. The several appellants contend that the decree of the Subordinate Judge ought to be set aside so far as they are against them. Several objections are taken to the decree and some of them are common to all the appeals. The first objection is that the suit is bad for misjoinder of parties. It is argued that each of the alienees has a distinct interest in some of the items of property specified in the schedule annexed to the plaint and no interest whatever in the rest of the property in litigation, that the cause of action in regard to each is separate, and that the union of several such causes of action in one suit is contrary to s. 45 of the Code of Civil Procedure. But it was held by a Full Bench of this Court

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in *Vasudeva Shanbhaga v. Kuleadi Narnapai and others*(1) that a similar suit brought against the alienees of a deceased member of a joint Hindú family for the recovery of family property illegally alienated was not bad for multifariousness. Assuming that the respondents are entitled to institute the present suit in respect of stanom property, we see no distinction in principle between it and the case cited above. In our judgment, it makes no difference whether the right enforced is that of a coparcener or a reversioner, for the object in both is to reduce to possession a vested interest as well in property illegally alienated as in the property held by the managing member or by the tenant for life. In the view that the primary ground of action is the interest vested in possession as regards the whole of the property in suit, there is a unity of title, and the claim made is one in respect of the same cause of action. Taking it then that a reversioner can claim the whole property to which the reversion extends in one suit whatever may be the number of illegal alienations by the tenant for life, he must be taken to be at liberty also to sue for a declaration which is a remedy only ancillary to that right in regard to the whole. We cannot, therefore, say that the Subordinate Judge was in error in following the decision of the Full Bench of this Court in preference to the decision of a Divisional Bench of the Bombay High Court in *Kachár Bhoj Vajja v. Bási Rdthore*(2).

The next objection is that the respondents cannot maintain the suit as finally dealt with by the decree appealed against. The respondents proceeded to trial on their averment that the property in suit was tarwad property in the ordinary sense of the expression, notwithstanding the contention on the part of the appellants in Appeal No. 116 that it was stanom property. These urged that what was termed Vayoth tarwad really consisted of three stanoms, viz., (1) Vayoth Nair, (2) Koikoten Vittil Kidavu, and (3) Ayoth Kidavu, and of three illakur houses or branch tarwads, called (1) Kanhirot, (2) Kavullatan, (3) Palliyil, that each of the stanoms and branch tarwads had separate properties and separate management, and that the senior male members in all the illakurs were entitled to succeed to the first two stanoms in the order in which they are mentioned, the eldest to the stanom of the Vayoth Nair, and the next in seniority to the stanom of Koikoten Vittil Kidavu.

(1) 7 M.H.C.R., 290.

(2) I.L.R., 7 Bom., 289.

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It is urged that for the purposes of this appeal we may confine our attention to the legal relation between the stanom of the Vayoth Nair and the three branch tarwads which are affiliated to it. At the conclusion of the trial, the respondents admitted for the purposes of the present suit that the contention was well-founded. Though the admission purports to have been made without prejudice to their right to a declaration, the Subordinate Judge considered that it was abundantly proved by the evidence on the record, and decreed such relief as might, in his opinion, be decreed on the view that the property in dispute was stanom property. It becomes, therefore, necessary to consider whether there are any conditions subject to which alone a suit will lie in respect of stanom property improperly alienated. In *Venkateswara Iyan v. Shekhari Varma*(1), the Privy Council observed that a stanomdar represents the *corpus* of his stanom much in the same way as a Hindú widow represents the estates which have devolved upon her, and he may alienate the property for the benefit or proper expenses of the stanom. In *Chemminikara Muppil Nair v. Kitiyanat Ukona Menon*(2), stanom property was held liable to alienation and charge for the payment of debts incurred for the conservation of the stanom. According to the custom of Malabar, the nature of stanom property is such that the present holder has in it a life interest and the successor derives no benefit from it during the life of his predecessor, whereas in ordinary tarwad property each member of the tarwad has a concurrent interest and a joint beneficial enjoyment. Although the position of a stani is analogous to that of a childless widow, in that both have a life interest, both represent the estate or inheritance for the time being, and both have a disposing power only to a limited extent, the analogy does not extend to the estate taken by the reversioner. Each male reversioner becomes under Hindú law the full owner when the reversion falls in, whereas the person that succeeds to a stanom takes the same qualified estate that his predecessor had. The legal relation therefore between the Vayoth Nair and the other stanomdars and the karnavans of the three subsidiary tarwads is that which subsists among a group of persons entitled to succeed to the stanom property in a certain order, each having only a life interest therein and a qualified power of disposition over it. The relation between the

(1) I.L.R., 3 Mad., 386; s.c. L.R., 8 I.A., 143. (2) I.L.R., 1 Mad., 88.

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stani and the junior member of each subsidiary tarwad is that which exists between the representative of the stanom for the time being and the class of persons who may become karnavans of their tarwads and therefore representatives of the junior and senior stanoms in the order of seniority.

With these general remarks, we shall consider whether the contention that the respondents could not maintain the suit is well-founded. The argument is that the person presumptively entitled to the stanom is alone competent to maintain the suit and that the respondents are in the position of remote reversioners.

The general rule is, no doubt, that the right to bring a declaratory suit before the reversion vests in possession is limited and belongs to the presumptive reversionary heir; but it must also be observed that a remote or contingent reversioner may be permitted to sue under special circumstances. In *Rani Anund Koer v. The Court of Wards*(1), the Privy Council after pointing out that if the right of suit were not limited, it would belong to every one in the line of succession, observed: "If the nearest reversionary heir refuses without sufficient cause to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue." In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue and would probably require the next reversionary heir to be made a party to the suit. Though this was a decision in regard to a remote reversioner under Hindú law, the present suit falls within its principle, viz., that a suit for a declaratory decree is allowed in order that the next reversioner may remove that which would be a bar to his title when it vested in possession; but there was an allegation in the plaint in the case before us that all the senior anandravans between the plaintiff No. 1 and the original defendant No. 1, viz., defendants 2—8, were hostile to the tarwad and forfeited their right of succession, and there was also a prayer for a declaration that they were debarred from such succession. Though this prayer was withdrawn on account of the order made by Mr. Ramachandra Ayyar, yet it would be necessary

(1) L.R., 8 I.A., 23.

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to inquire for the purpose of deciding whether a suit will lie, if there was collusion between those senior anandravans and the alienees and the stani for the time being.

The third objection urged in appeal is that the court below erred in allowing the plaint to be amended after the first hearing so as to convert a suit of one character into a suit of another and inconsistent character. Though the order made by Mr. Ramachandra Ayyar after the first hearing was apparently at variance with s. 53 of the Code of Civil Procedure, yet it had only the effect of reducing the nature and extent of relief claimed by the respondents, and on the ground that the cause of action was not altered it may be held that the appellants were not prejudiced; but the case on which the decree was passed by the present Subordinate Judge was essentially distinct from that disclosed by the plaint and on which the parties went to trial. There was no finding that all those in the line of succession to the stanom between plaintiff No. 1 and the original defendant No. 1 colluded with the alienees or were parties to the illegal alienations. Again, if plaintiff No. 1 was willing to sue, the other respondents had no *locus standi* in the present suit. Defendant No. 3, who is alleged to have succeeded the first subsequently to the suit, originally resisted the respondents' claim, but there is no finding that he was guilty of any fraud or forfeited his right to the stanom, or that he desired to oust the alienees from possession during his life; nor is any specific ground shown for holding that as remote reversioners any of the respondents had acquired a right to sue by the misconduct of those who stood nearer to the stani. The former sued to have the alienations declared void on the ground that the property alienated was that of their tarwad and that its illegal alienation was an injury to their tarwad and an act in excess of their karnavan's authority. The Subordinate Judge decreed the claim substantially on the view that the property alienated was not that of their tarwad, but that it was attached to a stanom, to which the tarwad was subsidiary, and that there was an injury to the respondents because they were remote or contingent reversionary heirs to the stanom. We cannot hold then that the appellants are not right in contending that the conditions subject to which contingent reversionary heirs ought to be allowed to sue, and the life interest of the stani for the time being subject to which a decree ought to be passed, have been ignored to their prejudice. On the ground, therefore, that the case proved by the respondents is materially

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distinct from the case disclosed by the plaint, the appeals must be allowed.

It must be noted, however, that the appellants in appeals, Nos. 105 and 106, did not allege in their written statements that the Vayoth was a stanom, or the property alienated to them was that of a stanom, their contention being that the alienations were valid and that the suit was the result of collusion between the respondents and defendants Nos. 1 to 16; but the finding of the Subordinate Judge is that what is called the Vayoth tarwad has been for years practically divided into three branches with separate properties and independent management and that common to these branches there are two dignities or stanoms, called Vayoth Nair and Koikoten Vittil Kidavu, which are also possessed of separate estates. He has further found that the holder of the junior stanom is the heir apparent to the senior stanom of Vayoth Nair, and that the eldest male in the three tavarais taken together succeeds to the junior stanom. There is also considerable evidence in support of the conclusion at which the Subordinate Judge has arrived. Though the appellants stated in their memoranda of appeal that the Subordinate Judge was in error in holding that Vayoth Nair was a stanom, they referred us specially to no evidence in support of their contention. On the other hand, the arguments urged in support of the appeal preferred by defendants Nos. 8 and 12 were adopted by them. As the fifth witness for defendants Nos. 8 and 12, the first plaintiff stated in his evidence that the three houses and the two alleged stanoms have had for more than thirty years properties separately assessed, that the person known as Kidavu belonging to the Koyikotu Vidu succeeds the Vayoth Nair, and that the senior next in years becomes his successor. His evidence strongly supports the conclusion at which the Subordinate Judge has arrived. Though it is urged for the respondents in appeal they never admitted that Vayoth was a regular stanom, yet the evidence shows that for more than forty years it has been treated as a stanom. We see no sufficient reason to say that the Subordinate Judge has not come to a correct finding on this point. On the facts found the respondents could not be treated as entitled to a decree on the case stated in their plaint. On this ground we set aside the decree of the Subordinate Judge so far as it relates to the appellants and dismiss the suit as against them with costs throughout.

APPELLATE CIVIL.

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

1887.
January 17.
April 6.

SUBRAMANYAN AND OTHERS (DEFENDANTS), APPELLANTS,

and

PARAMASWARAN (PLAINTIFF), RESPONDENT.*

*Malabar law—Nambúdris—Marumakkatayam law—Adoption of an adult male—
Form of adoption—Specific Relief Act (Act I of 1877), s. 42—Declaratory decree—
Evidence Act (Act I of 1872), ss. 13, 35—Limitation.*

In a suit the parties to which were Nambúdris Brahmans following the Marumakkatayam law, the plaintiff sued as the adoptive son of the last member of an otherwise extinct mana for a declaration of his title to certain lands as the sole uralen of a devasom. He was in possession of the greater part of the land, but one paramba was alleged to be held adversely to him by a person not joined in the suit, and the tenants of part of the remaining land had attorned to the defendant. The plaintiff was an adult at the time of his adoption and no female was adopted at the same time with the plaintiff. In 1875 a suit was brought by the defendant's brother and others against the plaintiff and others to set aside an alienation by the present plaintiff's predecessor in title, but the suit was dismissed without any decision as to the co-uraima right of the then plaintiff; and the present plaintiff had no further notice of interference by the present defendant's mana:

Held, that the claim was not barred and that the plaintiff was entitled to the decree sued for.

The form and evidence of adoption considered.

Per cur.—The restrictions imposed under s. 42 of the Specific Relief Act must be held to refer to the consequential relief properly obtainable by the plaintiff as against the defendants in the suit and not to be extended to the case of all third parties who may possibly support some of the contentions of the defendants.

The appellants filed an application for the admission in evidence of certified copies of certain judgments and decrees rejected by the Lower Court. The appellants sought to make use of these documents not as constituting matters in dispute *res judicata*, but as containing summaries of statements made by parties concerned in the management of the plaint properties and as evidence of conduct.

Held that the documents were inadmissible in evidence.

APPEAL against the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in Original Suit No. 6 of 1885.

The parties to this appeal were Nambúdris Brahmans following the Marumakkatayam law.

* Appeal No. 26 of 1886.

This was a suit for a declaration that the plaintiff was the sole uralen and manager of a certain devasom, being a member by adoption of the Thaliyil mana, in which the uraima right was vested, there being no other member of the mana alive. The plaintiff was in possession (by himself or his tenants) of all the devasom properties, excepting certain plots held by defendant No. 1 under a decree and another plot held adversely by one Vasudevan (who was not a party to the suit); some of the tenants, however, had attorned to defendant No. 1. The defendants denied that the adoption of the plaintiff was true in fact or valid in law, claiming, *inter alia*, that the fact that no female was alleged to have been adopted at the same time as the plaintiff was fatal to his case. The defendants further set up that the uraima right had been vested in their mana jointly with the Thaliyil mana, and since the extinction of the latter had vested in their mana alone. The defendants also contended that the plaintiff was not entitled to sue for a declaration, because he was not in possession of all the land to which his suit related.

The evidence most relied upon for the purpose of establishing the fact of the adoption of the plaintiff was given by an old Brahman inhabitant of the plaintiff's village. He said: "The mode of making an adoption and the mode in which plaintiff was adopted are as given below. White cloth and blanket were spread in the padinhatti (room). Lamp with wicks burning on the four sides was lighted and kept there. Raw rice was kept in a plate. The members of all the manas had come. The adoptive father said 'you are adopted to the mana because there are no heirs to the mana; you must manage everything as I managed; all rights are granted,' and put rice on plaintiff's head." The plaintiff, also, had contracted a marriage which would not have been in accordance with the custom observed by the parties to this suit if his adoption was invalid.

The Subordinate Judge decreed in favor of the plaintiff.

Against this decree, the defendants filed this appeal, alleging, among other grounds of appeal, that certain documents, described in the following judgment, which they tendered in evidence, had been improperly rejected.

Sankaran Ndyar for appellants.

Mr. Wedderburn and *Anantan Ndyar* for respondent.

The arguments adduced on this appeal and the further facts

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SUBRAMANYAN of the case sufficiently appear, for the purpose of this report, from the judgment of the Court (Muttusami Ayyar and Brandt, JJ.).

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JUDGMENT.—This was a suit brought by the respondent, Parameswareen Thirumumbu, claiming to be a member, by adoption, of the Thaliyil mana, in Kakkanisseri desom, Payanur amsom, and as such to be the sole uralen and manager of the Ramenthali temple in Kunnimangalam amsom, the management of which, and of all the properties belonging thereto, is alleged to pertain to the said mana, and to have been exercised from time immemorial by the karnavan of the mana for the time being.

The appellants are members of the Kunnath mana. The respondent prayed for a decree declaring that neither the appellants nor their mana have any uraima right in respect of, nor any right of management in or over the, Ramenthali temple; the cause of action alleged is that the first appellant, Kunnath Manayil Subramanian Thirumumbu, as uralen of the temple and representing the Kunnath mana, had instituted certain suits for the recovery of devasom properties and induced certain tenants of the devasom lands to attorn to him, and it is alleged that these proceedings came to the knowledge of the respondent only in 1881, and that is the date on which the cause of action is said to have arisen.

Thaliyil mana Narayana Thirumumbu was referred to in the plaint as having managed the devasom property for many years as of right and as being the karnavan of the mana for the time being, and Vasudevan Thirumumbu (of the respondent's Thayakat mana), son of Narayanan and brother to respondent's wife, was alleged to have taken part in the management with the consent of Narayanan during the lifetime of the latter, and for and with the consent of the respondent after the death of Narayanan.

The appellants denied the fact of the respondent's adoption into the Thaliyil mana, and pleaded that if such adoption were found as a fact, it is invalid in law and not in accordance with local or other customs, and can confer no right in respect of the management of the devasom. They alleged that such right does not and never did belong to the Thaliyil mana exclusively, but is exercised by the person appointed for the time being by the Kunnath and Thaliyil manas jointly, and that it was in virtue of such appointment that Narayanan Thirumumbu conducted the devasom affairs, the two "manas" having each of them uraima right, which right passed on the extinction of the Thaliyil mana

to the appellants' mana exclusively; that the right of appellant No. 1 as uralen and manager was judicially established in a suit in 1875 in the Court of the District Munsif of Kaval, to which representatives of appellant No. 1 and of the respondent were parties, and also in certain suits in 1881; and that those decisions render the matters now in issue *res judicata*.

The first issue was "Whether the plaintiff was properly adopted into the Thaliyil mana?" and the second "Whether by such adoption the plaintiff acquired uraima right to the Ramenthali devasom?"

The Subordinate Judge held the fact of adoption to be established beyond all question by the evidence of two Brahmans, one a pandit and the other an old resident in the gramom (village); the marriage of the respondent with one of the ladies of the Thayakat mana, which could not, it is said, have taken place unless the respondent had become a member of one of the "manas" constituting the community of the "gramom," and the absence of any evidence on the appellants' side in disproof of the alleged custom are also referred to by the Judge.

As to the invalidity of the adoption, which was asserted on the grounds that in this family or mana (in which the Marumakkattayam system obtains) the adoption of a male is impossible, that the evidence itself does not show that either in essentials, such as the giving and receiving, or in forms or ceremonies, was there any which can properly be considered an adoption in law, the Subordinate Judge ruled that there may be an adoption either of a female or of a male or of both together, and referred to the admitted facts that the father of appellant No. 1 was a member of his "mana" by adoption only, as was Narayanan Thirumumbu in the Thaliyil mana, the latter having been further an adult at the time when he was taken into that mana; that no special form of adoption is required, but that assuming that a ceremony described as "Ganapathy homam" was necessary, the evidence showed that it was performed. As to the second issue the Judge held that if by the adoption or appointment the respondent became a member of the Thaliyil mana, there could be no doubt that as such the uraima right vested in that mana devolved upon him, and that he is entitled to exercise it; and as to this no question was raised in appeal.

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On the issues as to whether the right of management pertaining to the Thaliyil mana is hereditary and exclusive, or whether the Kunnath mana has a joint or other right in respect of the devasom, the finding is in favor of the respondent and against the appellants. The Subordinate Judge observes that there is no evidence whatever in support of the allegation that Narayanan Thirumumbu, who admittedly exercised sole management for upwards of thirty years until his death in 1879, exercised such exclusive management under appointment by and with the consent or permission of the Kunnath mana, and that for reasons which will be stated and considered in detail under appropriate heads, the appellants failed to establish that they have any uraima right, while the respondent's documents prove independent as well as exclusive management by the Thaliyil mana, and even if the appellants' mana ever had any uraima right, such right has been lost and is extinguished. An additional issue raised the question whether in any case the respondent's suit for a declaratory decree is maintainable; the ground on which this contention was put forward in the court below appears to have been that the respondent was in a position to have demanded other and further relief in respect of possession of certain items of property belonging to the devasom obtained in execution of the decrees of the District Munsif's Court above noticed.

The Lower Court overruled the objection on the ground that the respondent having been a party to those decrees could not maintain a suit for recovery of the lands in dispute in those suits, and that in respect of land in the possession of third parties, the provisions of the Specific Relief Act, s. 42, and of the Code of Civil Procedure against the splitting of demands do not apply; and as to the contention that the respondent is barred by the decisions of the District Munsif in the suits of 1875 and 1881 in favor of the appellants' joint uraima right, that finding was held not to conclude the respondent, inasmuch as it arose incidentally, was decided by a court which had not jurisdiction to determine it otherwise than for the immediate purposes of the matter then in dispute, and that the decrees did not dispose of the general question now raised.

The appeal was argued here on the following grounds:—

That this suit for the declaration sought is not maintainable;

That the alleged adoption was not proved and is not a valid adoption; and

That the exclusive right of the Thaliyil mana to management of the temple and its properties in virtue of uraima right is not proved.

In support of the first contention, it is urged that, putting aside the respondent's own statement and evidence given by him, there is no proof that the respondent is in possession of the temple property, while, on the other hand, it is admitted that appellant No. 1 is in possession of some of the lands belonging to the temple, that tenants have attorned to him in respect of other such lands, and that the respondent's brother-in-law is in possession of one paramba, not with the consent or approval of the respondent, and it was, therefore, open to the respondent, and he was bound to ask for, further consequential relief.

A further contention, now raised for the first time in appeal, is that the claim for the declaration sought is barred by time, the cause of action having arisen on, and time having commenced to run from, the date on which appellant No. 1 to the knowledge of the respondent set up his title in opposition to the respondent, i.e., in 1875.

The respondent sued as being in possession of all the devasom properties, excepting the plots decreed to appellant No. 1 and the plot in the occupation of Vasudevan; such possession was not denied by appellant No. 1 in his pleadings; all the evidence tends to show that the respondent's allegation in this respect is true, and beyond the bare statement of the appellant No. 1, there is no evidence that he is not in possession.

The case of appellant No. 1 at best is that, though for upwards of sixty years his "mana" has not exercised any right of interference in, nor taken part in the management of, the devasom affairs until 1875, such right exists. Whatever possession he has is on behalf of the devasom, and, as the respondent is undoubtedly an uralen, it cannot be said that he is not, in the eye of the law, in possession, for the possession of one co-uralen is the possession of all.

Again the objection that because Vasudevan holds a paramba adversely to the respondent, and as some tenants have attorned to appellant No. 1, the respondent was bound to sue for consequential relief as against them and for this purpose to include them as

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SUBRAMANYAN v. PARAMAS-WARAN. parties to this suit, this might be disposed of as regards Vasudevan on the ground that there is really no evidence that his holding is adverse; the admission by the respondent that he does not altogether approve of Vasudevan's management or has had disputes with him is not evidence of adverse holding, but the objection may be overruled, both as regards him and the tenants also, on the ground that the restrictions imposed under s. 42 of the Specific Relief Act must be held to refer to the consequential relief properly obtainable by the plaintiff as against the defendant in the suit, and are not to be extended to the case of all third parties who may possibly support some of the contentions of the defendant. Where a title is in dispute there may be third parties who are honestly in doubt and ready to acknowledge the title of either of the contesting claimants, or who having attorned to one may be ready to acknowledge the person declared by the court to have the title; and the object of such a suit as the present might be practically defeated if it were necessary for the plaintiff to bring in all persons who may support the claim of the defendant; however this may be, we consider the construction which the appellants' contend should be placed upon the section of the Specific Relief Act is not the necessary or proper construction.

As to this suit being barred by time, the suit of 1875 (exhibit II) brought by the brother of appellant No. 1 and others against the respondent and others for the purpose of having set aside an alienation made by the respondent's predecessor in title was dismissed without any decision as to the right of the then first plaintiff as co-uralen (exhibits II and III), and in the absence of notice of further interference on the part of the appellants' "mana" time would not run for the purpose of limitation as against the respondent.

Exhibits VIII and IX are judgments and decrees in suits to which the respondent was no party and are not admissible as evidence of denial of the respondent's title by appellant No. 1, and the suit is brought within the time limited from the date of the suit (exhibit VI) in which the surrender of the lands to appellant No. 1 in this suit on behalf of the devasom as co-uralen with the respondent was decreed.

We may here conveniently refer to and dispose of an application made on behalf of the appellant to file certain documents which the Subordinate Judge rejected. The first brought to our

notice is a copy of an instrument, the original of which was not produced, and no explanation was given as to its non-production, the Lower Court rightly refused to file this. The other documents are certified copies of judgments and decrees which the appellants' sought to make use of, not as constituting matters in dispute *res judicata*, but as containing summaries of statements made by parties concerned in the management of the plaint devasom properties and as evidence of conduct. Reference was made to *Lekraj Kuar v. Mahpal Singh*(1) and *Parbutty Dassi v. Purno Chunder Singh*(2), in which the admissibility of such documents as containing matters of the character described in s. 13, or as being documents of the nature referred to in s. 35 of the Evidence Act, was contended for and discussed.

None of the documents here answer to the description of those admitted by the Privy Council in *Lekraj Kuar's case*, and as regards the other cases, we concur with the majority of the Full Bench of the Calcutta High Court in *Gujju Lall v. Fattah Lall*(3).

In respect of another judgment which the appellants apply to file and which if proved might be relevant, this was not presented in the court below at all. Appellant No. 1 files an affidavit in which he states that the paper purporting to be a copy of the judgment came into his possession only after judgment was delivered; but there is no declaration to the effect that the appellants were not aware of the existence of the judgment: it is moreover, not admissible, not being a certified or duly authenticated copy. None of the documents, then, which we are asked to admit can be admitted.

As to the adoption, it is true that two witnesses only have given evidence in support of it and that they are not members of the Thaliyil "mana" nor of the Payanur "gramom"; but they are men of position, and, in the Subordinate Judge's opinion, worthy of credit, nor has anything been said here to induce us to think that the Subordinate Judge was wrong; on the other hand the necessity for the introduction of one not a member of the "mana" into the Thaliyil mana at this juncture, and the precedent in that and in the "mana" of appellant No. 1 also render the fact probable, while no evidence to the contrary is adduced and no member of the family, who but for this adoption would have an interest

(1) I.L.R., 5 Cal., 744. (2) I.L.R., 9 Cal., 586. (3) I.L.R., 6 Cal., 171.

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WARAN. in the property, appears as witness to object to the respondent's adoption. We may further refer to the judgments and decrees in original suit 381 of 1880 on the file of the District Munsif of Kawai and in appeal and second appeal (exhibit VII) as showing that the appellants were aware of the character of the evidence which the respondent had in support of the adoption, and that it may well be that the respondent's omission to produce a greater bulk of evidence in this case was due to calculation that the appellants would not think it worth their while again to attempt disproof of the fact; however this may be in the absence of evidence or of circumstances tending to disprove or render the fact of adoption improbable, we think the Subordinate Judge rightly decided in the respondent's favor on this point.

The taking of the respondent into and constituting him, an adult, a member of the Thaliyil family cannot be dealt with strictly on the footing of an adoption according to the Hindú law in families in which the Marumakkatayam system does not obtain, and we are of opinion that the evidence supports the finding that there was what, for the want of a more appropriate term, may be called an adoption in accordance with the form usually observed in and required by the community which includes the Thaliyil mana, nor is the omission to take or adopt a female at the same time shown to be a fatal objection to the validity of the transaction. That such taking or adoption does not carry with it the right now in dispute was not contended in appeal.

It was then contended that possession and management are not proved to have been exclusively with the Thaliyil mana, and reference is made to expressions used in various documents from which a joint right of management may be inferred or which are not incompatible with the existence of such right, and it is urged that as the respondent is suing for a declaration that the appellants have no uraima right, the burden of proof is upon him.

It may be conceded that there is no direct evidence of active exclusion of the Kunnath family from the management, but the admitted fact that for some seventy years that family has not exercised nor claimed to exercise right of joint management is a fact of great weight as bearing on the existence of such right, nor can the appellants' claim be admitted simply because there are certain expressions used in the documents to which we shall presently refer, and which do not of necessity exclude or might even

be construed as indicative of the existence of more uralens than one. It may, indeed, be said that, with the exception of the entry "Thaliyil Thirumumbu, Kunnath Thirumumbu, uraima right" in the column headed "Names of uralers and particulars of rights" in the paimayish account, exhibit XII, there is no evidence of the right for which the appellants contend. There is certainly no proof whatever of the appointment of any person as manager by the two "manas" jointly, as alleged in the plaint. It was suggested that statements appearing in paimayish accounts relating to temples are not open to the objections which have been taken to such accounts relating to lands unconnected with temples, seeing that the former were the result of inquiries made by Collectors under orders from Government and the Board of Revenue at a time when, as being responsible for the management of such property, the officers of Government needed and called for information as to such property and as to everything connected with the institutions. There being nothing in the record before us to show that the entries appearing in exhibit XII were prepared in such circumstances, there is no force in the argument, and while we may take it as a fact that there was a "paimayish" early in the century, there are in the present case objections insisted on by the other side to this exhibit in addition to those generally applicable to such documents. The account or statement does not exhibit the signature of a Collector or other responsible officer, nor is there anything to show by whom or under whose orders or supervision it was prepared. It was no doubt filed in a suit in one of the courts of the district in 1869, but that does not relieve us of the duty of assigning to it its proper value as a piece of evidence, nor diminish the force of the objections taken to it; and even if it were evidence, it certainly is not by itself, nor, as we shall proceed to show, in connection with other facts, sufficient to establish that the Kunnath mana ever had joint uraima right.

Exhibit H is a deed of 1816, in which a member of Thaliyil family, a lady, named Sridevi, describes herself or is described as "the governing uralen" (Koyima uralen), and it is contended that this would imply the existence of another uralen or other uralens not being governing or managing uralens; and the same in the case of Narayanan Thirumumbu in exhibit D, a deed of 1868, in which he is described as "the uralen and the man who manages the affairs of the devasom."

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In exhibits E and F, however, Narayanan is styled "uralen" simply, and, in exhibit G, Vasudevan grants an otti demise of land, which he describes as "jenm of my devasom." Documents W (1821) and A. V. (1848) are no doubt consistent with the case of there being one or more uralens; but exhibits E, F, and G certainly rather support the respondent's case, and we cannot admit that the mere use in one or more documents of expressions not inconsistent with the existence of more uralens than one goes far to support the appellants' case.

On the other hand, we find the lady, Sridevi, selling absolutely in 1816 lands purporting to be sold as the jenm of the devasom, and there seems little doubt that exhibit A was passed by the same lady as uralen in 1819, and it is extremely difficult to understand abstention of the Kunnath mana from interference then, and subsequently until a few years back, if the right now claimed had really been vested in it; that the management of Sridevi could have been unknown to the Kunnath family would in itself seem improbable, and we further find that exhibit II purports to be attested by an adbhikari, who was a member of the Kunnath mana.

We are no doubt confronted by the decision of the District Munsif of Kaval in original suit No. 421 of 1875 (exhibit II), in which he decided the question now in dispute in favor of the appellant, and with the observations of the District Judge, Mr. Reid, in appeal (exhibit III); but the latter did not dispose of the suit on the ground that the plaintiff in that suit, the appellant before us, was entitled to joint management. The Judge placed his refusal to give the plaintiff a decree setting aside a sale of the devasom property by the respondent before us on the ground that "whatever rights the first plaintiff had he could not be allowed to come in and overturn a transaction to which in the plainest manner he gave his consent by abstinence from all control of the first defendant's management," which had extended over very many years.

The decision having been put on this ground, and the question as to the appellants' joint uraima right not having been finally heard and determined in that suit, we are free to say that we consider the grounds and arguments on which the District Munsif arrived at his conclusion are not sound nor sustainable; we have the less hesitation in coming to this conclusion seeing that the

question as to joint right of management was only incidentally before the Court of First Instance in that litigation. We are of opinion then that the Subordinate Judge came to a correct conclusion in the present case in holding that the respondent should have a declaration as prayed for, and we dismiss this appeal with costs.

We do not overlook the incongruity resulting from the existence of a decree passed by the Court of a District Munsif, the effect of which is that in respect of one or more specific pieces of devasom land the respondent and appellant No. 1 have jointly right of management, while under the present decree appellant No. 1 is debarred from again asserting and from exercising such right jointly with the respondent in respect of the devasom lands other than those which formed the subject of the suit or suits in the District Munsif's Court in which appellant No. 1 succeeded.

In the present case, however, the right of the party who succeeds before us has been recognized in the other suits also as uralen, but not as sole uralen, and, as the possession of one uralen is the possession of all, the result is not so incongruous as it might be in some cases.

APPELLATE CIVIL.

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

RANGAMMA (PLAINTIFF), APPELLANT,

and

VOHALAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 43.

The plaintiff having obtained a decree against the defendants for the payment to her of a monthly sum for her maintenance, subsequently sued to have it constituted a charge on certain land:

Held, that the claim in both suits arose out of the same cause of action, and, therefore, the plaintiff was precluded by s. 43 of the Code of Civil Procedure from asserting in the second suit the claim which she might have asserted in the first.

SECOND appeal against the decree of Venkata Rangayyar, Acting Subordinate Judge of Ellore, in Appeal Suit No. 510 of 1885,

* Second Appeal No. 903 of 1886.

RANGAMMA
VOHALAYTA. reversing the decree of O. S. Kristnamma, District Munsif of Ellore, in Original Suit No. 324 of 1884.

This was a suit to set aside the court-sale of certain property, and to declare a certain sum due to the plaintiff (under a decree) for her maintenance to be a charge upon the property.

Plaintiff and defendants Nos. 1 and 2 were members of a joint Hindú family; defendants Nos. 1 and 2 being, respectively, father and brother of the plaintiff's deceased husband. Defendant No. 3 obtained a money decree against defendant No. 1 in Original Suit No. 68 of 1876, and, subsequently, in execution of the decree, brought certain land belonging to the family to sale and purchased it himself. Before the execution of the decree the plaintiff's husband died, and the plaintiff sued defendants Nos. 1 and 2 for maintenance and obtained a decree for maintenance at the rate of Rs. 40 per annum in Original Suit No. 473 of 1878. The present suit was brought to set aside the sale in execution of the decree in Original Suit No. 68 of 1876 as collusive, and to declare the annual sum due under the decree in Original Suit No. 473 of 1878 a charge upon the land sold.

The District Munsif allowed the plaintiff's claim, but his decree was reversed on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal.

Rámachandra Ráu Sahib for appellant.

Mr. Ramasámi Ráju for respondents.

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

JUDGMENT.—In this case the third defendant, the respondent, obtained a decree in the year 1876 against the first defendant. In 1878 the appellant sued the first defendant and another member of the family for maintenance and obtained a personal decree against those two defendants, under which they were bound to pay to the appellant for her life a sum of Rs. 3 per mensem, with an allowance for cloths. Some time in 1883 the respondent, in execution of his decree, purchased a part of the family lands belonging to the first defendant's family. The present suit was brought to set aside the sale and the purchase of the respondent, and to have the appellant's maintenance charged on the land purchased by him. The Subordinate Judge held that in no circumstances

could a decree be made as prayed by the appellant, having regard to s. 43 of the Code of Civil Procedure.

It is contended in appeal that a claim for maintenance to be decreed against a person and a claim to have maintenance charged upon immovable property are different, and that they do not arise out of one and the same cause of action; and it was suggested that a widow or other female member of a family entitled to maintenance might have cause to sue for maintenance without having at the same time sufficient cause to demand that the charge be made a charge on the property or any part thereof; and that, if, subsequently, the manager of the family or others were to commit waste or alienate any part of the property, the claimant would be at liberty to come in and sue to have the maintenance already awarded made a charge upon the property. We are unable to allow this contention. The plaintiff had undoubtedly a right to a decree against the first and second defendants personally, or to a decree making the maintenance a charge on the property, and possibly to both; but it appears to us clear that, on the principle to which effect is given by the provisions of the Code of Civil Procedure, the plaintiff was bound, when she sued in 1878, to have asked, for all the remedies in respect of the right of maintenance, to which she was then entitled, and that these claims did arise out of one and the same cause of action, that cause of action being the right to maintenance.

On these grounds, we hold that the Sub-Judge is right and dismiss this second appeal with costs.

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APPELLATE CIVIL.

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

PERUMAL (DEFENDANT NO. 1), PETITIONER,
and

VENKATARAMÁ (PLAINTIFF), RESPONDENT.*

*Civil Procedure Code, ss. 223, 228, 249, 622—Mufassal Small Cause Court Act
(Act XI of 1865), ss. 20, 21—Execution proceedings—Appeal.*

The plaintiff obtained a decree in a small cause suit in a Subordinate Court in the mufassal and a certificate was granted to him under s. 20 of the Mufassal Small Cause Court Act for the execution of the decree against immovable property of the judgment-debtor in the jurisdiction of a District Munsif. He accordingly presented a petition to the District Munsif under s. 247 of the Code of Civil Procedure, but his petition was dismissed:

Held, that an appeal lay to the District Court.

PETITION under s. 622 of the Code of Civil Procedure, praying the High Court to revise the order of T. Weir, District Judge of Madura, on Civil Miscellaneous Appeal No. 29 of 1886, dismissing an appeal against the order of A. L. Lakshmana Chettyár, District Munsif of Tirumangalam, on Civil Miscellaneous Petition No. 401 of 1886.

The plaintiff in a small cause suit on the file of the Subordinate Court of Madura (East) obtained a decree, which he sought to execute under a certificate granted by the Subordinate Judge under s. 20 of the Mufassal Small Cause Court Act against the immovable property of the judgment-debtor situated within the jurisdiction of the District Munsif of Tirumangalam.

The plaintiff accordingly presented a petition to the District Munsif under s. 249 of the Code of Civil Procedure, but the District Munsif refused to grant execution on the ground that the plaintiff's claim was barred by limitation. An appeal was then preferred to the District Judge, who, however, ruled that no appeal lay from the order of the District Munsif rejecting the petition, since it was made on an application in execution of a Small Cause Court decree.

* Civil Revision Petition No. 269 of 1886.

The plaintiff preferred this petition on the ground that the District Judge had declined jurisdiction, since the order appealed against was not an order of a Small Cause Court.

Subramanya Ayyar for petitioner.

Bhāshyam Ayyangár for respondent.

The further facts of this case and the 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.—The decree, in which execution is sought, is one passed in a small cause suit (2680 of 1869) on the file of the Subordinate Court of Madura (East). The decree not being satisfied by execution against the movable property of the judgment-debtor in the jurisdiction of the Small Cause Court, a certificate was granted by that Court to the decree-holder under s. 20 (Act XI of 1865), on the strength of which he applied to attach in execution certain immovable property within the jurisdiction of the Court of the District Munsif of Tirumangalam.

Notice was issued to the defendants, and on objections raised by them, the execution was held by the District Munsif to be barred. The judgment-creditor appealed, but the District Judge held that no appeal lay, since s. 21 of the Mufassal Small Cause Courts Act provided that in the suits tried under that Act all decisions and orders of the Court shall be final. The District Judge, therefore, declined jurisdiction, and the present application is to revise his order under s. 622 of the Code of Civil Procedure.

It appears to us that the words "the Court" in s. 21 refer only to the Court constituted under that Act, that is, the Court of Small Causes which has a limited jurisdiction assigned to it under s. 6 and limited powers in execution of decrees passed by itself. Section 20 provides that if execution cannot be had against the movable property of the judgment-debtor, the certificate granted by the Small Cause Court may be presented to "any Court of Civil Judicature having general jurisdiction in the place in which the immovable property of the judgment-debtor is situate," and "such Court shall proceed to enforce such judgment according to its own rules and mode of procedure in like cases."

The Court of a District Munsif is such a Court of general jurisdiction as is here contemplated, and its orders are subject to appeal.

The enactment of s. 223 of the Code of Civil Procedure has not modified s. 20 of Act XI of 1865—vide *Kahánarāma v.*

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Ranga(1). Sections 223 and 228 of the Code of Civil Procedure are alike applicable to Small Cause Courts (see sch. II), and under s. 228 the orders of a Court executing a decree are subject to the same rules in respect of appeal as if the decree had been passed by itself.

It is no doubt the case that no second appeal would lie from the order of the District Judge in such a case—*Gorachand Misser v. Raja Baykanto Narain Singh*(2); but with regard to a regular appeal the question whether it will lie seems to us to depend upon the character of the tribunal and not upon the nature of the claim.

The order of the District Judge must be set aside, and he must be directed to hear and dispose of the appeal. The costs will abide and follow the result.

APPELLATE CIVIL.

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

PATUMMA (COUNTER-PETITIONER), APPELLANT,
and

MUSE BEARI (PETITIONER), RESPONDENT.*

Civil Procedure Code, s. 230—Execution proceedings—Limitation.

An application was made in 1886 for execution of a decree dated 1873. In the interval, viz., in October 1879, the judgment-debtor was arrested on an application in execution by the decree-holder, but execution was not proceeded with further:

Held, that the application made in 1886 was time-barred under s. 230 of the Code of Civil Procedure.

APPEAL against the order of J. W. Best, District Judge of South Canara, on Civil Miscellaneous Petition No. 308 of 1886, reversing the order of J. P. Fernandes, District Munsif of Kassargode, in execution petition No. 92 of 1886.

This was an application for execution of a decree passed in Original Suit No. 145 of 1872, dated the 9th September 1873. The present application was made on 19th March 1886. In the interval, viz., in October 1879, process was issued on the application of the present petitioner, for the arrest of the judgment-

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

(2) 12 B.L.R., 261.

* Appeal against Order 33 of 1887.

debtor, who was accordingly produced in custody before the Court, but the application was struck off and the judgment-debtor was released. In 1882 and 1883 also applications for execution were made, but not proceeded with.

The District Munsif dismissed the present application as barred by limitation under s. 230 of the Code of Civil Procedure, but the District Judge, on appeal, reversed his order. The judgment-debtor preferred this appeal.

Gopala Rao for appellant.

Srinivasa Rao for respondent.

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

JUDGMENT.—We must hold the application for execution in this case to be barred by time.

The decree, which it is sought to execute, was passed on the 9th September 1873. The present application was made on the 19th March 1886.

An application was made in October 1879, in accordance with which process for the arrest of the judgment-debtor was issued and he was produced in custody before the Court; at that time Act X of 1877 was in force.

The period prescribed for taking proceedings to execute the decree under the law in force immediately preceding the passing of the code of 1882 expired on the 9th September 1885. If the application of October 1879 was granted, and that it was granted within the meaning of s. 230 of the Code of Civil Procedure admits of no doubt, the case is different from that in which only a notice to appear and show cause is issued. The creditor applied for an order for the arrest of the debtor, and his application was complied with; that the creditor did not proceed further cannot in any way alter the fact that his application for execution was granted.

Under the Limitation Act in force prior to the passing of Act X of 1877 no period was prescribed beyond which execution of decrees should not be allowed, provided they were kept alive in due manner; but in 1877 the legislature saw fit to enact that if once an application were made and granted under s. 230 of the Code of Civil Procedure, there should be an end to all execution proceeding on the completion of twelve years from the date of the

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decree (except in certain specified cases which it is not necessary here to advert to); at the same time three years' grace was given subject to the conditions stated in the last paragraph of s. 230 of Act X of 1877.

As observed in the case reported in *Kollu Shettati v. Manjaya*(1), the law immediately in force when Act X of 1877 was passed, and to which regard should be had in disposing of applications for execution of decrees, was the Limitation Act, and that only as regarded limitation; but when the Act of 1882 superseded the former Act, "the law in force immediately before the passing" of the Act of 1882 was the Limitation Act, *plus* the law regarding limitation contained in s. 230 of Act X of 1877; and under the latter, any application to execute the decree now in dispute was barred after the lapse of twelve years from the date of the decree, seeing that an application to execute it was made, and, as we find, granted in 1879.

We, accordingly, reverse the order of the District Judge and restore that of the District Munsif, and the appellant's costs in this Court and in the District Court will be paid by the respondent.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KOMU (DEFENDANT NO. 1), PETITIONER,
and

KRISHNA AND ANOTHER (PLAINTIFF AND DEFENDANT, NO. 2),
RESPONDENTS.*

Mufassal Small Cause Court Act (Act IX of 1887), sch. II, art. 38—Jurisdiction—Suit for maintenance based on a family arrangement—Malabar law.

A suit for maintenance based on a family arrangement is within the jurisdiction of a Mufassal Small Cause Court.

A karnavan is not entitled of his own authority to set aside a family arrangement made on behalf of all the members of the tarwad.

PETITION under s. 622 of the Code of Civil Procedure, praying the High Court to revise the decree of V. P. deRozario, Subordinate Judge of Palghat, in Small Cause Suit No. 790 of 1886.

(1) I.L.R., 9 Mad., 456.

* Civil Revision Petition No. 307 of 1886.

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This was a suit on a karar, made on behalf of the members of the Malabar tarwad, securing the payment to one of the members of a certain sum by way of maintenance. The suit was filed as a Small Cause suit, and the karnavan of the tarwad was joined as defendant No. 1.

The plaintiff having obtained the decree prayed for, defendant No. 1 presented this petition to the High Court on the ground that the suit was not within the jurisdiction of Small Cause Court.

Mahadeva Ayyar for petitioner.

Gopalan Nayar for respondents.

The arguments adduced on this petition appear sufficiently, for the purpose of this report, from the judgment of the Court *Muttusami Ayyar and Parker, JJ.*

The basis of the claim decreed by the Subordinate Court was that the Small Cause jurisdiction was a family arrangement. The contention was that he had no jurisdiction to entertain the suit, and that he did not consider the objection that, as the present karnavan of the tarwad, he was not entitled to set aside a family arrangement made on behalf of all the members of the tarwad. At the date of the suit, the karar was in force as a subsisting contract, and we must hold then that the Subordinate Judge acted neither illegally nor with material irregularity nor without jurisdiction in passing the decree which he has made.

We dismiss this petition with costs.

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decree (except in certain specified cases which it is not necessary here to advert to); at the same time three years' grace was given subject to the conditions stated in the last paragraph of s. 230 of Act X of 1877.

As observed in the case reported in *Kollu Shettati v. Manjaya*(1), the law immediately in force when Act X of 1877 was passed, and to which regard should be had in disposing of applications for execution of decrees, was the Limitation Act, and that only as regarded limitation; but when the Act of 1882 superseded the former Act, "the law in force immediately before the passing" of the Act of 1882 was the Limitation Act, *plus* the law regarding limitation contained in s. 230 of Act X of 1877; and under the latter, any application to execute the decree now in dispute was barred after the lapse of twelve years from the date of the decree, seeing that an application to execute it was made, and, as we find, granted in 1879.

We, accordingly, reverse the order of the District Judge and restore that of the District Munsif, and the appellant's costs in this Court and in the District Court will be paid by the respondent.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KOMU (DEFENDANT No. 1), PETITIONER,
and

KRISHNA AND ANOTHER (PLAINTIFF AND DEFENDANT, No. 2),
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The plaintiff having obtained the decree prayed for, defendant No. 1 presented this petition to the High Court on the ground that the suit was not within the jurisdiction of Small Cause Court.

Mahadeva Ayyar for petitioner.

Gopalan Nayyar for respondents.

The arguments adduced on this petition appear sufficiently, for the purpose of this report, from the judgment of the Court Muttusami Ayyar and Parker, JJ.).

JUDGMENT.—The basis of the claim decreed by the Subordinate Judge in the exercise of Small Cause jurisdiction was a family arrangement in writing, and we cannot say that he had no jurisdiction to entertain the suit for maintenance. As to the contention that he did not consider the objection taken by the petitioner, *viz.*, that, as the present karnavan of the tarwad, he was entitled to set aside the karar sued upon, we are of opinion that the karnavan is not entitled of his own authority to set aside a family arrangement made on behalf of all the members of the tarwad. At the date of the suit, the karar was in force as a subsisting contract, and we must hold then that the Subordinate Judge acted neither illegally nor with material irregularity nor without jurisdiction in passing the decree which he has made.

We dismiss this petition with costs.

APPELLATE CIVIL.

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

KOMARASAMI (PLAINTIFF), APPELLANT,

and

GOVINDU (DEFENDANT), RESPONDENT.*

1887.
Sept. 30.

*Civil Procedure Code, ss. 344, 588—Appealable order—Insolvent judgment-debtor—
Notice to decree-holder.*

A debtor was arrested on civil process. He presented a petition to the Court from which process issued, alleging that he was unable to pay the debt and praying to be declared insolvent and to be released. The Court passed an order on the same day, directing that he should be released and that the creditor should proceed against his property:

Held (1) that an appeal lay against the order; (2) the order was bad for want of notice.

APPEAL against an order made by P. V. Rangacharyar, District Munsif of Sholinghur, on an application under s. 344 of the Code of Civil Procedure.

A judgment-debtor, arrested on civil process, presented a petition to the Court, which set out his circumstances and concluded as follows:—

"In the state of circumstances, I am not in position to pay the debt due under this decree. I will have no objection to pay plaintiff's debts when I may come in possession of property.

"I, therefore, pray that, on an investigation into the matter, an order may be passed, declaring me an insolvent and releasing me from the warrant."

The Court, on the same day, without notice given to the plaintiff, at whose suit the applicant had been arrested, made the following order:—

"Defendant is released. Plaintiff is to proceed against the properties of defendant, whatever they are, movable or immovable."

The plaintiff preferred this appeal.

Anandachari for appellant.

* Appeal against Appellate Order 78 of 1887.

Rangacharyar for respondent.

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

JUDGMENT.—Mr. Rangacharyar takes the preliminary objection that no appeal lies.

The objection is overruled. The order without doubt purports to be an order declaring the petitioner to be an insolvent and releasing him on that ground, but it was passed on the petition on the very day on which the application was made, and we set it aside as the notice required under chap. XX of the Code of Civil Procedure was not given. We shall not direct the District Munsif to take any further proceedings on it, as the petition does not contain the particulars required under chap. XX.

The petitioner, if so advised, can present a fresh application.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KUPPAN, in re.*

1887.
Sept. 27.

Act III of 1869 (Madras), ss. 2, 3—Service of summons.

Where a summons to a witness, issued under Act III of 1869 (Madras), was shown to a person and taken back:

Held, that the summons had not been served.

CASE referred by C. W. W. Martin, Sessions Judge of Salem.

The facts were stated as follows:—

The accused (Kuppan) was charged, at the instance of the Acting Tahsildar of Namkal taluk, with intentional disobedience to a summons under s. 174 of the Indian Penal Code, in that he failed to appear before the Tahsildar as a witness in a revenue inquiry, although summons had been served on him personally.

The accused denied the service of summons on him, but said that the parties to the revenue inquiry told him that he was summoned, without mentioning the date, and that he therefore did not appear.

The summons issued by the Tahsildar to the accused bears on its back the endorsement "I read this summons I will come

* High Court Proceedings No. 521 of 1887.

KUPPAN
in re.

and appear according to the time fixed. Mark of Kuppan. 22-6-87."

The sole witness examined in the case, Taluk Umedwar Hussain Sahib, who took the summons to the accused, appears to have stated that the accused's mark was taken on the back of the summons, that the summons was then taken back, and that the accused was informed of the date of the summons.

The Deputy Magistrate remarks on this evidence :—"Probably so; but if, as the law requires (s. 3 of Act III of 1869), the summons was in duplicate and a copy left with the accused as it should be, the accused could not have forgotten the date of hearing as he appears to have done, &c."

The Deputy Magistrate has not stated the law correctly. The Act does not require that the summons shall be in duplicate. It ordains personal service, with the alternative that the summons may be left with an adult member of the family or with the head of the village.

The acquittal is probably correct, since the Magistrate finds that the accused forgot the date of hearing; but the Magistrate's view of the law is wrong and requires correction.

Counsel were not retained.

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

JUDGMENT.—Although the Criminal Procedure Code (s. 68) enacts that a summons shall be issued in duplicate and the Civil Procedure Code (ss. 166 and 73) directs that a copy shall be delivered or tendered to the person summoned, it does not appear that Act III of 1869 contains any express provision as to the mode in which a summons is to be personally served.

Section 2 of that Act provides that the summons shall be in writing, and s. 3 that it shall be served personally on the person summoned, or may be left with some adult male member of his family residing with him.

The summons itself should, therefore, have been delivered and left with the accused; but it was merely shown to him and taken back. The Deputy Magistrate was, under these circumstances, entitled to hold that the summons had not been properly served. It is obvious that a man in accused's position might very probably fail to understand on what day he had to appear unless the summons was left with him for reference.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

against

SIVANNA AND OTHERS.*

1887.
Sept. 1.

*Madras Forest Act, 1882, Rules 7 and 12—Removal of leaves from classified trees
no offence.*

The mere removal of leaves from classified trees on unreserved land does not constitute a breach of rule 12 of the Madras Forest Act, 1882.

CASE referred under s. 438 of the Code of Criminal Procedure by
J. W. Best, Sessions Judge of South Canara.

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

Counsel were not retained.

JUDGMENT.—The question raised by the Sessions Judge in this reference is one of great public importance, and we cannot but express our surprise that the Public Prosecutor, to whom notice was sent by the special order of this Court, should not have been instructed to appear.

The Deputy Magistrate, on appeal, has confirmed the conviction of the accused, observing that their offence consisted of cutting plants and leaves of classified trees for the purposes of manure. Had the evidence established the offence of cutting plants of classified trees, the conviction might apparently have been sustained on that ground; but we observe that the Second-class Magistrate convicted the accused only of removing leaves of classified trees from unreserved land, and the evidence would seem to indicate that all they did was to remove the leaves and not to cut the plants. Rule 12 (for the breach of which the accused have been convicted) makes it unlawful for any person to fell, girdle, mark, lop, tap, uproot, or burn or strip off the bark or leaves from, or otherwise

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damage, any tree growing on reserved or unreserved land; but this prohibition is subject to the privileges, exceptions, and reservations specified in rules 7, 9, and 10. Rule 7 provides that in all unreserved lands the villagers shall continue to enjoy free of charge such privileges as they have hitherto exercised in the way of grazing cattle or of cutting, converting, and removing trees (other than reserved and classified trees) and timber and other forest produce for fuel or for building or agricultural or domestic purposes. It is observed that the words "other than reserved or classified trees" in rule 7 have reference only to the cutting, converting, and removing of trees, not to the removal of other forest produce for fuel or agricultural or domestic purposes.

There is no finding that the leaves were stripped off in such a manner as to damage the trees from which they were cut, and the mere removal of leaves from classified trees would not alone appear to constitute a breach of the two rules when read together. It may be that the Deputy Magistrate confirmed the conviction under the impression that the accused were guilty of cutting the plants of classified trees, but this was not the offence charged against them. We shall, therefore, set aside his order and direct that the appeal be reheard, after giving notice both to the appellants and to the Public Prosecutor at Mangalore.

APPELLATE CIVIL.

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

KHANSA BIBI (PLAINTIFF), APPELLANT,
and

SYED ABBA AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Madras Civil Courts Act (Act III of 1873, s. 12) Jurisdiction—Suit to recover
share of inheritance—Subject-matter of suit.*

The plaintiff sued to be declared an heir to a deceased Muhammadan and to recover her share of the inheritance, the share claimed being less than Rs. 2,500, while the value of the whole estate exceeded that amount:

Held, that the suit was within the jurisdiction of a District Munsif.

* Appeal against Order No. 130 of 1886.

APPEAL against the order of L. A. Campbell, District Judge of Nellore, returning a plaint for presentation in the Munsif's Court. KHANSA BIBI v. SYED ABBA.

The order appealed against was as follows:—

"Returned to plaintiff for presentation in a Munsif's Court. This suit has been filed in this court with reference to the judgment of the High Court in *Vydinatha v. Subramanya*(1). But that was a suit for partition of family property among Hindús. Here the parties are Muhammadans, and when the person from whom plaintiff claims died, his property at once went in definite shares to his heirs. Plaintiff's claim is to be declared one of such heirs and to recover from the other heirs her inheritance.

"The value of that brings the suit within the jurisdiction of a Munsif's Court."

The plaintiff preferred this appeal.

Mr. Parthasaradhi Ayyangár for appellant. The District Judge had jurisdiction to try the suit, as the value of the subject-matter exceeded Rs. 2,500.

Respondents were not represented.

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

JUDGMENT.—We think that there is an essential difference between the present suit and a suit for the partition of family property amongst Hindús. In the latter case relief can be given to all co-sharers as in an administration suit, while in the present claim the plaintiff merely asks for her definite share or its money value.

On these grounds we consider the order of the District Judge was right and dismiss this appeal.

(1) I.L.R., 8 Mad., 235.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

against

BASAVA.*

1887.
Sept. 18.

Criminal Procedure Code, ss. 250, 262—Vexatious complaint—Compensation.

The provisions of s. 250 of the Code of Criminal Procedure may be applied in summons cases whether tried summarily or not.

PETITION under s. 435 of the Code of Criminal Procedure, praying the High Court to revise the order of W. H. Grahame, Sessions Judge of Coimbatore, on criminal revision petition No. 2 of 1887.

The Head Assistant Magistrate, Nilgiris, dismissed a complaint for breach of contract after a summary trial, and, being of opinion that the complaint was frivolous and vexatious, he ordered the complainant to pay to the accused the sum of Rs. 50 as compensation.

The order as to compensation was set aside by the Sessions Judge on revision on the view that s. 250 of the Criminal Procedure Code was not applicable in the case of summary trials, or when evidence is not recorded.

Mr. Shaw for the complainant.

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

JUDGMENT.—Upon a petition presented by one Basava Maistry, the complainant in calendar case 101 of 1886 on the file of the Divisional (Head Assistant) Magistrate, Nilgiris, the Sessions Judge of Coimbatore, on the 31st March 1887, set aside the order made by that Magistrate, directing the said Basava Maistry to pay to one Joura, whom Basava had charged with breach of contract, a sum of Rs. 50 as compensation for making a frivolous and vexatious complaint.

* Criminal Revision Case No. 122 of 1887.

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Upon this the complainant was called upon by this Court to show cause against the order made by the Sessions Judge.

The Sessions Judge does not state under what provision of law he purported to set aside the order of the Magistrate, and it is not contended that order can be supported. We must set aside the order of the Sessions Judge as passed without jurisdiction; this restores the original order awarding compensation, and that order we are now asked to set aside in revision upon this ground, that, as the case was summarily tried, it was not within the jurisdiction of the Magistrate to award compensation under s. 250, the award of compensation being part of the substantive law, while s. 262 in chap. XXII of the Code, which provides that the procedure prescribed for summons cases (chap. XX) shall be followed in summons cases tried summarily, affects the procedure only. We are unable to allow this contention. It appears to us that s. 262 renders applicable, in the case of summons cases tried summarily, all the provisions of s. 250, and that in all cases, whether tried summarily or not, in which the Magistrate acquits, and is also of opinion that the complaint was frivolous or vexatious, it is open to him to award compensation.

It was suggested that it could not have been the intention of the legislature that a Magistrate of the second and third class, against whose decision in any trial an appeal lies, should have the power to award compensation up to the amount of 50 rupees without the accused having it in his power to appeal. We cannot on this account refuse to give to the provisions of the Code, to which we have adverted, the effect which, as it appears to us, must be given to them when read together and reasonably construed, and we hold that s. 250 is applicable to cases tried summarily. Application can always be made for revision, and it is only in extreme cases that even Magistrates of the first class would inflict a fine of 50 rupees. We see then no reason to set aside the original order awarding compensation. There are certain statements made in an affidavit filed by the complainant to the effect that his evidence was not taken, but we decline to act on those statements, having regard to the record of the Magistrate, which shows that such evidence as there was was taken and a finding recorded.

The order then for payment of compensation remains in force.

APPELLATE CIVIL.

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

1887.
Sept. 16. RANGASÁMI AND ANOTHER (DEFENDANTS NOS. 1 AND 2), PETITIONERS,
and
MUTTUSAMI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, ss. 516, 622.

A District Múnsif passed a decree in the terms of an award without giving notice of the filing of the award under s. 516 of the Code of Civil Procedure:

Held, that the District Múnsif acted with material irregularity within the meaning of s. 622 of the Code of Civil Procedure.

PETITION under s. 622 of the Code of Civil Procedure, praying the High Court to revise the decree of N. Saminada Ayyar, Principal District Múnsif of Trichinopoly in original suit, No. 116 of 1885.

The questions arising in the above suit were referred to arbitration. An award in favor of the plaintiff was returned by the arbitrators, and the District Múnsif passed a decree in the terms of the award, without giving notice to the parties that the award had been filed.

Defendants preferred this petition on the ground that the District Múnsif had acted with material irregularity in not giving notice as above.

V. K. Désikacháryár for petitioners.

Srinivása Ráu for respondent.

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

JUDGMENT.—We are of opinion that the decree made by the District Múnsif in this case must be set aside, and that he must be directed to hear the objections which the petitioners may urge against the award and then proceed to pass a fresh decree in accordance with law. By s. 516 of the Code of Civil Procedure, he was bound to give the petitioners notice of the filing of the

* Civil Revision Petition 94 of 1887.

award, and this he has failed to do. In our judgment this omission is a material irregularity. He should not have proceeded to pass a decree in conformity to the award without first hearing the petitioners' objections. The decree, as it stands, is one made without hearing the petitioners, who were entitled to be heard, and which it was not competent to the District Múnsif to do. We direct him to restore the suit to the file, to give the petitioners ten days' time for filing the objections, and, after considering them, pass such orders as appear to him to be just in the circumstances of the case.

Costs will abide and follow the result.

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APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

against

NALLA.*

1887.
Sept. 13.

Penal Code, ss. 403, 429—Bull dedicated to an idol.

A bull dedicated to an idol and allowed to roam at large is not *fera bestia* and therefore *res nullius*, but, *prima facie*, the trustee of the temple, where the idol is worshipped, has the rights and liabilities attaching to its ownership.

THIS was a case taken up by the High Court under s. 435 of the Code of Criminal Procedure.

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

Counsel were not instructed.

JUDGMENT.—In this case two persons were charged before the Second-class Magistrate of Periyakulam, Madura district, with theft of, and mischief and criminal misappropriation in respect of, an animal described by that Magistrate as "the Kamatchi Amman temple bull."

The Magistrate recorded no finding in respect of the theft, but convicted the accused on the other two counts under ss. 429 and

* Criminal Revision Case No. 178 of 1887.

403, Indian Penal Code, it appearing that they with others hamstrung the bull, killed it, and cut it up, and were caught in the act of taking away or appropriating portions of the carcase. The Magistrate referred the case to the Divisional Magistrate under s. 349, Criminal Procedure Code, being of opinion that the offences called for heavier punishment than he was competent to inflict. The Divisional Magistrate, upholding the conviction, sentenced the accused each to four months' rigorous imprisonment.

The Sessions Judge, on appeal, quashed the conviction, and the accused were set at liberty after undergoing three months of their sentences. Having regard to the principle on which the case—*Queen-Empress v. Bandhu*(1)—was decided, namely, that a bull set at large in accordance with Hindú religious usage, when the original owner abandons all proprietary right in such animal, cannot be the object of larceny, and being of opinion that no material distinction in principle can be drawn between the case of a beast so abandoned and the case of a beast abandoned by its former owner and dedicated or attached to a temple, the Judge, not however without considerable hesitation, held the bull in the case before him to be a *fera bestia* and as *res nullius* (unappropriated by not belonging to any person) to be incapable of being the object of the offences, in respect of which the accused were convicted.

We do not consider it necessary to interfere in revision, not because we agree with the Sessions Judge that there is no material distinction in principle between the case of an animal—property in which is wholly renounced or abandoned and allowed in accordance with religious or superstitious usage to roam at large free from all control—and that of such an animal so abandoned and at large after dedication to a temple, but because the accused have undergone three months' rigorous imprisonment for the offences of which they were convicted.

We consider there is a material distinction between the two cases.

The Divisional Magistrate was, in our judgment, right in holding the bull not to be *fera bestia* and therefore *res nullius*, simply because temple bulls are, as he says, ordinarily wandering beasts, or even if it were proved, as the Second-class Magistrate found, that this bull ordinarily roamed about at large.

(1) I.L.R., 8 All., 51.

If, on the evidence, it appeared that the animal was turned loose after dedication to the temple and that it was actually or inferentially accepted as so dedicated on behalf of the temple, then, though the animal were allowed to be at large free from all control, it would, *prima facie*, be the property of the temple.

If such animals, in their wanderings at times, trespass on, and do damage to, private property with impunity, it is because superstition induces villagers to regard them with veneration, and to endure the mischief which they commit without seeking redress as of right. If the Sessions Judge's view of the law were correct, it would seem to follow that the trustee of a temple, who accepted the dedication to the temple of such an animal, would not be responsible for injuries caused, for example, to a child playing in the street by a bull, to his knowledge dangerous or habitually mischievous: a proposition on the face of it untenable. Even in the case of a person wholly abandoning an animal, such as a bull, without any precaution taken for its future control, it is not to be assumed that he would be free from liability, civil or criminal, in respect of damage done by such animal. The Sessions Judge records no distinct finding as to whether the bull in this case was in fact the property of the temple or not. The second witness, who described himself as the manager of the temple, spoke of the animal as "the temple bull;" but without a specific finding on this point, we cannot definitively say whether or not the conviction was properly reversed, and, as the Judge says, it appears unlikely that any further material or more precise evidence would be forthcoming, we shall leave the case as it stands, having above indicated sufficiently, for present purposes, the principles to which regard should be had in such cases.

Ordered accordingly.

APPELLATE CIVIL.

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

SRINIVÁSA (PLAINTIFF No. 1), APPELLANT,

and

VENKATA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Court Fees Act (Act VII of 1870, sch. II, art. 17, cl. vi)—Religious Endowments Act (Act XX of 1863), ss. 14, 18.

A and B being worshippers at a Hindú temple, obtained sanction under s. 18 of the Religious Endowments Act to sue for the removal of the managers of the temple on the ground of breach of trust and for damages.

A and B sued to remove the managers, but claimed no damages in their plaint :

Held, that, as the suit instituted differed from the one for which sanction was given, the plaint was properly rejected.

APPEAL against the order of D. Irvine, District Judge of Trichinopoly, in original suit No. 10 of 1885.

This was a suit brought under the Religious Endowments Act (Act XX of 1863, s. 14) by two persons, being worshippers in a Hindú temple at Srirangam, against seven persons as managers or trustees of the temple, alleging various acts of misfeasance and praying for their removal from office. No claim was made for damages, though the order sanctioning the suit sanctioned such a claim and the plaint was stamped with Rs. 10 only.

The District Judge directed that a claim for damages should be added, and an *ad valorem* stamp affixed; this, however, was not done, and he accordingly made an order rejecting the plaint under s. 54 of the Code of Civil Procedure.

One of the plaintiffs preferred this appeal against the above order.

Bhāshyam Ayyangár for appellant.

Rámá Ráu for respondents.

The further facts of the case and the arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (Muttusámi Ayyar and Brandt, JJ.).

JUDGMENT.—The appellant is a worshipper in the Hindú temple at Srirangam, in the district of Trichinopoly, and the respondents are managers or trustees of that temple. The suit from which this

* Appeal No. 52 of 1886.

appeal arises was instituted by the former against the latter under s. 14 of Act XX of 1863. In miscellaneous petition 585 of 1884, on the file of the District Court of Trichinopoly, the appellant applied under s. 18 of the Act for sanction to institute a suit for the removal of the respondents from their office of trustees and for recovery from their private property of the damages mentioned in the schedule attached to his petition. On the 24th January 1885, the District Judge made an order granting permission to institute the suit; he observed, however, that from the statements of the counter-petitioners themselves, it appeared very desirable that the accusations made against them should be sifted. On the 7th July 1885, the appellant and the second plaintiff presented their plaint, which prayed for a decree removing the respondents from the office of managers of the temple in question and awarding the appellant the costs of the suit. The plaint stated further that the respondents were guilty of various acts of misfeasance, breach of trust, and neglect of duty, by which the temple sustained a loss of nearly Rs. 17,000. The respondents contended, *inter alia*, that the suit was under-valued, and that the plaint, which was engrossed on a 10-rupee stamped paper was improperly stamped. The Judge considered that the plaintiffs were bound to include in their plaint a claim for damages, and that the suit was under-valued. He also pointed out that the suit instituted was not the suit for the institution of which sanction had been given, and he directed them to amend their plaint by adding a claim for damages and to pay additional stamps in proportion. The appellant failed to comply with his order, and thereupon he rejected the plaint under s. 54, cl. (d) of the Code of Civil Procedure. It is argued, in support of the appeal, that the plaint was sufficiently stamped; that the suit was not under-valued; and that the sanction accorded under s. 18 of Act XX of 1863 extended also to the suit, which was actually instituted. If it were necessary to determine for the purposes of this appeal, whether the plaint was properly stamped, we should certainly follow the decision of this Court in Appeals Nos. 89 of 1881(1) and 65 of 1884. The District Judge notices them in his

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(1) *Veerasami Pillay v. Chokappa Mudaliar and others.*—This was a suit brought under Act XX of 1863, s. 14. On appeal to the High Court (Turner, C.J., and Muttusámi Ayyar, J.) in their judgment, say: "The relief sought is the removal of the defendants from the offices, it is alleged, they severally hold, on the ground that they have been guilty of misfeasance; the suit is one, of which the subject-matter does not admit of valuation and the court fee payable on its institution is 10 rupees."

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judgment, and observes that he is unable to take the same view, or to accept them as binding upon him; but it appears to us that his reasoning is inconclusive, and that several of his remarks are at variance with the recognized rules of judicial interpretation; nor are we prepared to accept his view as to the distinction which is said to exist between the relief asked for in a suit and its subject-matter. As, however, we come to the conclusion that this appeal must fail on another ground, which we shall presently state, we shall not dwell further on this part of the case, and state at length our reasons for holding that the decisions of this Court are right. We are of opinion that the suit actually instituted by the appellant was not the one for the institution of which sanction was accorded, and cannot, therefore, say that the plaint was not properly rejected. The Judge observes that sanction might not have been accorded, if, when the application was made, the intention not to claim damages had been distinctly intimated to the court. It may be that the fact of a person not interested otherwise than as a worshipper in a temple being prepared to include a claim to damages in his suit and to pay stamp duty thereon was regarded to some extent as evidence of *bonâ fides* on his part. It is urged by the appellant's pleader that the words of the prayer in the application for sanction should be taken distributively, and that it was competent to the Judge, under s. 14, to award damages for the benefit of the temple, whether they were claimed in the plaint or not. In this case, the appellant distinctly asked for permission to sue both for the dismissal of the trustees and for compensation for the loss entailed on the institution, and it was open to the plaintiffs, if they changed their mind subsequently, to apply to the court for an amendment of the order under which leave was given to them to sue. Having regard to the fact that the character of the suit, which the appellant proposed to institute, was one of the circumstances which the Judge was entitled to take into consideration in forming an opinion as to whether the application was *bonâ fide*, we are not prepared to hold that the appellant was entitled, as a matter of right, to give the suit a character different from that in respect of which sanction was granted. The obligation, which s. 18 imposes on the Judge to satisfy himself that there are sufficient *prima facie* grounds for the institution of a suit, and the power conferred upon him by s. 19 to call for the production of accounts of the trust before giving leave for the institution of

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the suit, indicate an intention on the part of the legislature to provide an adequate protection to the trustees against vexatious suits, and, in cases of doubt, we think, we ought, so to construe s. 18 as not to take away the protection. The contention that the plaint needs only a stamp of Rs. 10, even when damages are claimed, cannot be supported, inasmuch as the compensation claimed would then form part of the subject-matter of the suit, capable of being estimated at a money value within the meaning of the Court Fees Act. On the ground that the suit instituted was different from the one for the institution of which sanction was granted, we dismiss the appeal, but, under the circumstances, there will be no order as to costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusâmi Ayyar and Mr. Justice Brandt.

VENKOBA (PLAINTIFF), APPELLANT,

and

SUBBANNA (DEFENDANT), RESPONDENT.*

1887.
August 5.

Civil Procedure Code, s. 43—Claim for mesne profits received prior to date of former suit for land.

Where a suit to recover land was brought and no claim was made for mesne profits received prior to date of plaint:

Held, that s. 43 of the Code of Civil Procedure was a bar to a subsequent suit for such mesne profits.

CASE stated under s. 617 of the Code of Civil Procedure by H. R. Farmer, Acting District Judge of Kurnool, as follows:—

"The plaintiff (appellant) on the 29th of September 1885 brought suit No. 458 of 1885 on the file of the District Munsif's Court of Nandyal, and on the 8th of October 1885 suit No. 476 of 1885 on the same file, to set aside a deed of gift of certain lands and to obtain possession thereof. He obtained decrees in his favor on the 24th of November 1885. He, subsequently, on the 23rd April 1886, brought the suit No. 159 of 1886, which has

* Referred Case No. 4 of 1887.

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led to the present reference. This last-mentioned suit was for the mesne profits, which had accrued on the lands which formed the subject of the deed of gift above mentioned, and which profits accrued between the date when the defendant obtained possession of the lands by virtue of the deed of gift and the date of suit. The Munsif held that s. 43 of the Code of Civil Procedure showed that mesne profits were not recoverable in the suit now under reference (original suit 159 of 1886), inasmuch as it was obligatory on the plaintiff to have claimed them in the suits for possession. If the cause of action is held to be the same, the Munsif is apparently right, but from the wording of rule (a), s. 44, it seems that the cause of action in a suit for mesne profits is not always the same as the cause of action in a suit for the possession of the lands on which these profits accrued. In the present case I am of opinion—but my view is not free from doubt—that the Munsif was right in holding that the cause of action was one and the same.

“The question is whether a plaintiff, who sued for possession of land only without suing for mesne profits in respect of the same land, which he could have done in the same suit, is entitled to bring another suit to recover the said mesne profits.”

Srirangacharyar for plaintiff.

Ramachandra Rau Saheb for respondent.

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

JUDGMENT:—The facts of the case are sufficiently stated in the letter of reference. It appears that the plaintiff claimed possession of certain lands in suits Nos. 458 and 476 of 1885 and obtained a decree for possession; that decree was executed and he was placed in possession. He brought the suit, out of which this reference arises, to recover Rs. 120 as the amount of mesne profits due to him for the years 1883, 1884, and 1885. It is conceded for him that he was in a position to have claimed such profits when he instituted the former suits, and we agree with the referring officer that s. 43 of the Code of Civil Procedure is a bar to the present suit. That section provides that every suit shall include the whole of a claim which the plaintiff is entitled to make in respect of the cause of action on which the suit is founded, and a claim for rent due for the year 1874, whilst in a former suit the rent due for the year 1875 only was claimed, the rent for 1874 and

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1875 being then due, is mentioned in the illustration as barred by the section. On comparing s. 43 of Act X of 1877, as modified by Act XIV of 1882, with s. 7 of Act VIII of 1859, we find that the words “which the plaintiff is entitled to make in respect of the same cause of action” have been substituted for the words “arising out of the cause of action.” We are, therefore, of opinion that the words “every suit shall include the whole of the claim in respect of the cause of action,” include not only the claim arising out of that cause of action but also any other claim founded on the same cause of action and enforceable at the date of the former suit. This view is in accordance with the decision of the Judicial Committee in *Madan Mohan Lal v. Lala Sheo Sanker Sahai*(1).

Our answer, therefore, to the reference is that no second suit would lie for mesne profits, which had accrued due prior to the date of the former suit and which the plaintiff was in a position to have then claimed. The plaintiff will pay the defendant's costs of this reference.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

VITLA KAMTI (PLAINTIFF),

and

KALEKARA (DEFENDANT).*

Limitation Act, 1877, sch. II, art. 80.

Suit on an unregistered bond, whereby certain movable property in the debtor's possession was pledged as security for the repayment of principal and interest:

Held, that the suit was governed by art. 80, sch. II, of the Indian Limitation Act, 1877.

CASE stated, under s. 617 of the Code of Civil Procedure, by P. Ram Rau, District Munsif of Kasergode, in small cause suit No. 24 of 1887.

The material portion of the Munsif's judgment was as follows:—

“The suit was for Rs. 17-2-6, principal and value of arrears of interest under a bond, being a hypothecation of movable

1887.
Sept. 2.

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"Defendant denied the plaintiff's claim, ignored the bond, and contended that the suit is barred by the law of limitation. He stated that no interest was ever paid, that the obligor, Fakira, died four years ago, and that his property has not come into defendant's possession. The exhibit A executed to plaintiff by defendant's uncle Fakira, on 31st May 1882, for Rs. 7 was filed for plaintiff, and three witnesses were examined for plaintiff. The bond A was proved by the evidence of two of the plaintiff's witnesses—the writer and one of the attesting witnesses. The evidence, however, as to the payment of interest given by two of the plaintiff's witnesses, who deposed to a payment of 75 cocoanuts 'between two and three years ago' was vague and unsatisfactory, and had the appearance of having been merely got up with a view to take the case out of the statute of limitation; accordingly I have rejected it. Payment of interest being thus not proved, the question arises as to the bar of limitation and as to the article of the Limitation Act XV of 1877, which should govern this case.

"If the period of limitation applicable to the case is the ordinary limitation of three years, the suit is clearly barred, seeing that the six months' time allowed in A for payment of the debt expired at the end of November 1882 and the suit was not instituted till the 18th February 1887; but it is contended for plaintiff that A is not a mere bond but a hypothecation of movable property, and that neither such hypothecation nor a suit for recovery of money charged on movable property is contemplated in any of the articles of schedule II of the Limitation Act prescribing a period of three years; and it is, therefore, argued that, in the absence of any express provision, the article applicable to the case is No. 120,

which prescribes a period of six years for cases not elsewhere provided for. **VITLA KAMTI**
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"The defendant's vakil argues, on the other hand, that the limitation applicable to the case is three years under art. 80, which refers to a 'suit on bill of exchange, promissory note, or bond not herein expressly provided for,' if not under art. 115 (for compensation for breach of contract, not in writing registered and not specially provided for); and he submits that, even if the suit were viewed as for specific performance of contract, or even if the plaintiff were to sue for possession of the specific movable property hypothecated, the case would be governed by three years' limitation (arts. 113 and 49). Another article referred to by him, viz., No. 65, I pass over as inapplicable to the present case.

"In support of the argument for plaintiff that neither art. 80 nor 115 is intended to be applicable to a suit on a hypothecation bond, the following analogy is suggested, viz., while a suit against a mortgagee to redeem or recover possession of immovable property mortgaged has a period of sixty years (art. 148), a similar suit for movable property has thirty years (art. 145), and as a suit for money charged upon immovable property is governed by a limitation of twelve years (art. 132)—vide *Aliba v. Nanu*(1)—it is submitted that it is not unreasonable to suppose that a suit for money charged upon movable property must be governed by a limitation of six years as in art. 120, and not merely three years. It is further submitted that, when even a hypothecatee of immovable property after the passing of the Transfer of Property Act, 1882, can sue for foreclosure or sale at any time within sixty years under art. 147 (see *Aliba v. Nanu*), a hypothecatee of personal property may fairly be supposed to have a longer period than the ordinary limitation of three years, but the above position of the hypothecatee of immovable property is the outcome of the Transfer of Property Act, with which the cases of movable property have nothing to do.

"The question for decision, then, is whether the limitation applicable to this suit is three years or six years, or, in other words, whether a suit for money due on a simple pledge, without possession of movable property, falls under art. 120 or under art. 115 or 80.

(1) I.L.R., 9 Mad., 218.

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"I am of opinion that the limitation applicable is three years either under art. 80 or under art. 115; but, as the parties have applied for the reference of the question for the decision of the High Court, and, as, under the circumstances stated, I have doubts whether such a suit may not fall under art. 120, there being no decided case in point, I respectfully refer the above question, and, contingent upon the decision of the High Court, I direct that the suit be dismissed as time-barred."

Gopdl Rdu for plaintiff.

Defendant did not appear.

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

JUDGMENT.—The bond, which is the subject of this suit, created an obligation to pay a debt on the security of certain movable property, which the debtor retained in his possession. The question referred for our opinion is whether art. 80 or 120 of the sch. II of the Limitation Act, 1877, applies to the suit, and whether the period of limitation prescribed for it is three or six years. There can be no doubt that a suit to recover the debt due under the bond is governed by art. 80. The power to bring the movable property to sale is an incident in the nature of an accessory to the right to recover the debt, and, if that right becomes incapable of being enforced owing to the lapse of three years, the power to sell the security must likewise cease to be capable of being exercised. In the absence of a special provision applicable to a suit brought to enforce the sale of the security, we must hold that the period of limitation is three years and that the suit is governed by art. 80.

The question referred to us will be answered accordingly.

APPELLATE CIVIL.

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

VÁSUDEVAN (DEFENDANT No. 2), APPELLANT,

and

THE SECRETARY OF STATE FOR INDIA.*

1884.
Dec. 1, 9.
1886.
August 30.
1887.
August 30.

*Malabar law—Nambúdris, their personal law—Power of disposing of tarwad property
by an antharjanam—Sarvasvadhánam marriage.*

Suit by the Secretary of State to declare a right of escheat of the property of a Nambúdrí illam. The last male member of the illam died about 1859, leaving defendant No. 1 and her mother the sole surviving members of the illam. Defendant No. 1 had previously been married to a member of another illam by a sarvasvadhánam marriage, but her husband died without issue. In 1872, defendant No. 1 and her mother—there being no aṭṭaladakkam heirs—appointed defendant No. 2, an adult member of a third illam, to be manager and heir of their illam and to marry and raise up issue for it. The mother and father of defendants Nos. 1 and 2 respectively, were brother and sister:

Held (1) that Nambúdrí Brahmans are governed by Hindú law, as modified by special customs adopted by them since their settlement in Malabar;

(2) that defendant No. 2 had no right to the property of the illam independently of the appointment of 1872;

(3) that the property of the illam was not the soudáyika of defendant No. 1, and as such at her absolute disposal;

(4) that a Nambúdrí widow, who is the sole surviving member of her illam, is not at liberty to alienate the property of the illam at her pleasure;

(5) that there was sufficient evidence of a custom that a Nambúdrí widow can adopt or appoint an heir in order to perpetuate her illam in the absence of dayadies with ten or three days' pollution; and the appointment of defendant No. 2 was valid against the Crown.

Quære.—Whether in such appointment of an heir, it is necessary to direct that he should marry for the illam to which he is appointed as heir.

APPEAL against the decree of F. Wilkinson, District Judge of South Malabar, in original suit No. 57 of 1882.

This was a suit to declare the Crown to be entitled to the property of the Tamarasseri illam on the death of defendant No. 1, notwithstanding the disposition made by that defendant in favor of defendant No. 2.

* Appeal No. 10 of 1884.

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The defendants were Nambúdrí Brahmans and members of different illams. In 1872, defendant No. 1 and her mother, the sole surviving members of their illam—there being no attaladakkam heirs—had appointed defendant No. 2 to be heir of their illam and to marry and raise up issue for it. Defendant No. 1 had previously been given in sarvasvadhánam marriage to a member of another illam, who, however, had died without issue.

The case for the plaintiff was that the appointment of defendant No. 2 was invalid and that defendant No. 1 was without heirs.

The District Judge passed a decree in favor of the plaintiff, and against his decree defendant No. 2 preferred this appeal.

Sankaran Náyar for appellant.

The Government Pleader (Mr. Shephard) for respondent.

The further facts of the case and the arguments adduced on appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.).

JUDGMENT.—The property which is the subject of this litigation is that of a Nambúdrí family called Tamarasseri illam in the Ernad taluk in the district of Malabar. The last male member of that family was one Sankaran Nambúdrí, who had an only daughter named Savitri, the first defendant in the present suit. In order to perpetuate his family, he gave her, in what is usually called, sarvasvadhánam marriage to a member of another Nambúdrí family called Vadakumpat illam. It is not disputed for the Crown that if she had a son he would, by the custom obtaining among Nambúdrí Brahmans, take the place of Sankaran Nambúdrí's own son and continue his family. But Savitri's husband died shortly after her marriage without issue, and her father died about the year 1859, leaving him surviving Savitri and her mother. Savitri's husband had a brother named Narayanan Bhattathiri, and from 1859 to 1872 he managed the affairs of her family on her behalf and that of her mother. A disagreement having since arisen, the two ladies removed him from management and executed document A in favor of Vásudevan Nambúdrí, defendant No. 2, on the 4th November 1872. Vásudevan Nambúdrí's father and Savitri's mother were brother and sister.

By document A he was appointed heir to the Tamarasseri illam and constituted owner of all that belonged to it. He was

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further directed to marry for that illam, to assume management of its affairs at once in the capacity of owner, and to protect the two ladies during their life-time. It then proceeded to state that "If you die without you or any of your brothers having issue after marrying for the Tamarasseri illam, or if we die before the marriage is celebrated, the said illam, with all its properties, &c., ought to lapse to Maranat illam wherein you were born by right of your anandravanship." According to its true construction, the right of the widows was reduced to that of maintenance; the appellant was to become at once owner and manager of the illam, to raise up an heir to it by a fresh marriage, and in case he died without begetting issue, the properties of the Tamarasseri illam were to vest in Maranat illam, of which he was a member. At the date of document A the appellant had already married and had issue by that marriage, and the marriage he was desired to contract was a fresh marriage designed for raising up heirs to the Tamarasseri illam according, as it is said, to the usage of Nambúdrí Brahmans in Malabar. According to the provisions of the document, he took possession of the properties of the Tamarasseri illam in 1872 and has since continued in management. It is also in evidence that he contracted a new marriage on account of the illam, though no child is yet born of that marriage. From 1872 to 1879 he and the two ladies were apparently on terms of cordiality, and the senior lady, Sankaran Nambúdrí's widow, died about the year 1879. In consequence of some misunderstanding the junior lady since brought original suit No. 1 of 1880 to set aside document A and to resume possession of the properties of her family, but the appellant resisted her claim, and it was dismissed on the ground that she was not entitled to set aside her own deed. The remarks made by the learned Judges of the High Court when the claim came under their consideration in second appeal will be found in *Vásudéva v. Náráyana* (1), and it will be observed that in the opinion of Innes, J., document A aimed at defeating the right of escheat vesting in the Crown. The second appeal was dismissed in June 1881; and in November 1882 the present suit was brought by the Secretary of State for India to have it declared that on the death of the first defendant the Crown is entitled to the property in suit, and that document A is of no effect as against

(1) I.L.R., 6 Mad., 122, 123.

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it. The plaint stated that in so far as document A attempted to constitute the appellant heir to the Tamarasseri illam, it prejudiced the right of escheat which must accrue on the death of Savitri, the first defendant. The appellant resisted the claim on several grounds. He took two preliminary objections, viz., (i) that the claim was barred by limitation, and (ii) that the plaint disclosed no cause of action and the suit could not be maintained. He contended further that he was the next heir to the illam irrespective of document A and by virtue of his relationship to Savitri's mother. He alleged that in consequence of the first defendant's sarvasvadhānam marriage, the property of the illam became her soudāyika, and that, as such, it was at her absolute disposal. He stated also that, according to the usage of Malabar, a Nambúdrī widow, or antharjanam as she is usually designated, was at liberty to appoint an heir to her illam and to alienate its property at her pleasure; that Hindú law was not applicable to her, and that his appointment as heir was in accordance with local custom and ought to be upheld as equivalent to "Kritrima" adoption known to Hindú law. Lastly, he asserted that the Crown had no right of escheat in regard to the "jenm" lands of Malabar or the property of Nambúdrī Brahmins.

As to the two preliminary objections, the District Judge overruled them and his decision is not questioned in appeal. We therefore dismiss them from further consideration.

As to the question, what law is to be applied to Nambúdrī Brahmins, the Judge has found that they are governed by Hindú law as modified by special customs which they have adopted since their settlement in Malabar. Although it was urged in appeal that they do not follow Hindú law, the contention was ultimately not seriously pressed upon us. As the question is, however, one of general importance, and as the decision of several other issues in this case depends upon its determination, we may add that in our opinion the Judge has come to a correct conclusion. According to the evidence on both sides, succession is traced among Nambúdrīs through males and property passes from father to son, whereas among Nayars, succession is traced through females and property descends from mother to daughter. Thus, the mode of tracing succession and the devolution of property are in accordance with Hindú law and contrary to marumakkattayam usage. Again, legal marriage is the basis of the law of

succession among Nambúdrīs as among Brahmins of the East Coast, whilst among Nayars there is no recognised connection between marriage and inheritance. Thus, the notion of paternal relation founded upon legal marriage as the cause of inheritance obtains both under Hindú law and among Nambúdrī Brahmins. Further, a Nambúdrī woman, in common with a Brahmin on this side of the ghāts, takes her husband's gotram upon her marriage and passes into his family from that of her father; and perpetual widowhood and incapacity to remarry on her husband's death are the incidents of marriage both among Nambúdrīs and Brahmins of the East Coast. But among Nayars, a woman continues through life to belong to the family in which she is born, and the sexual relation which she forms, or her so-called marriage, operates in law neither to give her the domicile of her husband nor to create a disability in her either to remarry or to put an end to her marriage at her pleasure during her first husband's life. Moreover, the same rule of collateral succession obtains both among Nambúdrī Brahmins and other Brahmins in Southern India. Among the former, dayadies or distant kinsmen are divided into those who have ten and three days' impurity or pollution, and among the latter, such kinsmen are classified as gotraja sapindas and samanodakas, the sapinda and the samanodaka relationship being severally the cause of ten and three days' impurity or pollution, arising from the birth or death of any one so related. Moreover, Nambúdrīs and Brahmins on the East Coast recognise alike the authority of the vedas and of smritis, and they have faith in the religious efficacy of ceremonial observances and of funeral and annual obsequies. We may also refer to the ceremony of investiture or upanayanam and to the notion of second birth as common to both. The view, therefore, that when Nambúdrīs settled in Malabar they carried their personal law with them, though they changed it in some respects after their settlement on the West Coast, is supported not only by the foregoing facts, but also by the fact that gotrams of Nambúdrī Brahmins are said to be the same as those of Brahmins on the East Coast, indicating thereby common descent from the same original male ancestors. It was observed by the Privy Council in *Rutchepetty v. Rajunder*(1) that when a class of Hindús migrate from one place

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to another and retain their ancient religion, the presumption is, unless the contrary is shown, that they carried their personal law with them to the new settlement. There is therefore sufficient foundation for the opinion of the Judge that Nambúdris are governed *prima facie* by Hindú law; but it must be remembered that the personal law which they presumably carried with them was the Hindú law as received by Brahmans at the time of their settlement in Malabar, and that it is *not* the Hindú law as modified by customs which have since come into prevalence among Brahmans on the East Coast. For instance, the form of marriage called the sarvasvadhánam marriage, which is referable to the ancient Hindú law of putrika putra or of the appointed daughter and her son, is still in force among Nambúdris as a mode of affiliation, though it is obsolete on this coast. Another qualification with which Hindú law should be applied to Nambúdris consists in their adoption of the territorial law or the usage of Nayers in several respects subsequent to their settlement in Malabar. Under Hindú law, both ancient and modern, partibility is an incident of ordinary Hindú property, coparcenary depending for its continuance upon the mutual consent of cosharers; but among Nambúdris, as among Nayers, family property is not liable to be divided at the instance of any one of the coparceners. Again, self-acquired property merges, on the death of the person acquiring it, into family property as is the case among Nayers. It appears further that the senior male, in point of age, is entitled to management in preference to the representative of the senior branch. We may also mention that among Nambúdris, the eldest brother alone usually marries, and the others, as is the case among Nayers, consort with Nayar women otherwise than with the sanction of marriage. Having regard to the evidence on both sides, the conclusion we come to is that Nambúdris are governed by Hindú law, except so far as it is shown to have been modified by usage or custom having the force of law, the probable origin of the special usage being either some doctrine of Hindú law as it stood at the date of the settlement, though now obsolete, or some marumakkatayam usage.

The next question for decision is whether the property in dispute became the soudáyika of the first defendant, and whether as such it was at her absolute disposal. This contention which the appellant rests on Hindú law is one which cannot at all be

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supported. The term soudáyakkam is applied to that class of "stridhanam" over which a Hindú lady has absolute power of disposition and every description of stridhanam presupposes a gift to her, but a sarvasvadhánam marriage does not necessarily imply a gift of property to the girl who is given in marriage. As pointed out by a Division Bench of this court in *Kumaran v. Náráyanan*(1) sarvasvadhánam marriage is referable to ancient Hindú law, which authorised the appointment of a daughter or her male child as the legitimate son of her father for purposes of funeral obsequies and of inheritance, and the formula used during that marriage is the text of Vasishta which is as follows: "I give unto thee this virgin (who has no brother) decked with ornaments, and the son who may be born of her shall be my son." It is this special agreement between the bride's father and her husband that distinguishes sarvasvadhánam from an ordinary marriage, and it suggests nothing more than a form of affiliation in use under ancient Hindú law. If the appellant's contention were to prevail, a Nambúdris would cease to own his property if he were to give his daughter in sarvasvadhánam marriage, and it would vest at once in the daughter and be divested from him and from the daughter's future son who is affiliated as his next heir at that marriage. Under ancient Hindú law, either a daughter was appointed by the father to be in the place of a legitimate son, or her future son was so appointed; if the former, there was an express stipulation to that effect, and in the latter, the special agreement took the form "that the child which shall be born of her shall be mine for the purpose of performing my obsequies." In the first case the daughter stood in the place of a legitimate son for purposes of inheritance notwithstanding her sex, and the legal relation between her son and her father was that of a son's son; but in the second case, it was her son who was appointed to be her father's legitimate son, and on his birth, his legal relation to his maternal grandfather was that of an adopted son, the difference between this form of appointment and an ordinary adoption consisting in that the affiliation was made during the daughter's marriage and in the expectation that she might have a son. (See the passage cited from Hemadri in Colebrooke's Translation of the *Mitákshará*, Stokes' Hindú Law Books, page 412.) In neither mode of

(1) I.L.R., 9 Mad., 290.

appointment is there any warrant for the contention that there was an implied gift of family property to the daughter by the father at the time of her marriage; though in both a son was affiliated. On the other hand, the formula used during the sarvasvadhánam marriage suggests that it is not the daughter but her future son that is adopted as son, and that the family property is not intended to vest in her absolutely. So long as there is the prospect of a son being born, she and, through her, her husband hold the property in the event of her parent's death in trust for the heir in expectation, and if she becomes a widow and the prospect of having a male child fails, her legal position is that of a daughter, who is retained in her father's family for the purpose of raising up an heir to it instead of, as is ordinarily the case, being transferred to her husband's family. According to ancient Hindú law, then, she never had an absolute estate either during her father's life or after his death, though when she became childless widow and the sole heir to the illam, she had the same right that the other widows of the family had.

The evidence of the fifth witness for the respondent, who is a vydika, and as such an expert, is to the same effect. He says: "The person who has accepted a girl in the sarvasvadhánam marriage has no right whatever to the property of the family into which he is married. He is maintained, however, in the illam. If he dies, the daughter becomes a widow of the illam: she is like other widows, and she is not competent to alienate the family property at her pleasure. If a son is born to her, the property goes to him; but the person who contracts the sarvasvadhánam marriage may be appointed heir to the illam. Among Nambúdiri women, the mother is competent to give her daughter in sarvasvadhánam marriage." His evidence as to the appointment of the son-in-law as heir by an express stipulation to that effect is supported by exhibit II. The other reliable evidence on record as to the effect of a sarvasvadhánam marriage is substantially the same. The result then is that the contention that the property in dispute became the soudáyika property of the first defendant by reason of her sarvasvadhánam marriage must be overruled.

Another question raised for decision in this appeal is whether the appellant is entitled to succeed to the property in suit on Savitri's death, irrespective of document A. The relationship on which he rests this contention is that his father was the brother of

the first defendant's mother, but it does not make him Sankaran Nambúdiri's cognate or bandhu within the meaning of the term as explained by the author of the *Mitákshará* in chapter II, section V, sloka 3.

The next contention is that a Nambúdiri widow is at liberty to alienate the property of her family at her pleasure; that she is entitled to appoint an heir to her illam, and to authorise a Nambúdiri Brahman to marry for the illam and thereby raise up an heir for it. There is no doubt that it cannot be supported under Hindú law as now administered on the East Coast in Southern India. That a Hindú widow takes but a qualified heritage; that her succession is only a case of interposition; and that, upon her death, the heirs of the previous male owner are entitled to the inheritance, are questions which have been set at rest by the decisions of this Court and of the Privy Council in the *Shivaganga case*(1). It was also held by the Judicial Committee in *The Collector of Masulipatam v. Cavalry Venkata Narrainapah*(2) that the restriction placed on the widow's estate is absolute; that it is due to the austere life prescribed for her with reference to her status as a Hindú widow, and that neither the estate which she takes, nor the power of alienation which she possesses, can be extended owing to the non-existence of other heirs. The substantial question then for decision in this appeal is whether, as alleged by the appellant, she has the powers claimed for her by virtue of usage having the force of law in Malabar and traceable either to some doctrine of ancient Hindú law, now obsolete on the East Coast, or to the territorial law or usage of the Nayars.

At the original trial held before the Judge, eight witnesses were examined on each side, and their evidence, being conflicting, was considered by him not sufficient to justify a finding in favor of the custom set up by the appellant. Accordingly, the Judge decreed the respondent's claim, and the second defendant appealed from his decision to the High Court.

When the appeal came on for disposal, the learned Judges who heard it considered that further inquiry was necessary and made the following order:—

"We consider that it would be unsafe in this case to apply the doctrines of Hindú law as it now obtains among the Brahmans of

(1) L.R., 8 I.A., 99.

(2) 8 M.I.A., 519.

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Southern India other than Malabar and Canara to the Brahman illams in Canara and Malabar. Very wide divergences from that law are well known and recognised in the rules accepted by the illams to regulate the devolution of property and the incorporation of members in the illam. So far as the evidence goes, we consider that it rather favors the contention of the appellant; but before we pronounce an opinion, we desire that the Judge will make a more extended inquiry, and we suggest that a commission should be despatched to the several Munsifs in South Canara and in North and South Malabar to take evidence as to what are the rights and powers of a lady in a Brahman illam who has survived all the male members of the illam, and who has no known attaladakkars, as to the disposal of property of the illam and the adoption of members to continue the family. A commission will be issued from this court to the High Court of Travancore and the Appeal Court of Cochin for the elucidation of this question."

After making the further inquiry ordered by the High Court, the Judge has returned a finding to the effect that the whole evidence taken at its best is, in his opinion, far from being clear and unambiguous, and utterly insufficient to establish a special usage modifying the ordinary law of succession, and that this being his view, the rights of a Nambúdrí widow in the circumstances stated in the issue are the same as those of any other Hindú widow. This finding is again objected to, and what we have now to decide is whether it is opposed to the weight of evidence on the record.

The Judge speaks apparently of the modern Hindú law as received by Brahmans on this side of the Western Ghâts as the personal law which Nambúdris took with them when they settled in Malabar. As to the probable period of their settlement in Malabar we have no precise information; but the well-known usages of Nambúdris, purporting to be derived from Hindú law and to rest on smritis, disclose considerable divergence from the doctrines of Hindú law now received on the East Coast. Sarvas vadhánam marriage is traced by Nambúdris to Hindú law, and the text of Vasishtha, which is adopted as the formula to be solemnly pronounced during the marriage, discloses a connection between this usage and the ancient smriti law. But this form of marriage is unknown on the East Coast, nor is it recognised as a mode of affiliation. Again, a Brahman woman becomes an outcaste on the East Coast by not marrying at all, or by marrying after she

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attains her maturity; but in Nambúdrí illams women marry after they attain their maturity, and some never marry at all. Further, the adoption of a son as the son of two fathers or in the dwaya-mushyayana form is obsolete on this coast, and, according to the evidence taken on commission in Travancore and Cochin, it is the ordinary form of adoption recognised in Malabar. Further, on the East Coast, no Hindú widow is competent to adopt in the absence of express authority either from her husband or his sapindas; but according to the evidence taken in Travancore, the Nambúdrí widow has an implied authority to adopt in the absence of express prohibition. (See also Dattachandrika). It appears from the case of *Lakshmáppá v. Rámáva*(1) that the theory of an implied authority in the absence of express prohibition is recognised as law in Western India. It is therefore important to bear in mind that the Hindú law applicable to Nambúdris was as it existed at the time of their settlement in Malabar. The appellant claimed in this case, as already remarked, three special powers for a Nambúdrí female, or an antharjanam as she is commonly designated, and the first of those powers is a power to alienate inherited property at her pleasure. The Judge finds that the custom urged in its support is not made out by the evidence on the record, and we see no sufficient reason to come to a different conclusion. There are, on the other hand, several facts that support the finding. It should be observed here that a childless widow never had an absolute power of disposition over property inherited from her husband under Hindú law throughout its history. The ancient Vedic law excluded her from succession altogether by reason of her sex, and the Vedic text embodying the rule of exclusion is cited in Smriti Chandrika (Kristnasamy Aiyar's Translation, p. 54). The ground on which she was permitted to inherit when she desired to raise up issue for her husband, or when niyoga (appointment to beget a son) was in vogue, was that she inherited not in her own right, but in right of the son who was to be begotten upon her. (See the argument of Dharasvara cited and discussed by the author of the *Mitákshará* in chapter II, section I, slokas 6 to 28).

As to the Smritis of Katyayana and Brihaspati which gave her a place in the line of heirs, they also restricted the power of alienation and gave her but a qualified heritage in the nature of a

(1) 12 P. M. H. C. R., 364.

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personal provision. (See the judgment of this Court in the *Shivaganga case*(1).) There is then no foundation in the history of Hindú law for the power of alienation claimed for her. According to Nayar usage, however, women have no doubt full ownership when they are the sole members of their tarwads; but the system of law under which they have such ownership is essentially distinct from Hindú law. The status and the usage of Nambúdris women in other respects are anything but similar to those of Nayar females. The restriction on the disposing power of a Hindú widow is the outcome of her status as widow and the austere life prescribed for her by her religion and of the text that Hindú property was designed for religious sacrifices and spiritual purposes. The religion and status of Nambúdris widows are substantially the same, whilst widowhood and its peculiar religious obligations in the form in which they are recognised among Nambúdris are wholly unknown to Nayars. It is, therefore, antecedently improbable that Nambúdris women should have adopted Nayar usage in respect of the power of disposition only, notwithstanding their custom as to widowhood and its religious obligations.

Turning to the evidence in its support, we see reason to think that it is by no means weighty. Several witnesses who support the contention say that she is not competent to alienate when there are attaladakkam heirs, implying thereby that she is governed by Hindú law; that the heritage which she takes is a qualified one, and that a reversionary interest is carved out of it. Again, the law of compulsory registration has been in force in this presidency since 1864, and the absence of documentary evidence in support of the contention is an important matter for observation. Many of the witnesses examined on this point are Nambúdris, and it is strange that their evidence should be conflicting in regard to what must be of frequent occurrence. The first seven witnesses who were examined for the respondent at the original trial, and who denied that an antharjanam had the unrestricted power of alienation claimed for her, are Nambúdris. Two of those witnesses (Nos. 5 and 6) are vydikas, or men competent according to the caste organization obtaining among Nambúdris to express an authoritative opinion on questions of religion and caste usage. Three of them refer to the text of Yajnyavalkya, which declares that a

(1) I.L.R., 3 Mad., 331, 332.

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man is never independent and always in a state of pupillage as applicable to her. Though the evidence of the Dewan of Cochin is apparently in the appellant's favor, yet it is not really so, for, he states that it has not been settled whether the consent of the Raja at Cochin is necessary to validate an alienation by a Nambúdris widow who is the only surviving member of her illam. The only evidence recorded at the original trial in favor of the contention is that of appellant's witnesses Nos. 1, 3, 5, 6 and 7, who depose that she can alienate at pleasure and without the consent of attaladakkam or reversionary heirs. The fifth, sixth and seventh witnesses add that they or their tarwads made purchases from Nambúdris women, but they produce no sale deeds, nor do they go into detail as to the circumstances in which the purchases were made. Contradicted as they are by the respondent's witnesses, we cannot say that the Judge was in error in holding that there was no sufficient evidence to warrant a finding in appellant's favor.

As to the evidence taken on commission at the re-trial, we shall refer first to the evidence recorded at Cochin and Trevandrum. Six witnesses were examined at Cochin and five were summoned by the Commissioner himself as persons competent to give evidence as to the usage of Nambúdris, and one was examined as an expert at the instance of the respondent's pleader. The expert is one Piruvengadaahari, who has been a Zila Judge in Cochin territory for about seventeen years, and made local custom a subject of special study. His evidence is that a Nambúdris female cannot alienate in the absence of a tarwad necessity, whether there are attaladakkam or reversionary heirs or not. Of the other five witnesses, the first, second, fourth and fifth ascribe to her an absolute power of disposition, whilst the third witness, who is a wealthy landholder, says, that she can only part with her family property from necessity or for certain charitable purposes, and that no male or female can alienate tarwad property without a tarwad necessity, or for other than a tarwad purpose. The Commissioner accepts his evidence as that of one well informed on the subject of custom under investigation, and the effect then of the better portion of the Cochin evidence is that, as a matter of actual practice, the Nambúdris female does not possess the unrestricted power of alienation that is claimed for her. It is, however, no doubt open to the observation that the principal Nambúdris witness, the Commissioner and the expert think that tarwad property is a perpetual entail, and

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that the person owning it for the time being, whether a male or a female, is not at liberty to alienate it, except under necessity or for a proper tarwad purpose. Whatever may be the weight due to the reason which they assign and to the theory of perpetual entail, as modifying the right of property in tarwad lands, the fact is clear that the evidence is against the appellant as to actual practice, whether it is satisfactorily accounted for or not.

As to the Travancore evidence, four witnesses were examined by the Chief Justice of the High Court at Trevandrum, and the second and third witnesses are representatives of respectable Nambúdrí illams, while the fourth witness is an expert who has been the Accountant-General of the Travancore Government for upwards of fifteen years. Their evidence is that in the absence of dayadies or reversionary heirs, a Nambúdrí female can alienate her family property at her pleasure. In this connection the remark made by the Commissioner is important, viz., that the Travancore Government, scrupulously following the ancient Hindú law, never claimed a Brahman's property by right of escheat, and that the natural consequence of the absence of attaladakkam heirs and of the right of escheat led to the result that the alienation by a Nambúdrí female was never questioned by the Travancore Government. The evidence of the Accountant-General and the expert gives an idea of the extent to which the right of escheat is asserted by the Travancore Government in connection with alienations by the last surviving female of a Nayar tarwad. "The old custom is," says the witness, "that in a Sudra house, the last survivor, whether a male or a female, cannot make a gift of tarwad properties, or do anything with them for want of heirs. But the sarkar does not interfere if documents are executed for lawful purposes: if they are executed for unlawful purposes, the government rejects them." This portion of the Travancore evidence, in common with the Cochin evidence, suggests a theory of perpetuity as a bar to the alienation of tarwad property. In *Cavalý Vencata Narrainapah v. The Collector of Masulipatam*(1), the Judicial Committee overruled the notion which had prevailed till then, viz., that under Hindú law, the Crown can never take the estate of a Brahman by escheat. One of the principles on which that decision rests is that when the last owner dies heirless, the per-

(1) 8 M.I.A., 519.

sonal law applicable to him ceases, and the public law relating to the prerogative of the Crown in regard to heirless property takes its place. The Travancore evidence as to Nambúdrí usage cannot then be accepted as evidence of a custom of which the validity is to be determined with reference to the law of escheat as interpreted by the Privy Council.

As to the evidence taken in South Canara at the second trial, the Judge attached no weight to it, and our attention was not drawn at the hearing specially to any part of it. As to the evidence taken by the District Múnsifs in North and South Malabar, the Judge has set it out in his finding on the issue referred for retrial, and we agree in the conclusion at which he has arrived. As observed by him, it is not uniform, often hearsay, and generally vague as to the circumstances in which alienations were made. The reason suggested by several witnesses (for instance the witnesses examined by the District Múnsif at Badagara) is that when there are no reversionary heirs, the sole surviving female has all the powers of the sole surviving male. If alienations by Hindú widows prior to the decision in *Cavalý Vencata Narrainapah v. The Collector of Masulipatam* on this coast, under the mistaken view of Hindú law in regard to the escheat of property belonging to Brahmans, formed no foundation for a valid custom, a similar practice, we apprehend, could not be taken to have originated a valid usage in Malabar, though some alienations might possibly have been made under its influence. The conclusion to which we then come upon the whole evidence is that we must accept the finding of the Judge that a Nambúdrí widow does not possess the power of alienation which is claimed for her.

So far we agree with the District Judge, but we are unable to concur in his opinion as to the effect of the evidence in regard to the other two powers which are claimed for a Nambúdrí female. The first of them is a power to appoint an heir to perpetuate her illam, which is otherwise likely to become extinct for want of heirs, and the second is a power to direct a Nambúdrí to marry again specially for her illam under the agreement that the son, if any, who may be born of that marriage shall be the heir to that illam. These powers relate rather to modes of affiliation of sons into a Nambúdrí family than of alienation of its property.

As to the evidence recorded at the original trial, the first, second, fifth, sixth, seventh and eighth witnesses were examined

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on this point, and the first is one Raman Nambúdrípad, who is the representative of a Nambúdrí illam in the appellant's village. According to him an antharjanam can appoint an heir to perpetuate her illam, and he mentions three cases in which such appointments have been made. The first was an appointment made on behalf of the Manthatpuram illam, the second was made on behalf of the Kiyadath Muthadath illam and the third was made on account of Kavunkel Vellilakat illam.

The second witness is one Divakaran Nambúdrí of the Walavanad taluk, and his evidence is that a Nambúdrí can adopt one who is even married, and that an antharjanam is competent to adopt.

The fifth witness is Manavikraman, the junior tirumulpad of Nilambur tarwad, which pays an assessment to Government of Rupees 7,000 per annum. His evidence is that an antharjanam is competent to appoint an heir, and that it is not necessary for her to obtain the previous consent of reversionary heirs.

The sixth witness is one Narayanan Nambúdrí of the Calicut taluk. He deposes that a Nambúdrí female is entitled to appoint an heir, and that Nanga Neeli of Chirutayur illam appointed Kiyadom Damodaran Nambúdrí as heir to her illam about twenty-five years ago.

The seventh witness is one Narayanan Nambúdrí of the Ernad taluk. He also deposes in favor of the competency of a Nambúdrí lady to appoint an heir, and mentions three cases in which antharjanams appointed heirs to their illams and directed them to marry specially in order to raise up heirs for those illams. Of the three instances mentioned by him, two are the same as those deposed to by the first witness. In one the witness was himself the person who was appointed and married specially to raise up heir for the Vellilakat illam, and the registered copy of a document produced by him and used in evidence corroborates his statement. Document I, which is dated August 1877, says: "As there are no heirs in my tarwad, and as you married with my permission on the 28th Makarom last in order to raise up issue for my tarwad, I appoint you as my representative in interest and give you the property of my tarwad to be enjoyed as owner." In another case mentioned by him, his own sister was the bride selected by a member of Palat illam, who was appointed heir by a female of Mepalaseri illam and directed to marry specially in order to raise

up heir for that illam. He stated also that his uncle accepted a girl in sarvasvadhánam marriage under exhibit II, which appointed the son-in-law as heir, and that the marriage which the witness contracted to raise up issue for the Vellilakat illam was celebrated like sarvasvadhánam marriage, though it was not a regular sarvasvadhánam.

The eighth witness is the vydikan of the appellant's village, and he deposes that by custom a Nambúdrí female is competent to appoint an heir to her illam, that the expression "appointed as heir" means that the person so appointed is to marry specially to raise up issue for the illam of which the female is the surviving member. The witness adds that the appellant was appointed heir under the advice of his father and in consultation with him, as he was the vydika of their village so long as he was alive.

On the other hand, eight witnesses were examined for the respondent, but some of them support the evidence for the appellant, whilst several do not contradict it. The eighth witness is the Dewan of Cochin, and his evidence is that a Nambúdrí female who is the only surviving member of her family may appoint an heir; that the person so appointed may be an adult; that, though the sanction of the Raja is obtained, it is obtained to ensure public recognition of the heir, and that the appointment is valid by custom.

The fifth and sixth witnesses are vydikans, and as such, experts. The sixth witness does not refer to appointment of heir by a Nambúdrí widow, but mentions a case in Cochin in which, on the death of the last female of a Nambúdrí illam, the Raja took the property of that illam and gave it to a Nambúdrí Brahman. This evidence does not necessarily negative her power to appoint an heir, and the Cochin evidence to which we shall presently refer supports that view. The fifth witness states that a widow alone cannot appoint an heir; but in his cross-examination he admits that among Nambúdrí women the mother has the authority to give the daughter in sarvasvadhánam marriage, and that the person who marries in sarvasvadhánam may be appointed heir of the illam. He adds that an adult and a person who has even married may be appointed heir; that even in cases other than those of sarvasvadhánam marriage, a married man may be appointed heir, irrespective of age, and that no ceremonies whatever are necessary when such appointment is made. He states further that the last

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surviving antharjanam can authorise a Nambúdrī to perform funeral obsequies and sradhas. In his re-examination, he says also, that a Nambúdrī woman may make a kritrima adoption; that it is in accordance with acharam or custom; and that in Cochin and Travancore the kritrima adoption must be made with the consent of the raja.

This witness does not realise the fact that there is no substantial distinction between the power to make a kritrima adoption and the power to appoint an heir, and on this point the evidence of the Cochin expert, Tiruvengadachari, is material. After referring to "pattukayyal adoption," or to adoption with ten hands as it is commonly called, the Cochin witness goes on to say: "There may be cases which are not pattukayyal dattu; for instance, the adoption of a boy whose natural parents are dead, or the adoption of a boy by a widow or a widower; but the latter instance cannot be called dattu, as no dattahomam can be performed. It is only appointing an heir to the illam." Sutherland describes the form prescribed for kritrima adoption by Rudra-dhara in Sudhi Viveka, Note XVI of his Synopsis (Stokes' H. L. Books, page 676), and it consists in the adopter saying: 'Be my son,' and in the adopted replying, 'I am become your son,' and the consent of both parties is the only requisite, neither any ceremony nor any set form of speech being an essential as in the case of a regular adoption. This form of adoption does not sever him from his natural family, and this is precisely the effect of appointing a person as heir. Reading the evidence of the fifth witness in the light thrown upon it by the nature of the kritrima adoption, which, according to him, a Nambúdrī widow is competent to make, it is clearly in support of her power to appoint an heir to her illam, and in saying in another portion of his evidence that she alone cannot appoint an heir, the witness did not perhaps intend to deny her power, but intended to add that she should do so in consultation with reversionary or attaladakkam heirs, if any.

The seventh witness, Raman Nambúdrīpad, deposes that "if a woman or a widow alone survive in an illam, a person used to be adopted in Ayatha Vidhi for performing her funeral obsequies." But this witness adds that he can ask for his share in the property of his illam, and his evidence is not of much value.

As to the first three witnesses for the respondent, two of them do not deny the power of a Nambúdrī woman to appoint an heir,

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but they say that the power should be exercised with the consent of attaladakkam heirs. As to what should be done if there are no attaladakkam heirs, their evidence is discrepant. The third witness states that if there are no attaladakkam heirs, she cannot at all appoint an heir, and the second witness says that the sovereign used to appoint an heir in former times. The first witness refers to Yajnyavalkya's text in regard to want of independence on the part of a woman, and says, if she alone survives in her illam, no heirs can be created. None of them has been asked whether Kritrima adoption can be made. The first witness states that there may be several kinds of adoption, and that he cannot say what the nature of each is, and none of the three witnesses is either an expert or of high social position. Among those who support the appellant's case there are experts and men of high social position.

The oral evidence recorded for the appellant at the original hearing is supported by several witnesses for the respondent and by document I. Several specific cases of appointment are mentioned by appellant's witnesses, and they are not shown to be fictitious. Again, the evidence receives considerable accession of strength from the decision of the late Sadr Court in the case of *Tottakara Alluttar Manakal Narrain Nambúdrīpad and another v. T. M. Trivikrama Nambúdrīpad and others*. In that case a Nambúdrī illam, called Kypenjeri illam, vested in a female named Savitri, and in order to continue succession in the illam, she, according to the custom of the caste of Nambúdrīs, introduced the then defendant's father to beget a son in and for that illam. He accordingly contracted a marriage, the fruit of which was a son named Kelan. The property then vested in Kelan, but, on his death without issue, reverted to Savitri. On her death, the next-of-kin of Savitri's husband and the half-brothers of Kelan severally claimed the right of succession. In August 1855, the Court of Sadr Adalat, acting on the opinion of the then senior pandit, decided in favor of the former. The senior pandit viewed the introduction of Kelan into the family as that of a son obtained by gift, and the succession to him of Savitri as that of an adoptive mother, and observed that "Kelan coming in thus as a gift was cut off from alliance with his natural kindred." The appointment was made in 1805 and the decision was passed in 1855. It is clearly an authority for the position that the custom of a Nambúdrī widow directing a person to marry to raise up issue for her

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illam was in vogue in 1805, that the succession of the son raised up by that marriage to the illam was held to be valid according to custom, and that the status of the son in the illam for which he is begotten is that of a son obtained in gift by adoption. The reasons assigned by the Judge for not attaching weight to that decision are not satisfactory. He says that he cannot act on one decided case, but there can be no doubt that it is important evidence of the custom set up by the appellant both in regard to its truth and validity. Another reason mentioned by the Judge is that the first defendant's father in the reported case was entitled in his own right to succeed to the Kypenjeri illam; but this is a mistake, and the ground of decision was that the custom was true and operated to transfer Kelan from his natural family into that of Savitri's illam. Again, the Judge says that in the reported case the marriage authorised was contracted and that a son was born of that marriage; but even supposing that no marriage was contracted in this case as directed, it by no means negatives the custom pleaded by the appellant. The appellant's fifth witness said in his evidence: Vásudevan Nambúdrí had married on behalf of Tamarasseri illam, and the fact was not disputed at the hearing of the appeal before us. It is true that there has been no issue of the marriage contracted by the appellant, but if a son is hereafter born, that son will be the lawful heir according to custom and the property in suit cannot then be said to be heirless for the Crown to step in and claim it as an escheat.

In these circumstances, we consider that, as observed by the Division Bench at the former hearing, the evidence recorded at the first trial was more in favor of the appellant's than of the respondent's contention. We shall now proceed to consider whether the evidence taken at the second trial supports the custom set up in this case.

The six witnesses examined at Cochin state that a Nambúdrí widow may appoint an heir. They say that she cannot make the "Pattukayyal" adoption, but that she can make an adoption to prevent the extinction of her illam, that no ceremony is needed for it, and that the person adopted may be an adult and even a married man. This is also the evidence of the expert cited for the respondent and of the Dewan examined at the original trial. The Commissioner accepts the evidence as substantially correct and observes that, though an antharjanam cannot make an adoption

in the religious form, called pattukayyal dattu, she can appoint a male as heir to succeed to the property of her illam subject to the sanction of the sovereign. He observes, further, that, according to the practice of the Cochin state, sanction is not applied for, as a rule, before making the appointment, but it is subsequently obtained to give the appointment retrospective effect, such sanction being given generally on payment to the Raja of 20 per cent. of the value of the property. The Dewan states in his evidence that the sanction is obtained only to ensure public recognition of the heir. The effect of the Cochin evidence then is that the sole surviving antharjanam of a Nambúdrí family is competent to appoint an heir, that the heir appointed may be a married man, that the sanction of the Raja is usually obtained after the appointment on payment of one-fifth of the value of the property, and that, according to the Dewan, the sanction is obtained only to ensure public recognition of the heir.

In Travancore four witnesses were examined and the effect of their evidence, as stated by the Commissioner, is that a lady in a Brahman illam, in the absence of attaladakkam heirs or dayadies, is competent to adopt a son. In that state, the Raja does not claim by escheat the property of a Brahman, so much so that, if the last surviving female does not appoint an heir to her illam, Nambúdrí Brahmans living in the neighbourhood inform the Raja of the fact, and, after obtaining his consent, appoint an heir to continue the illam (see the evidence of Muttukumarasami Thiraviyam, Accountant-General).

But the Cochin and the Travancore evidence does not show, and was not considered, as to whether the person appointed as heir might be authorised to contract a marriage specially to raise up a son. As to the form in which the power of appointing an heir is exercised by an antharjanam, it is said to consist in adopting the person, who may be an adult or a married man, without any ceremony and by simply giving a writing to the heir appointed or sending written information to the Raja. It shows further that the adoption or appointment by a widow to perpetuate the illam is called kritrima adoption in contradistinction to the pattukayyal dattu, which is the regular and religious adoption prevalent among Nambúdris. It is called pattukayyal dattu, or adoption with ten hands, the hands of both the natural and adoptive parents who must be alive and the hands of the boy being joined when the

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gift is made. Dattahomam is performed, but the adoption is in the dwayamushyayana form which is obsolete on this coast (see the evidence of Tiruvengadachari, the Zila Judge of Trichur, examined at Cochin); but the appointment made by a widow is called kritrima adoption, because there is no ceremony, the agreement to take and to become heir being all that is considered necessary. Although the person appointing the heir is a widow, still the Travancore witness, Brahma Dattan Nambúdris, refers to a rule of Hindú law, which may account for its being accepted as a valid affiliation. He says in his evidence: "The Sastra followed by Nambúdris is that which is adopted by all Hindús, but there are some points of difference. In a common Hindú household, the adopted son is entitled to the property of his adoptive father alone, but among Nambúdris, the adopted son is entitled to the properties of both his natural and adoptive fathers. The said adoption is known as dwayamushyayana adoption. There is another kind of adoption called the chanchamatha adoption. Either the father or the mother of the adopted son gives away by himself or herself the son to be adopted and a male or female by himself or herself accepts the son in adoption: Dattahomam is performed in connection with this adoption also. If a female is the sole survivor of her illam, no male members being left, that female has the power to adopt. She can adopt either if her husband gives his consent before his death, or if he dies without prohibiting it. Another Travancore witness, Damodaran Sankaran Nambúdris, advertent to the widow's power to adopt, observes, a widow who has neither issue nor dayadies can adopt if she has obtained the permission of her husband. If the husband has died without raising any objection to it, his silence is taken to imply consent. The evidence of the Trichur Judge at Cochin as to the several forms of adoption is to the same effect. Advertent to the sole surviving lady in a Nambúdris illam, he says: "in either case (whether unmarried or a widow) she cannot adopt a son according to the pattukayyal dattu, but she can appoint an heir to the illam; but in such a case, the heir appointed cannot enter upon the management of the illam properties before he obtains what is called a theetooram (writing) from His Highness the Maharaja, allowing him to do so. He has to pay a fee of 20 per cent. on the value of the illam property, but the Maharaja may forego the whole or part of it. I know of no limit to the age or quali-

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fication of the person appointed as heir. He may be a married man with children, but, I think, he must be of the same caste with the lady appointing him as heir." We have already referred to that portion of the witness' evidence in which he said that the adoption by a widow in which dattahomam can be performed amounts only to appointing an heir. Several of the witnesses examined at Cochin and of the experts examined at the original trial call the person appointed, kritrima son, and the appointment made, kritrima adoption, for, in that form of adoption, there is no religious ceremony necessary.

We shall next compare these modes of affiliation with those now current on the East Coast and see whether they have a place in the history of Hindú law. Pattukayyal dattu or adoption with ten hands as a dwayamushyayana adoption is obsolete on this coast, but we need hardly cite texts or do more than refer to Datta Chandrika, s. II, 41 and 42, in order to show that dwayamushyayana adoption was well known to ancient Hindú law, though the form in which adoption now prevails on this side of the ghâts is what is called sudha dattu, or adoption pure and simple, that is to say, an adoption which completely severs the person adopted from his natural family and fixes him in the adoptive family. As to a widow's power to adopt so as to perpetuate her husband's family, it is necessary that she should be expressly authorised on the East Coast either by her husband or his sapindas, and the theory is that the adoption is made not for herself but for her husband. The practice among Nambúdris is otherwise. The theory is the same among them also, but in its application the husband's authority is presumed unless there is an express prohibition. In the case of *Lakshmáppá v. Rámáva*(1), which was referred to by this Court in R.A., 90 of 1885, reference is made to the same doctrine as a rule of law still prevalent in Western India. We may here refer to a passage in Datta Chandrika, s. I, 32, in which the theory of an implied assent in the absence of an express prohibition is mentioned in connection with the power of a widow to give a son in adoption. The commentator says: "Now, if there be no prohibition even, there is assent. The intention of another not prohibited is sanctioned. Yajnyavalkya suggests the independency of the woman—'He whom his father or

(1) 12 Bom. H.C.R., 364.

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mother gives is a son given.' Also in another place, 'deserted by his father or mother or either of them.' In the previous paragraph 31, a text of Vasishta is cited to the effect "let not a woman either give or receive a son unless with the consent of her husband." It is clear also from the Bombay case that adoption which is made for securing an heir competent to perform funeral and annual obsequies is regarded as a religious and meritorious act and that assent on the part of the husband is therefore presumed in Western India in the absence of an express prohibition.

As to the evidence that the person adopted may be an adult and even a married person, the author of the Datta Chandrika, after referring to several texts, says in s. II, para. 33: "And thus the practice of all the ancients even in respect to the adoption of a son unlimited to any particular time is upheld." Again the author of the Vyavahara Mayukha observes in chap. IV, s. V, para. 19: "And my father has said that 'a married man who has even had a son born may become an adopted son.'" There is thus no ground for the suggestion that, because the modes of affiliation said to be current among Nambúdris are not now recognised on the East Coast, they cannot be referred to ancient Hindú law, or the personal law which they carried with them when they settled in Malabar.

It may not be amiss here to allude to the probable date when Nambúdris settled in Malabar. There is internal evidence to show that the event must have occurred before the Mitákshará was written. The sarvasvadhánam marriage is recognised in Malabar, and, as far as we are aware, there is no allusion to it in the Mitákshará as a form of marriage in use. According to the latter, daughters are in the line of heirs and the Cochin expert, Tiruvengadachari, and several other witnesses say that they are not heirs among Nambúdris unless they are given in sarvasvadhánam marriages and thereby retained in their father's family. We may also state that the migration must have taken place prior to the time of Sankaracharyar, the founder of the Advaita or non-dualistic school of Vedic philosophy. It is in evidence that the acharams or practices of Nambúdris are believed to have been regulated by him, and he is known to have lived about the fifth or seventh century. Again, according to tradition, Parasurama was the first king who introduced Brahmans into Malabar as an organised community, and a considerable period of time must have intervened

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between him and Sankaracharyar. Further, niyoga or inviting a Brahman to beget a son upon a childless widow for her husband was in use among Brahmans in early times, but, at a later period, several Smritis reproved the practice as "fit only for cattle," and under their influence, various forms of adoption gradually took the place of niyoga, which was ultimately forbidden. The direction to marry specially for an illam, which is said to be founded on analogy to sarvasvadhánam marriage, conveys the impression that the girl selected for the marriage is by special agreement substituted for the daughter born in the family into which she is married, so that her son and his descendants, like the son of the appointed daughter and his descendants, become the representatives of that illam. This is an indication that Nambúdris settled in Malabar at a time when niyoga was in disrepute so far as it authorised sexual intercourse between a woman and a person who was not her husband, and when there was a tendency to substitute a form of adoption for it, so that its value as a mode of affiliation might be retained. We can only say upon the evidence that Nambúdris must have settled in Malabar more than 1,200 or 1,500 years ago. It may not be out of place to refer in connection with this historical fact to the interesting account given by Mr. Logan of the probable mode and time of settlement in Appendix I to his report on Malabar Land Tenures. The conclusion to which he has come is stated by him, in paragraph 64, as follows: "I think there is enough to show that Nambúdris entered and settled in Malabar in large numbers and as an organised body precisely at the time (end of seventh and first half of eighth century) when the extinction of the Perumal's authority was for the first time menaced by the Western Chalukiyas. It is reasonable to conclude that the Perumals received them with open arms at a time, when, as shown by the Jewish and Syrian deeds, they were seeking succour from every quarter; and it is also reasonable to conclude that they in some way managed to do the Perumals some friendly office, for we find, from the Syrian grant, that they had already in A. D. 774 obtained commanding influence in the country." However this may be and whether there was one migration or whether there were successive migrations, whether the first migration was in the seventh century or several centuries before it, there is enough to show that the personal law which they carried with them is not Hindú law as expounded by the authors of the Mitákshará,

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Smriti Chandrika, and Madhavya, but the ancient Hindú law as it was probably understood and followed about the commencement of the Christian era.

Before we pass on to the other evidence, we may state that the modes of affiliation in use among Nambúdris, according to the evidence we have hitherto mentioned, are in accordance with those mentioned in two recent manuals written by Messrs. Wigram and Ramachandra Aiyar, who have been for several years District Judge and Subordinate Judge of Malabar. Both refer to the appointment of heir as an adoption and as akin to the *kritrima* form of adoption in force in the Mithila country (see Wigram on Malabar Law and Custom, chapter I, and Ramachandra Aiyar on Malabar Law and Custom, chapter VI). It is clear then that the appointment of an heir is regarded as a mode of affiliation and not as a form of alienation, and, though it is valid, it is called *kritrima* adoption not in the sense that it is unauthorised as on the East Coast, but in the sense that it takes place without any ceremony as in the case of the other two forms of adoption, namely, adoption by ten hands or *pattukayyal dattu* and adoption by *chamatha*, that is, by burning a pan of sacred grass. Keeping in view, therefore, the connection between adoption and what is loosely called appointment of heir and the fact that it was the ancient Hindú law, which the Nambúdris presumably carried with them as their personal law, we proceed to consider the evidence recorded in North and South Malabar at the second trial.

More than 100 witnesses were examined by District Múnsifs in Malabar.

At Calicut, though forty witnesses were examined, nine alone gave evidence on the point now under consideration. As observed by the Judge, seven deposed that a widow could adopt an heir. Two denied her power, though the first witness said that if the widow could adopt, she should have obtained her husband's consent. He was not asked whether he referred to ceremonial adoption or *kritrima* adoption, and whether such consent might not be presumed in the absence of prohibition. The witnesses do not mention specific cases of appointments in support of their evidence. Several Nambúdris witnesses say that they do not know whether she can adopt.

As for the six witnesses examined at Tellicherry, their evidence

is stated by the Judge to be that the widow must have the consent of her husband or his near relatives. No explanation was given as to this at the hearing of the appeal, but it seems they were not cross-examined.

At Ernad, fourteen witnesses were examined, and though the Judge refers only to eight, our attention was called to twelve witnesses as giving evidence on adoption.

The first witness is one Jata Vedan Nambúdris. His evidence is that a widow is at liberty to adopt or appoint an heir, and he names four specific instances in which a widow appointed an heir and directed him to marry in order to raise up issue for the *illam*. He adds that his own maternal grandfather and the appellant's paternal grandfather were so appointed.

The next witness, Vasudevan Nambúdris, states that the widow is competent to adopt an heir and that it is an ancient custom. He mentions the appointment of Alayi Nambudri to Muthudeth *illam* as an instance. He adds also that if a maiden alone survives in an *illam*, she may be married in *sarvasvadhánam* form to raise up an heir for it, and that if there are dayadies having ten or three days' pollution, their consent is necessary to the appointment of an heir. In cross-examination he says also that he does not fully know the custom of Malabar.

Vamanan Elayad is the third witness, to whose evidence our attention was called. According to him also the widow is competent to appoint an heir, and if there is an unmarried girl in the *illam*, she may be married for that *illam* and kept in it. He observes that the widow is empowered to appoint an heir because there is no salvation unless there is male issue to perform funeral ceremonies. He mentions two cases of appointment of heir, and says that he had personal knowledge of one of them. In cross-examination he adds that when there are *attaladakkam* heirs, no heir can be appointed by a widow in violation of their rights.

The fourth witness is one Kesavan Nambúdris. He also deposes to the custom, but mentions no specific instances.

The fifth witness is one Narayanamangalath Chingan Nambúdris. His evidence is that, according to ancient custom, a widow of an *illam* can appoint an heir when there are no dayadies having ten days' pollution. He mentions, however, no specific cases of appointment as being within his personal knowledge.

The sixth witness, Sankaran Nambúdris, deposes to appointment

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of heir by a widow and to causing him to marry for the illam as an ancient practice. He says there are stanams and positions of honor to be held by certain tarwads, and that, as these have existed from generation to generation, the power to keep up tarwads is vested in women.

The seventh witness is one Keshavan Somayajipad. He says, if a mother and daughter survive in an illam, issue used to be raised for the illam by giving the daughter in sarvasvadhām marriage, and similarly, if there be no maiden, the widow has power to raise up issue by appointing a person as heir for the illam. He mentions two cases of appointments and adds that in one of them his uncle was appointed heir and authorised to marry for Manthapurath illam and that he married for that illam in 1860. In cross-examination, he says that a widow cannot adopt without the consent of the husband, but she has power to constitute a person as heir. The witness is referring here probably to ceremonial adoption, for we have already shown that kritrima adoption and the appointment of an heir are, as explained by the Cochin witness, substantially the same.

The eighth witness is one Narayanan Nambúdrī. He also states that a widow is competent to constitute another person as heir to her illam and make him marry for that illam and perpetuate the lineage. He mentions the appointment of Kiyakkedoth Nambúdrī as heir to Manthapurath illam as an instance in his village and as within his personal knowledge. In cross-examination he says that the widow has no power to appoint an heir without the consent of dayadies having ten and three days' pollution, if any.

The ninth witness is one Narayanan Mussad and owns land yielding 50,000 paras of paddy. He says if there are males and no attaladakkam heirs, the widow is entitled to adopt for the perpetuation of the lineage, though without the consent of her husband. He adds that it is customary to do so, that he cannot mention the principle from which the custom has originated, that among Nambúdris the eldest brother alone marries, and that, in order that illams may not become extinct from this cause, widows have this power. In cross-examination he states that constituting an heir and adoption are the same. When he was pressed to name instances, he named three as having occurred within a period of thirty years, adding that he had personal knowledge of one, viz., the appointment of Mayerkare Mussad as the heir of Chembatte illam.

The tenth witness is a Nambi. He gives similar evidence and names the appointment of Meleteth Nambúdrī as heir by a widow in Mannil illam in Panniyur desham.

The eleventh witness, Subramanian Nambúdrīpad, and the twelfth witness, Narayanan Nambúdrīpad, give similar evidence, and they mention specific cases of appointment. They say that this power is vested in Nambúdris, lest their illams in which the eldest alone marries may become extinct. The former named two instances, of which he had personal knowledge of one. They say that they have seen no instance in which a widow has made an adoption without the consent of her husband.

All the twelve witnesses agree that a widow can appoint an heir to perpetuate the illam in the absence of dayadies or reversionary heirs. Most of them mention specific cases of appointments made by widows. In accounting for the custom, some refer to the spiritual benefit accruing from the existence of a male heir, some to the practice prevailing in Malabar according to which the eldest brother alone marries, and some to the fact that ancient stanams and offices are held by several illams which it is necessary to perpetuate.

The Angadipuram District Múnsif examined two witnesses, and it appears that they said that a widow can only adopt with her husband's sanction. No special explanation is offered as to this evidence in appeal.

The Chowghat District Múnsif examined two witnesses. Both of them state that a widow could make an adoption for the illam. The first witness added that the absence of any objection on the part of her husband was sufficient and that his express consent was not necessary. The second witness stated that it used to be said that the husband's consent was necessary; but that he had seen adoptions made by widows, but that he did not know whether it was with or without such consent.

There were three witnesses examined by the Betutnad District Múnsif. The first alone gave evidence about adoption, and he deposed that a widow is competent to adopt an heir without her husband's consent.

Two witnesses were examined by the Nedunganad District Múnsif. They both state that a widow can adopt without her husband's consent.

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One witness was examined by the District Munsif of Kutnad. He gives similar evidence and cites Datta Chandrika as an authority.

Eight witnesses were examined by the District Munsif of Pynad and seven say that widow can adopt. As to the necessity for the husband's sanction, the first witness states that a widow can adopt if there is no prohibition from the husband and refers to Yajnyavalkya's text, cited in Datta Chandrika. The second witness, Purushothaman Nambudri, says that the husband's consent is not necessary, and mentions a case in which a widow adopted without such consent. The third witness, Damodaran Nambudri, states that if there be no attaladakkam heirs or dayadies, a widow can make an adoption for purposes of issue for her illam without anyone's consent. Another witness, Govindan Nambudri, says that a widow cannot make an adoption without her husband's consent; but, in the absence of such consent or of a maiden in the family, who can be given in sarvasvadhānam marriage, the illam properties may be given to a Nambudri on condition of her being protected and her funeral obsequies being performed. Another witness, named Bramhananda Bhutasami, says that he is not much conversant with the law of adoption, that a widow cannot perform dattahomam, and that the husband's sanction is necessary. Two more witnesses were also examined, and one of them, Krishnan Nambudri, states that she can make the adoption without the husband's consent and that he has heard so. And the other, Narayanan Nambudri, considers husband's sanction is necessary, and that the sanction, if any, given by his kinsmen is not sufficient. The result is that, out of eight witnesses, seven say that she can adopt, though one denies her power, and that the majority say that the husband's sanction is not necessary, those well read in the shastras accounting for it; whilst those who say that such consent is necessary refer to no instance in which the adoption was set aside for want of the sanction.

Thirteen witnesses were examined by the District Munsif at Badagara, and, though four of them only are Nambudris, there are several vakils, among others, who have practised in that court for more than fifteen years. Ten of them say that a widow can adopt either with or without the sanction of her husband, and three state that such sanction is necessary, but several of the former mention specific instances in which widows constituted others as

heirs in view to perpetuate their illams. It appears that the witnesses were not cross-examined, though there was an opportunity for doing so.

Two witnesses were examined at Cannanore and they say that a widow can only adopt with the sanction of the husband. The first witness refers to the text of Yajnyavalkya, which states that a woman is never independent, and that she is protected by her father in her youth, by her husband during womanhood, and by her son in old age.

Four witnesses were examined at Nadapuram, and two of them, who alone give evidence in regard to adoption, say that a widow can adopt. Specific instances are mentioned in their evidence.

Seven witnesses were examined at Kaval. The first, third, fourth, and seventh state that a widow can adopt, though the second and sixth appear to have denied her power to adopt.

The evidence recorded by the District Munsifs in South Canara is considered by the Judge to be of no importance, and our attention is not drawn in appeal to any portion of it.

The foregoing is the evidence recorded at the second trial. It appears to us that the large majority of witnesses examined at various stations in North and South Malabar support the case that a widow can adopt in view to perpetuate her illam. Though at Tellicherry and in a few stations some witnesses deny her power, their evidence furnishes no satisfactory answer to a number of specific instances mentioned by the others, and the evidence of the large majority is in accord with the evidence taken in Cochin, in Travancore, and at the original trial. Having regard to the fact that the witnesses belong to various places, we see no reason to hesitate to accept their evidence as *bonâ fide*.

The points about which there is conflict are two, namely, whether her husband's sanction is necessary and whether she can adopt when there are attaladakkam or reversionary heirs. As to the first we have already remarked that the true Hindû theory is that no widow can adopt except for her husband, and that, on the East Coast, his express authority or that of his kinsmen is held to be necessary, whilst in Western India it is presumed in the absence of an express prohibition. We have also shown that there is a text of Yajnyavalkya, which bears out this theory, and

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that the very same interpretation is placed upon it by the author of Datta Chandrika in regard to a widow's power to give in adoption. The allusion to this special text by several of the witnesses learned in the shastras appears to us to show that the practice has a legal origin. On a point like this it is by no means a matter for surprise that there is a conflict between those who are well read and those who are not. As to the text of Yajñyavalkya on the subject of want of independence in woman generally, it must be taken together with the special text, which declares her independence in respect of adoption on the ground that it is a religious and meritorious act. In dealing with this part of the case, the Judge takes the Hindú law as now administered in this Court as the law that applied to Nambúdris when they migrated to Malabar and treats the practice spoken to as an innovation; but before doing so it is necessary to see whether the practice is one which is inconsistent either with ancient Hindú law or with a different interpretation of a text received as law, and whether there is ground for the presumption that the practice is the outcome of the Hindú law or interpretation which prevailed when Nambúdris settled in Malabar, especially when several experts refer the practice to Hindú law and to a special interpretation. The Judge had not before him the evidence taken at Cochin and Trivandrum, which, as coming from disinterested persons residing in foreign territory, where the law of escheat as administered in British courts is not in force, has a special probative value.

As to the second point, namely, whether a widow can adopt when there are attaladakkam heirs, it is not necessary to determine it for the purposes of this appeal. It is not suggested that there are attaladakkam heirs in this case. The bulk of the evidence is in favor of her power, though, as observed by Mr. Wigram in his manual, the selection is usually made from them. It may be an open question whether a stranger can be adopted, but it is not necessary to decide it for the purposes of this appeal, and we do intend to decide that a widow is entitled to adopt a stranger in supersession of her husband's divided kinsmen or attaladakkam heirs. In our judgment, there is sufficient evidence to the effect that a widow can adopt or appoint an heir in order to perpetuate her illam in the absence of dayadies with ten or three days' pollution.

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There is one other point, in respect of which there is a conflict in the evidence. The Ernad and several Pynad witnesses state that when an heir is appointed there must be a direction that he should marry for the illam. There was also some oral evidence to that effect at the original trial; but in the case before us the appellant was directed to marry for the Tamarasseri illam in order to raise up heir for it. The evidence appears to be reasonable, when regard is had to the fact that the heir is appointed to continue the illam and not to absorb it into the illam in which the person appointed is born; but the Cochin, Travancore, and other evidence does not show that this direction is indispensable. There is this reason in support of it, namely, that the affiliation of a son is complete when he is appointed by reason of the mutual agreement implied by kritrima adoption and that any further direction is not a pre-requisite, though it may be a matter of preference.

Document A appoints the appellant as heir and directs him to raise up heir for the Tamarasseri illam. There is reliable evidence showing that in the case of sarvasvadhánam marriage, the son-in-law may be appointed heir to the illam by a special provision to that effect. It may well be that the power to appoint an heir is equivalent to kritrima adoption, and that the direction to marry specially for the illam is a graft upon it designed on the analogy of sarvasvadhánam to secure the issue of such marriage, if any, as a class of heirs exclusively entitled to the illam, and thereby to prevent its ultimate absorption into the illam to which the person who is appointed heir belongs. That it is usual to direct that a special marriage be contracted in order to raise up heir for an illam is also shown by the decision of the Sadr Court in 1855. That its peculiarity as a mode of perpetuating the illam is some guarantee for its being regarded *bonâ fide* as a special mode of affiliation.

In the case before us, the appellant was appointed heir and he was also directed to contract a special marriage for the illam which he has done. His position and that of the future issue of the special marriage, if any, are same as that of a son adopted on this coast by a Hindú widow with the sanction of her husband and his issue, if any, and on this ground the property in suit cannot be treated as heirless property which the crown may claim by right of escheat.

As to the objection that there can be no such right in regard

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to jenm lands of Malabar, or the property of Nambádri Brahmans even in the absence of legal heirs, it is on its face frivolous.

But for the other reasons mentioned above we are of opinion that the appeal must be allowed and the suit dismissed with costs throughout.

We order accordingly.

APPELLATE CIVIL.

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

SHRAJUDIN AND OTHERS (APPELLANTS), PETITIONERS,

and

KRISHNA AND ANOTHER (RESPONDENTS), RESPONDENTS.*

Civil Procedure Code, s. 549—No extension of period for finding security for costs of appeal after default.

Section 549 of the Code of Civil Procedure being imperative, the time cannot be extended after the expiry of the period fixed in the order directing the appellant to find security for the costs of an appeal.

Haidri Bai v. East Indian Railway Company, I.L.R., 1 All., 687, followed.

APPLICATION by the appellants in appeal No. 101 of 1886 on the file of the High Court for an extension of the time fixed by an order of the Court within which they were bound to give security for costs.

The appellants alleged that they had been ordered to find security by the 12th July 1887 for the costs of the appeal: that on 2nd July they lodged security in the lower court and the Judge passed an order stating that the security was insufficient: that they, believing the security was sufficient, were not prepared to furnish fresh security on the same day and that the Judge refused to allow them to furnish security after the 12th.

Srinivasa Rau for petitioners.

Anantan Nayar for respondents.

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

* Civil Miscellaneous Petition No. 411 of 1887.

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JUDGMENT:—The Subordinate Judge's Court reopened on the 21st June last and the appellants tendered security on the 2nd July. The application for its acceptance was posted to the 12th July, when the appellants did not appear either in person or by pleader. The Subordinate Judge was not satisfied with the security tendered and rejected it. It is alleged that a representation was made that sufficient security would be given, but it is not stated when and by whom. We are not satisfied that the petitioners did what they were bound to do, viz., to attend the court on the day on which the sufficiency of the security was inquired into either in person or by pleader. Nor did they tender other security at once. We have no power to extend the time granted after the expiration of the period mentioned in the original order. Section 549 is imperative. See *Haidri Bai v. East Indian Railway Company*(1).

We dismiss this petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

MADHAVAN (PLAINTIFF), APPELLANT,

and

KESHAVAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 13, expl. V.

Where the uraima right over a certain devasam was vested in five trustees representing different illams, and a suit was brought by one of the trustees to recover certain property alleged to have been illegally alienated by three other trustees to a stranger and dismissed:

Held, that the decree in such suit was a bar to a second suit brought for the same purpose by the fifth trustee, who had not been a party to the former suit, on the ground that he must be deemed to claim under the plaintiffs in the former suit within the meaning of s. 13, expl. v, of the Code of Civil Procedure.

APPEAL from the decree of W. P. Austin, District Judge of North Malabar, confirming the decree of D. D'Cruz, District Munsif of Chavacherry, in suit No. 199 of 1883.

The plaintiff, one of five uralars or trustees of a devasam, sued

(1) I.L.R., 1 All., 687.

* Second Appeal No. 710 of 1886.

1887.
August 30.
Sept. 30.

MADHAVAN
v.
KESHAVAN. to recover certain land which had been alienated by the other four uralars, defendants Nos. 1 to 4, to defendant No. 5.

Defendant No. 5 pleaded, *inter alia*, that the suit was barred by s. 13 of the Code of Civil Procedure, inasmuch as a former suit, to which plaintiff was no party, brought against him for the same purpose by another of the trustees, had been dismissed.

The lower courts held that the present suit was barred.

Plaintiff appealed.

Sankaran Nayar for appellant.

Srinivasa Rau for respondents.

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

JUDGMENT:—It appears to us that the uraima right over the devasam was a private right vested in certain illams, one uralar representing each illam. All of the illams except that of plaintiff were represented in the litigation with defendant No. 5 in 1881 (suit No. 337 of 1881 on the file of the Chavacherry District Munsif's Court). At that time plaintiff's adoption was not recognized by the other uralars, but he succeeded in establishing it in December 1882. The uralars are trustees and have no personal pecuniary interest in the devasam or its properties.

There are no grounds for supposing that the litigation of the uralars with fifth defendant was not *bona fide*, and therefore we think that the matter is *res judicata* under s. 13, cl. 5, of the Civil Procedure Code.

It might of course be open to plaintiff to sue to set aside the decree on the ground of fraud and collusion, but that is not the cause of action put forward in the present plaint, and from the attitude of his co-uralars in this suit it might be gathered that they were now in the same interest with the plaintiff and making another attempt to upset a decree given against the devasam in previous litigation.

K. P. Kanna Pisharody v. V. M. Narayanan Somdayajipad(1) does not apply. In that case there were several co-owners of a sabha; only some of them sued in respect of the property, and the rest of the co-owners, who were living, were not parties to the suit. Objection was taken on that ground and the objection was allowed. No objection was made in suit No. 337 of 1881 by reason that plaintiff's illam was not represented in the suit. We have no

(1) I.L.R., 3 Mad., 234.

doubt, however, that plaintiff's illam was sufficiently represented by the uralars of the other illams, who had a common interest with plaintiff's illam. MADHAVAN
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The second appeal, therefore, fails and must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

MADAYYA (PLAINTIFF),

and

YENKATA (DEFENDANT).*

1887.
July 15.

Civil Procedure Code, s. 266—Attachment—Standing crops—Immovable property.

Standing crops are, for the purposes of the Code of Civil Procedure, immovable property.

CASE stated by T. Sami Ráu, District Munsif of Kurnool, under s. 617 of the Code of Civil Procedure as follows:—

“In small cause suit No. 120 of 1886, the plaintiff applied for execution of the decree and asked standing crops to be attached. I objected to order their attachment, saying that they must be regarded as immovable property. The plaintiff's pleader urged that they were movable property, that they had always been sold as such, and that this had been the practice of this court. There is no ruling of the Madras High Court either way, and there are conflicting decisions of the other High Courts. I have the honor, under s. 617 of the Code of Civil Procedure, to submit for decision the question whether standing crops are movable or immovable property for the purposes of the Code of Civil Procedure.”

“As standing crops adhere to the land, they must, under the General Clauses Act, be considered as immovable property. In the same way, fruits upon growing trees must be considered as immovable property as they form part of the trees which are attached to the land, and they become movable property only when they are picked from the trees, but the Allahabad High Court have held, in *Nasir Khan, in re*(1), that fruits adhering to trees are movable property. Under this ruling ears of corn adhering to standing stalks

* Referred Case No. 5 of 1887.

(1) I.L.R., 3 All., 168.

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can be considered as movable property. The Registration Act expressly declares that growing crops are movable property; but this is for the purposes of registration only. It has been held in *Pandah Gazi v. Jennuddi*(1) that they are immovable property for the purposes of the Limitation Act, and again they have been held in *Sadu v. Sambhu*(2) to be immovable property for the purposes of the Civil Procedure Code also. It is argued for the plaintiff that, if crops be regarded as immovable property, there will be a great deal of loss to parties in regard to their attachment. The following circumstances have been urged. Under the rules for the attachment and sale of immovable property prescribed by the Civil Procedure Code and by the High Court, a long time elapses between the date of attachment and the date of sale, and the period is generally three months. Certainly, the crops cannot remain on the ground so long a time without being spoiled. Agricultural operations must be carried on to make them grow properly, such as weeding, &c. They must be protected from being browsed by cattle and from being trodden upon by cattle and men. When they are in ear, men must be employed to watch them and to prevent them from being removed by thieves, or eaten by birds, &c. In the case of wet crops they must be watered, and a great deal of work must be done. There is no provision in the Code of Civil Procedure or in the High Court rules to get this work done, and even if there is a provision, it is almost impossible to get it done satisfactorily and without causing loss. Sometimes a crop is asked to be attached when it is a month old. In that case, it has to be taken care of till it is brought to sale, which will be under the rules about three months after. An enormous cost will entail upon parties to protect the crops for so long a time. Sometimes attachment is asked for when the crop is in ear and is fit to be reaped in a week or fortnight. If crops are attached as immovable property, they must be kept on the ground until they are brought to sale and will be spoiled if they are retained so long. The judgment-debtor cannot be allowed to interfere with the crops, for, if he does so, he will neglect to take care of them, and they will be spoiled. Moreover, the moment the attachment is made, he will cease to look after the crops, thinking they will be sold. Whereas, if they are sold at once, they will fetch a good price. It is

(1) I.L.R., 4 Cal., 665.

(2) I.L.R., 6 Bom., 592.

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impossible for a court amin or peon to watch the crops and to take the same care of them as if the owner would take. If they are attached as immovable property, they cannot be brought to sale immediately under s. 269 of the Code of Civil Procedure, as that section applies to movable property only. If growing crops be treated as immovable property, the provision in the Code of Civil Procedure must be altered so as to confer some power on the courts as in the cases mentioned in s. 269 of the Code of Civil Procedure. It is argued that, in consideration of these difficulties, the legislature could never have intended to class growing crops as immovable property for the purposes of the Code of Civil Procedure. I may mention other facts in connection with this matter. The town of Kurnool is situated on the banks of the river Toongabadra, and water melons, called kurbuch, are extensively grown in the bed of the river in the hot weather. I have received applications for the execution of decrees in which the water-melon crops have been asked to be attached and sold at once. They cannot be left unsold for more than two or three days after attachment, for either they will be spoiled or stolen. In one case there was objection to the attachment of cholum crop, and about three weeks' time was required to inquire into and decide the objection. There was difficulty in watching the crops for such a long time.

"A. Subba Ráu, first-grade pleader, argued, as *amicus curiæ*, whether s. 503 of the Code of Civil Procedure applied to the attachment of crops. I ruled that, under that section, I had to submit nomination of receiver to the District Court for sanction in each suit, and that it would tend to delay and to cause loss to parties. I do not think it advisable to apply s. 503 to cases of attachment of crops in execution of decrees. My opinion is that, under the definition of immovable property given in the General Clauses Act, growing crops must be held as immovable property. At the same time, I beg to suggest the advisability of altering the provisions of the Code of Civil Procedure relating to attachment and sale of standing crops if they are to be treated as immovable property."

Counsel did not appear.

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

JUDGMENT:—On referring to the cases cited by the District Munsif, we do not find that there is any conflict. The case of

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Nasir Khan v. Karamat Khan(1) referred to by a Full Bench of that Court in *Umed Ram v. Daulat Ram*(2) was apparently distinguished, on the ground, that it was not held in the former case that the trees themselves but that the fruit of the trees (for the wrongful taking and removal of which compensation was claimed) constituted movable property.

There is a direct decision in *Sudu v. Sambhu*(3) that the words "immovable property," as used in the Code of Civil Procedure, include standing crops.

We agree in that conclusion and consider that it may be supported upon the principle indicated in the Full Bench case of the Allahabad Court above cited, viz., that, in the absence of any specific definition of immovable property in the Code of Civil Procedure, regard is properly had to the General Clauses Act, in which growing crops come within the definition of immovable property. To the question stated by the District Munsif, our answer is that standing crops are, for the purposes of the Code of Civil Procedure, immovable property.

APPELLATE CIVIL.

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

SUBBARAYADU (PLAINTIFF), APPELLANT,

and

GANGARAJU (DEFENDANT, No. 2), RESPONDENT.*

Regulation XXIX of 1802, s. 7—Karnam in zamindari Village—Title to Office.

The holder of a karnam's office in a zamindari village being incapacitated, resigned the office in 1863, leaving a minor son, the plaintiff. The brother of the late holder was then appointed to the office, and held it till 1877, when he died. Plaintiff was then nominated by the zamindar, but did not enter on the office. In 1879, the zamindar being dead, defendant No. 2 was appointed by the zamindar's widow and entered on the office:

Held, that under Regulation XXIX of 1802, s. 7, defendant No. 2 being the heir of the last holder was the lawful holder of the office.

APPEAL from the decree of T. Ramasami Ayyangar, Subordinate

(1) I.L.R., 3 All., 163.
(3) I.L.R., 6 Bom., 592.

(2) I.L.R., 5 All., 564.
* Second Appeal No. 662 of 1886.

Judge of Cocanada, reversing the decree of A. F. Elliot, District Munsif of Cocanada, in Suit No. 324 of 1884. SUBBARAYADU
v.
GANGARAJU.

Suit to recover the office of karnam in a zamindari village.

The facts appear from the judgment of the Court (Collins, C.J., and Muttusami Ayyar, J.).

Mr. Norton for appellant.

Ramasami Mudaliar for respondent.

JUDGMENT.—The plaintiff's father resigned the office of karnam in 1863, being incapacitated, the plaintiff then being a minor. The plaintiff's uncle was then lawfully appointed and continued to hold the office until 1877, when he died. The plaintiff was nominated by the zamindar, the husband of defendant No. 1 in 1877, but never took upon himself the duties of the office. The zamindar died in 1877. Defendant No. 2, the son and heir of the late karnam, was appointed in 1879, and defendant No. 1 has held the office since that year. It seems clear that under Regulation XXIX of 1802, s. 7, the heir of the preceding karnam must be chosen. Defendant No. 2 was the heir of the late karnam and is the lawful holder of the office.

The second appeal must be dismissed with costs.

APPELLATE CIVIL.

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

NAGAMMA (PLAINTIFF), APPELLANT,

and

SUBBA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Courts Act (Madras), 1873—Jurisdiction—Suit for partition and mesne profits—Civil Procedure Code, s. 544.

N. sued S. and others for partition of a share of certain land and claimed mesne profits from other defendants who were tenants of the land. S. obtained a decree by consent for her share and a sum of 99 rupees was decreed to her against the tenants for mesne profits. Against this decree the tenants appealed.

The Subordinate Judge finding that the subject-matter of the suit, the land of which partition was claimed, exceeded the jurisdiction of the Munsif, reversed the

* Second Appeal No. 918 of 1886.

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decree of the Munsif and directed the plaint to be returned for presentation in the proper court. It was contended, on appeal to the High Court, that the Subordinate Judge could not set aside the decree against the tenants for mesne profits:

Held that, as the Munsif's Court had no jurisdiction to entertain the suit for partition, it could make no decree for mesne profits.

APPEAL against the decree of Venkata Rangayyar, Acting Subordinate Judge at Ellore, reversing the decree of M. Ramayya, District Munsif of Tanuku, in suit No. 328 of 1879.

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

Subba Rau for appellant.

Respondents did not appear.

JUDGMENT.—In this case, the plaintiff, one of a large number of agra-haramdars, sued for the ascertainment, partition, and delivery to him of his share, and eventually all those who had any interest were made parties to the suit. Some of the defendants were sued as in possession as tenants liable to pay rent to the agra-haramdars. During the course of the trial it appears that some amicable arrangement was come to among the agra-haramdars between themselves, the result of which was that a decree was made for the plaintiff, without further resistance on their part, for some 7 or 8 acres of land. Decree was also made in her favor for 99 rupees, the value of mesne profits, as against the defendant tenants. Against that part of the decree the latter appealed. In the Lower Appellate Court, it was contended that the value of the entire property exceeded the pecuniary jurisdiction, and that this is so was admitted. On the authority of *Vydinatha v. Subramanya*(1), the Subordinate Judge held that the District Munsif had no jurisdiction in the suit, and, therefore, set aside the decree and directed the plaint to be returned to the plaintiff to be presented in the proper court, ordering the parties to bear their own costs throughout. In this appeal, presented by the plaintiff, it is contended that the Subordinate Judge was wrong in holding that the decision of this Court above referred to applies in the present case, but we can draw no distinction between the one case and the other. The principle is that, where it is necessary to ascertain and decree to a plaintiff a share in undivided property, it is necessary that the court should have before it, and at its disposal for the purposes of the suit, the whole property, in order to adjudicate upon the claim to

(1) I.L.R., 8 Mad., 235.

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the share claimed, and, if the claim is allowed, to separate and give possession of such share, and this is necessary no less in the case before us than in a suit for partition of family property.

It is then urged that in any case it was not open to the Subordinate Judge to set aside the decree in so far as it awarded mesne profits to the appellant, the only parties to the appeal being the tenants on the one side and the plaintiff and the decree-holder on the other. A reference is made to s. 544 of the Code of Civil Procedure and certain cases bearing upon this section were cited, but none of the authorities referred to touch the question—What is to be done when neither the court of first instance nor the court of appeal has jurisdiction to try the case at all? It appears to us clear that the Subordinate Judge could not, even to the limited extent contended for, support the decree in favor of the plaintiff. If the court of first instance had no jurisdiction to make a decree for the appellant's share, it had no jurisdiction to make a decree for mesne profits, the one being, for the purposes of this suit, subsidiary to, and dependent on, the other; and if the court of first instance had no jurisdiction, the course adopted by the lower appellate court was the proper course for it to adopt.

We dismiss the appeal without costs, no one appearing for the respondents.

APPELLATE CRIMINAL.

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

VENKATA

against

PARAMMA.*

*Criminal Procedure Code, s. 488—Maintenance order passed on report of
Subordinate Magistrate, illegal.*

Under s. 488 of the Code of Criminal Procedure a Magistrate of the first class may, upon proof of neglect or refusal by a person having sufficient means to support his wife, order such person to make a monthly allowance for the maintenance of his wife: a First-class Magistrate having referred a complaint by a wife for maintenance to a Subordinate Magistrate to take evidence and report upon the facts

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* Criminal Revision Case No. 138 of 1887.

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stated in the petition of complainant, passed an order upon such report in the absence of the husband for payment of maintenance :

Held, that the order was illegal.

APPLICATION under ss. 435 and 439 of the Code of Criminal Procedure to revise the order of F. D. O. Wolfe-Murray, Acting Principal Assistant Magistrate of Vizagapatam District, in maintenance case No. 5 of 1887.

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

Mr. *Mitchell* for defendant.

Mr. *Subramanyam* for complainant.

JUDGMENT.—The petition by the complainant was put in on 26th January 1886, and was referred to the Second-class Magistrate for inquiry and report on 28th January. This was irregular, as the Principal Assistant Magistrate was bound to make the inquiry himself. The defendant expressed to the Second-class Magistrate his willingness to pay to the complainant the maintenance fixed by the Court on his share of the property, and the order of 22nd January 1887 was apparently passed on this report.

There is nothing to show that defendant had even an opportunity of appearing before the Principal Assistant Magistrate, and the record would appear to show that he had no such opportunity.

We set aside the order and direct the Principal Assistant Magistrate to hear the case himself without further delay.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

RAMASAMI (DEFENDANT), APPELLANT,

and

RAJAGOPALA (PLAINTIFF), RESPONDENT.*

Rent Recovery Act, 1865, s. 4—Patta—Uncertainty as to amount of rent.

An agreement in a patta to pay whatever rent the landlord may impose for any land not assessed which the tenant may take up is bad for uncertainty.

APPEAL from the decree of S. T. McCarthy, Acting District Judge

* Second Appeal No. 786 of 1886.

1887.
August 8.

of Chingleput, reversing the decree of C. M. Mullaly, Acting Sub-Collector of Chingleput, in a revenue suit.

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v.
RAJAGOPALA.

The facts appear from the judgment of the Court (Kernan and Brandt, JJ.).

Mr. *Norton* and *Ramachandra Rau Sahib* for appellant.

Mr. *Subramanyam* for respondent.

JUDGMENT.—The Judge held that the condition that if defendant took up (presumably without permission) land not assessed, he should pay whatever tirva the sirkar (landlord) should fix, was bad for uncertainty, and that the patta tendered containing such clause was bad. In this opinion we agree. The tenant accepted for thirteen years a patta containing a similar condition ; but we do not consider that the tenant was thereby precluded from objecting that the clause rendered the tendered patta illegal, because as the latter stands now it is uncertain what rent the landlord might fix, and the tenant, if bound, might be liable for an unreasonable rent beyond the value of the land.

This appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

THE MADRAS DEPOSIT AND BENEFIT SOCIETY (PLAINTIFFS),

1885.
July 25.

and

PASSANHA (DEFENDANT).*

Transfer of Property Act, s. 69(1)—Mortgage—Invalid condition as to notice of sale—Sale valid.

In a deed of mortgage of property, situate within the town of Madras, it was provided that a power of sale might be exercised after fifteen days' notice. The property was sold :

Held that, (s. 69 of the Transfer of Property Act, 1882, requiring three months' notice before such a power of sale shall be exercised,) the condition as to notice was invalid, but that the sale was nevertheless valid.

CASE stated, under s. 69 of the Presidency Small Cause Courts Act, 1882, by J. W. Handley, Chief Judge of the Madras Court of Small Causes.

* Special Case No. 82 of 1887.

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The case was stated as follows :—

"This was a suit to recover Rs. 1,149-2-2, being the balance of principal and interest on a mortgage bond, dated 24th August 1883, after giving credit for the sale-proceeds of the mortgaged premises and for payments made by, and on behalf of, defendant. The mortgaged property had been sold in execution of a power of sale contained in the mortgage deed. The mortgage deed is filed as exhibit C.

At the hearing, defendant's attorney raised the preliminary objection that the power of sale in the mortgage deed is invalid as it provided for only fifteen days' notice, whereas the Transfer of Property Act, s. 69, proviso (1), requires three months' notice, and that, therefore, the sale made under that power was bad and the right to sue for the balance had therefore not arisen. I hold that the power of sale was not invalidated altogether by reason of its providing for notice in contravention of the terms of the Act, but that only the provision as to notice was invalid, and that, notwithstanding that provision, notice in accordance with the Act was necessary; and that, if such notice was not given by s. 69 of the Act, the sale still held good and the mortgagor's remedy was by suit for damages. I, therefore, overruled the preliminary objection.

"Defendant's attorney requested me to state a case upon the point under s. 69 of the Presidency Small Cause Courts Act.

"The following question is, therefore, submitted for the opinion of the High Court:—Is the fact that the power of sale in question in this suit does not provide for such notice as is required by s. 69 of the Transfer of Property Act a bar to the present suit? I may mention that it is alleged on behalf of plaintiff that three months' notice was in fact given."

Mr. *Mitchell* for plaintiffs.

Grant & Laing for defendant.

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

JUDGMENT:—The question referred to us is whether the fact that the power of sale in question in this suit does not provide for such notice as is required by s. 69 of the Transfer of Property Act is a bar to the present suit.

The facts are that, under a mortgage instrument, dated 24th August 1883, there was a power of sale conferred on the mortgagee. Such a power is valid in the case before us, as the property mort-

gaged is situated in the Presidency town—s. 69 (c); but it is contended that the provision which the mortgage instrument contains, namely, that fifteen days' notice should be given of intention to sell before the power of sale is exercised, invalidates the sale.

It is conceded that, if there were no provisions at all for any notice of intention to sell, contained in the instrument, the sale might perhaps be upheld. We fail, however, to see any distinction between a case in which there is no provision as to the length of notice to be given and a case in which the notice provided to be given is insufficient in law.

In both cases, s. 69, sub-section 1, of the Transfer of Property Act, should be read as if it formed part of the contract. The proviso in regard to notice is not a condition, which, as suggested, either suspends or defeats the power to sell, but contains only a direction in regard to its exercise, the infringement of which affords a ground for damages, if any, to the person or persons damaged by the sale. Nothing can be clearer than the terms of the proviso, which express an intent to protect the purchaser and to confine the remedy of the mortgagor to a suit for damages when due notice is not given.

It was suggested that the words "such a power" in cl. 2, s. 69, should be taken to mean a power exercised after three months' notice, but we are of opinion that the words "such a power" refer simply to the power of sale mentioned in the first clause of the section, and have no reference whatever to the period for which notice of sale is to be given.

Our answer then to the question stated is that the present suit is not barred by reason of the power of sale contained in the instrument of mortgage, providing a period of notice shorter than that prescribed by s. 69 of the Transfer of Property Act.

The costs of the plaintiffs in this reference will be borne by the defendant.

Solicitors for the plaintiffs—*Barclay & Morgan*.

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APPELLATE CIVIL.

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

1887.
Dec. 5.

VENKAYYA (DEFENDANT, No. 3), APPELLANT,
and

NARASAMMA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 13—Res judicata—Issue decided in former suit, in which parties were rival defendants claiming under different titles.

B. sued L.N. and P.V. to recover certain property claimed under a nuncupative will of his father N. P.V. denied the will and alleged that the property was ancestral and had vested in him by survivorship. L.N. set up title to the property under a will in writing executed by N. and denied the title both of B. and of P.V. The question whether P.V. was divided or not from N. was tried. It was found that the will in writing was valid, that P.V. was divided, and that B's title was not proved. In a suit by L.N. against P.V. to recover certain land granted to her by the will executed by N.:

Held that the question whether P.V. was divided from N. was *res judicata* under s. 13 of the Code of Civil Procedure by reason of the decision in the former suit, although in that suit P.V. and L.N. were both defendants.

APPEAL from the decree of T. Ramasámi Ayyangár, Subordinate Judge at Cocanada, confirming the decree of A. F. Elliot, District Múnsif of Cocanada, in suit No. 373 of 1883.

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

Bhádshyam Ayyangár for appellant.

Subba Rau for respondent.

JUDGMENT.—The respondent's mother, Lakshmi Narasamma, the original plaintiff, instituted the present suit to recover certain property under a will left by her late father, Narasayya. The appellant, Venkayya, resisted her claim on the grounds that he was the undivided nephew of Narasayya and that the property in suit was ancestral property. The lower courts have found that the will set up by the respondent's mother is true and that the contention that the appellant was undivided could not be set up in this suit, he being concluded by the decision in Original Suit No. 314 of 1878.

* Second Appeal No. 397 of 1886.

It is urged, in second appeal, that the appellant and the respondent's mother were only defendants in that suit and that the adjudication on the question of division or non-division as between the then plaintiff and the present appellant was not material to the decision in that suit.

Original suit 314 of 1878 was brought by Bapanamma, another daughter of Narasayya, against the respondent's mother, the present appellant, and others, to recover certain property on the ground that it had been orally devised to her by her father. Her claim was resisted both by the present appellant and by the respondent's mother, the former alleging, *inter alia*, that the property then in suit was ancestral and that Narasayya was his undivided uncle; and the latter that a written will had been left by her father and that the lands claimed in that suit had not been devised to the then plaintiff, that the nuncupative will or oral testamentary disposition of property was untrue. She further pleaded generally that the present appellant was in no way entitled to the property.

It is clear that, although the appellant and the respondent's mother were co-defendants in the former suit, their contentions were hostile to one another, the daughters, on the one hand, claiming to take under their father's will; whilst the nephew, on the other hand, denied both the *factum* of the will and its validity on the grounds that there was a subsisting coparcenary and that the property was ancestral. The second issue recorded in the previous suit, namely, whether the appellant before us was divided from Narasayya was material to the joint contentions of the plaintiff and the present respondent's mother. Our attention was also drawn to the fact that the respondent's mother produced certain pattás standing in the name of her late father, which were relied on by the District Múnsif in his judgment as some evidence of partition.

Upon these facts, we are of opinion that the Subordinate Judge was right in holding the appellant to be debarred from raising in the present suit the question of division or non-division and that the appellant is concluded by the finding on that issue in the previous suit.

Two objections are urged in appeal against that decision by the appellant's pleader. The first is that, inasmuch as the former suit was dismissed and there was a finding that the oral will set up by the plaintiff in that suit was not true, the finding that

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NARASAMMA. Venkayya was divided nephew was not necessary to the decision in that suit. The second objection is that, as the present appellant and the respondent's mother were only co-defendants, there was no trial as between them with reference to that issue.

As to the first objection, it is provided by s. 13 of the Civil Procedure Code that no court shall try . . . any issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties "litigating under the same title."

It was incumbent on the plaintiff in the former suit to show, before she could claim a decree, that there was an oral will, as alleged by her, that her father was divided from his brother and that there was no written will, or that the oral will prevailed against the written will; and we cannot say that the issue as to division or non-division was not material to the ground of claim in that suit, nor are we prepared to adopt the suggestion that it was not material to the decision actually recorded in that suit, for the Subordinate Judge based his decision in appeal on the grounds that the written will was proved, that the oral will was not proved, that division was proved, and that the written will was valid, and that the property then in suit was not devised under it to the then plaintiff.

As to the second objection, it is not disputed that, although a plaintiff and a defendant may have been co-defendants in a former suit, a matter in dispute between them in a subsequent suit may have formed the subject of active controversy in the former suit so as to preclude them from raising the same question in the subsequent suit.

In the case before us, the question whether the respondent's mother's father and the appellant were divided or undivided was a matter directly and substantially in issue in the former suit, regard being had to the title then litigated as between the appellant and the respondent's mother, and it is also in evidence that the latter took an active part in making good her contention by producing in evidence documents which were used as evidence of partition.

We are of opinion then that the position of the respondent's mother in the former suit, though formally defendant in that suit, was not that of a party taking no active part in the contest between the then plaintiff and the appellant before us:

As to the contention that the finding in the former suit against the truth and validity of the oral will was sufficient for the dismissal of that suit, there is nothing before us to show that the claim was disallowed on that ground only. In *Krishna Behari Roy v. Brojeswari Chowdranee*(1), the Judicial Committee of the Privy Council observed that the adjudication on the question of adoption in a previous suit concluded the party claiming to be adopted in a subsequent suit, although the decision in the former suit proceeded on the finding that a patni lease granted by the mother of the plaintiff was not in excess of her powers as a widow, and although the determination that the adoption was true was not necessary to the dismissal of the claim, though it would certainly be material to the ground of claim.

We are, therefore, of opinion that this second appeal must fail, and we dismiss it with costs.

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

VENKATACHALAM (PLAINTIFF), APPELLANT,

and

VENKATAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act XIV of 1859, s. 1, cl. 9, 10, 16.

The period of limitation applicable under Act XIV of 1859 to suits upon written instruments which could not have been registered under the law in force at the time of execution of such instruments is six years under cl. 16 of s. 1 of the said Act.

APPEAL from the decree of W. F. Grahame, Acting District Judge of Cuddapah, confirming the decree of S. Dorasami Ayyangar, District Munsif of Cuddapah, in suit No. 176 of 1884.

This appeal was reheard after an application for review of judgment had been granted on 1st February 1886.

The Acting Advocate-General (Mr. Spring Branson) and Balaji Ráu for appellant.

Rama Ráu for respondents.

The facts necessary, for the purpose of this report, appear from the judgments of the Court (Brandt and Parker, JJ.).

(1) L.R., 2 I.A., 283.

* Second Appeal No. 483 of 1885.

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BRANDT, J.—A suit brought upon the bond, dated the 13th April 1848 (exhibit III), would not have been barred under the law of limitation then in force, viz., Regulation II of 1802 (Madras) at the time when the bond was renewed under exhibit VII, viz., the 15th January 1858.

And in the case of the bond of the 28th May 1848 (exhibit XII), it also was renewed within twelve years from the date on which the sum secured became payable on default of payment of instalments as agreed, viz., the 20th May 1850, the renewed bond (exhibit IX) bearing date the 26th January 1862, and a suit might, therefore, have been instituted upon the latter bond within three years from the date of the passing of the Act of 1859, viz., the 5th May 1859.

The question, then, is whether the renewals in 1869 of the debt secured by exhibit VIII (dated the 17th October 1863), which latter was in renewal of exhibit III, and in 1867 of exhibit IX by other documents, being within six years, but in excess of three years, suits upon the bonds of 1862 and 1863 were or were not barred in 1867 and 1869 respectively?

I am of opinion that the six years' rule must be held to apply.

The law as to registration in force up to the 1st January 1865 was contained in Regulation XVII of 1802 (Madras) and Act XIX of 1843. Under that law the only deeds which the registering officer was "authorized and required" to register were deeds relating to real property, wills and authorities to adopt. The bonds (exhibits VIII and IX) could not then have been registered under the law then in force.

Whether it might be possible to put some other construction upon cls. 9, 10, and 16 of s. 1 of the Limitation Act of 1859 I do not think it necessary to consider. These provisions have been, on several occasions, the subject of judicial decision by this court—*Gurivi Chetty v. P. Aiyappa Naidu*(1), *V. Venkatachalam v. Mala Kasigadu* (2), and we should follow those decisions, unless strong reasons appear for doubting them, and to me no such reasons appear.

A clear distinction was intended to be drawn between suits for money lent and on contracts not evidenced in writing and suits in which the loan or contract was evidenced in writing, and it

(1) 2 M.H.C.R., 329.

(2) 5 M.H.C.R., 68.

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would seem that the general rule aimed at was to allow three years in case of the former class of suits and six years in the case of the latter, an exception being, however, made in the case of the latter to this extent that, where the instrument could have been, but was not, registered, or was registered; but not within six months from the date of its execution, the creditor should be in no better position than if he held no security in writing. Section 10 does not expressly deal with the case of writings which could not be registered, but, unless by implication suits on such writings are taken to fall within cl. 16 of the section, a suitor in a suit based upon such an instrument would stand on the same footing as regards limitation as one bringing a suit under cl. 9.

It is more reasonable to infer an intention to place the holder of an instrument which he could not register on the footing of the holder of a registered instrument.

The result is that, in my opinion, our decision in second appeal No. 483 of 1885 should be set aside and the decree of the Lower Appellate Court restored, the second appeal being dismissed with costs. I would allow no costs in the matter of this application for review as the exception to the plea of bar by limitation was not fully argued in the second appeal on the point on which we now allow the appeal.

PARKER, J.—I agree with my learned colleague that the debts secured by the renewals of 1869 and 1867 (exhibits XI, XIV, XV, and XVI) were not barred.

The bonds then renewed were exhibit VIII executed in 1863 and exhibit IX executed in 1862, and the question is whether the period of limitation for suits on these bonds was three years or six.

The Limitation Act applicable was Act XIV of 1859 and the bonds VIII and IX could not have been registered by virtue of any law or regulation then in force. The period of limitation was, therefore, six years under s. 1, cl. 16.

It was argued by the learned Advocate-General that Act XIV of 1859 made no distinction between loans and loans evidenced by writing, but that the only distinction was between loans (whether in writing or not) and loans of which the registration was compulsory. This view, however, is not in accordance with the rulings of this court reported at II, Madras High Court Reports, 329 and 401, by which we are bound.

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When the appeal was before us for the first time the point was not taken as to what was the right period of limitation calculated under Act XIV of 1859, and hence there was an oversight in assuming that the time was three years as under the present law.

The second appeal must, therefore, be dismissed with costs, but we make no order as to costs in the review.

APPELLATE CIVIL.

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

1887.
Aug. 31.

TIRUPATI AND OTHERS (DEFENDANTS), APPELLANTS,

and

NARASIMHA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 43.

A leased certain land to B. The lease expired in 1877. B continued to hold over and refused to accept a fresh lease from A. A sued B in 1882 for mesne profits for three years, but did not claim possession of the land. The suit was dismissed on a preliminary point. A then sued B to recover possession of the land and mesne profits. It was argued that A's claim to the land was barred by s. 43 of the Code of Civil Procedure, because he omitted to claim the land in the former suit for mesne profits:

Held that the suit was not barred.

APPEAL from the decree of Venkata Rangayyar, Acting Subordinate Judge at Ellore, confirming the decree of M. Ramayya, District Munsif of Tanuku, in suit No. 139 of 1884.

Bhashyam Ayyangar for appellants.

Rama Rau for respondent.

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

JUDGMENT.—The land in dispute, which is in the appellants' possession, belongs to the respondent. The appellants originally entered into possession under a lease which expired in 1877. They continued, however, to hold over, and refused to accept a fresh lease from the respondent. In 1882 the landlord claimed mesne profits for three years, but did not claim possession of the land on the ground that the appellants were liable to be evicted. The District

* Second Appeal No. 908 of 1886.

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Munsif, who tried the suit of 1882, considered that he could not adjudicate upon it until the respondent set aside a lease granted by his uncle for a term of 25 years, and which the appellants then contended was binding upon the respondent. The latter then brought the suit, out of which this second appeal arises, to recover possession of the land and mesne profits for five years, namely, Bahudhanya, Pramadi, Vikrama, Vishu, and Chitrabhanu, at the rate of Rs. 25 per annum. The courts below disallowed the claim to mesne profits for the year Bahudhanya as barred by limitation, and in other respects passed a decree in favor of the respondent. Two questions are argued in appeal. The first of them is that the respondent's claim to possession of the land is barred by s. 43 of the Code of Civil Procedure, inasmuch as he omitted to include that claim in the suit which he instituted in 1882 to recover mesne profits for three previous years. It is urged that, if the former suit had been instituted for the recovery of the land and if the respondent omitted to claim mesne profits, which had then accrued due, he could not again be permitted to institute a second suit for the recovery of such mesne profits, and that the case before us is only its converse. Reliance is placed on *Debi Dial Singh v. Ajai Singh*(1). In that case the defendants interfered with the plaintiff's possession of certain trees and wrongfully took their fruit at the same time, viz., on the 19th June 1879, and it was held that the claim to mesne profits was one which the plaintiffs were bound to have included in the suit for possession of the land on which the trees stood, and that both claims arose out of the same wrong or cause of action. In the case before us it is argued by the appellants' pleader that, when a tenant holds over in opposition to the landlord, the latter is under an obligation to eject him at once and has not the option of suing simply for mesne profits on the ground of adverse occupancy until either the tenant gives up possession or he desires to eject him; but in applying s. 43, it should be remembered that there is a distinction between splitting of the same cause of action into two or more suits and instituting different suits upon distinct causes of action. Though it is true that claims, such as those mentioned in the illustration to s. 43, are referable to the same cause of action on the ground that, when the rent remains unpaid for several years, the debts due, though consisting of several items, are so connected

(1) I.L.R., 3 All., 543.

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as to form one entire demand, yet it cannot be held that, when the causes of action are distinct and independent, the plaintiff is bound to unite all the claims founded upon them in one suit. We are of opinion that the suit to recover mesne profits and the suit to eject are not parts of a claim founded on the identical cause of action within the meaning of s. 43, and that if mesne profits are alone claimed in the first suit as damages due for adverse occupancy, a second suit can be maintained to recover possession of the land.

It was held in *Monohur Lall v. Gouri Sankur*(1) that a plaintiff suing for possession of land was not precluded from maintaining a second suit for mesne profits. Although that case was decided with reference to Act VIII of 1859, we do not consider that the difference in the language of s. 43 of the present Act and ss. 7, 9 and 10 of Act VIII of 1859 warrants the appellants' contention. The only alteration consists in the substitution of the words "which the plaintiff is entitled to make" for the words "arising out of the cause of action." It would be preposterous to say, as is suggested for the appellants, that, assuming that the respondent succeeded in the former suit and obtained a decree for mesne profits, he would still be precluded from claiming possession of the land. The first contention must, therefore, be overruled. As to the second contention, it is conceded by the respondent's pleader that the claim to mesne profits due for the year Pramadi is barred, and the decree appealed against must be modified by diminishing the amount allowed by the Judge for mesne profits by Rs. 25. As to the mesne profits claimed for the other three years, the question of limitation does not arise, inasmuch as they accrued due within three years prior to the date of the suit. In the former suit there was a refusal to adjudicate upon the respondent's claim to mesne profits claimed for Vikrama, but whether the refusal was right or wrong the claim is not barred by s. 13 as there was no adjudication on the merits. Upon the facts found, we are of opinion that the appellants must be taken to be trespassers or in possession in opposition to their landlord, and that they are not entitled to any notice. We modify the decree of the Lower Appellate Court as indicated above and confirm it in other respects. The appeal has substantially failed, and we direct that the appellants do pay the respondent's costs in this court.

(1) I.L.R., 9 Cal., 283.

APPELLATE CIVIL.

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

KUMARA (PLAINTIFF), APPELLANT,

and

SRINIVASA (DEFENDANT), RESPONDENT.*

Evidence Act, s. 92—Civil Procedure Code, s. 317.

By an agreement in writing, A, after reciting that he bid for certain property sold in execution of a decree benámi for B and paid the deposit amount into court for B and that B paid the balance, promised to convey the property to B. In a suit by B to recover the property from A:

Held that, under s. 92 of the Evidence Act, B was not debarred from proving that A bought the property for himself and not benámi for B.

APPEAL from the decree of J. Hope, District Judge of South Arcot, confirming the decree of Appavayyar, District Munsif of Chidambaram, in suit No. 559 of 1885.

The plaintiff sued to compel the defendant to execute to him a conveyance of certain property and to recover the same and mesne profits. He alleged in his plaint that defendant bought the land at a court-sale and promised to convey the same to plaintiff. The plaintiff filed the following agreement (exhibit A):—"In the court-sale (held) in suit No. 275 of 1881, on the file of District Munsif's Court at Chidambaram, I bid for the property, which is the subject of sale, for Rs. 771, for you as a name-lender, received from you Rs. 200, the deposit money, on the date of sale, and paid for you. As the balance of Rs. 571, after deducting this, was paid by yourself in court this day, I shall obtain the sale certificate for the said property as soon as the sale is confirmed, sell it to you, and put in a petition to the court to deliver the said property to you. Thus was this agreement executed by me out of my consent."

The Munsif, from the terms of exhibit A, held that the suit was really one to recover property from a certified purchaser contrary to the provisions of s. 317 of the Code of Civil Procedure, and dismissed the suit.

* Second Appeal No. 87 of 1887.

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

JUDGMENT.—The case set forth in the plaint is that defendant really intended at first to purchase the land for himself and borrowed Rs. 200 of plaintiff for that purpose in order to make the deposit required by law; that defendant did bid and make that deposit on his own account, but that, when he afterwards found himself unable to complete the purchase, he executed exhibit A to the plaintiff, asking plaintiff to pay the balance of the purchase money into court and contracting on his part to convey the property to plaintiff on confirmation of the sale.

The recitals of exhibit A are no doubt inconsistent with this plaint, but the suit, as it is disclosed in the plaint, is one for specific performance of a promise to convey and is not one against the certified purchaser on the ground that the purchase was made on behalf of the plaintiff.

The allegations made in the plaint may or may not be true, but on the cause of action there disclosed it cannot be said that the suit is barred under s. 317, Code of Civil Procedure. The rule laid down in that section is, we may observe, a rule of procedure only, and there is nothing in itself illegal in one man buying property in the name of another.

The real question is whether plaintiff is precluded by s. 92 of the Evidence Act from giving evidence, which will be inconsistent with exhibit A. It is urged that a suit based upon the state of facts recited in exhibit A would be clearly prohibited under s. 317 of the Code of Civil Procedure, and that plaintiff cannot show that the agreement was of a different character.

In order to determine this question, it is necessary to consider what a contract really is. It is defined in s. 2(b) of the Indian Contract Act as an agreement enforceable by law, and an agreement is defined as "every promise and every set of promises forming the consideration for each other."

If the agreement was that expressed in exhibit A, the promise was to convey the land to the plaintiff. No consideration is alleged, and the writing could add no force to the promise implied by law to convey to a person the property purchased on his behalf.

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If, on the other hand, the agreement was that set up in the plaint, the promise was the same, viz., to convey the land to plaintiff; but the consideration for the promise was the payment of Rs. 571 into court by plaintiff in order to enable defendant to complete the purchase which he had made for himself and save the forfeiture of the deposit money.

In each case, therefore, the promise was the same, viz., to convey to plaintiff, but the reason or the consideration for the promise is different. It has been held that s. 92 of the Evidence Act does not prevent a party to a contract from showing that the consideration was different to that described in the contract—*Hukum Chand v. Hirālāl*(1)—and the Madras High Court has held in *Vasudeva v. Narasamma*(2) that s. 92 does not prevent the disproof of a recital in a contract as to the consideration that has passed by showing that the actual consideration was something different from that alleged.

Here the difference is between the actual promise to pay money into court and the promise legally implied as the consideration for the promise to convey, but whichever of them was the consideration the terms and character of the agreement, viz., that defendant shall convey to plaintiff, are neither contradicted nor varied.

We think, therefore, that plaintiff is not precluded by s. 92 from bringing evidence in support of the case put forward in his plaint, and we will, therefore, reverse the decrees of the courts below and remand the suit to the court of first instance for a decision upon the facts. We do not wish, at the present time, to express any opinion upon the merits. The appellant should have his costs in this and in the lower appellate court, and the costs in the court of first instance should abide and follow the result.

(1) I.L.R., 3 Bom., 159.

(2) I.L.R., 5 Mad., 6.

APPELLATE CIVIL—FULL BENCH.

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

1887.
July 29.

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

Stamp Act. s. 2 (13)—Specified property—Sch. I, art. 25—Declaration of trust—
Sch. I, art. 5 (c)—Agreement.

An agreement was made between certain persons to transfer the future surplus profits of their respective trades to a trustee, in order that the trustee should hold the fund so to be created on certain trusts declared in the agreement:

Held that the agreement was liable to stamp duty as a declaration of trust under the Indian Stamp Act, 1879, sch. I, art. 25, and as an agreement under art. 5 (c):

Held, also, that the fund intended to be created under the agreement was not "specified property" within the meaning of s. 2 (13) of the said Act.

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

On 5th February 1887, this case was referred to the Board of Revenue by the Collector of Madras under s. 45 of the Stamp Act and stated in the following letter:—

"I have the honor to request that the Board of Revenue will be so good as to favor me with their decision as to the amount of stamp duty chargeable on the enclosed document (styled "memorandum of agreement"), presented by Messrs. Dymes and Co. for my adjudication under s. 30.

"The agreement has been made among certain cotton press companies, who mutually agree, among other conditions, to make over certain surplus receipts from their respective presses to a trustee, nominated under the deed, in view to such trustee holding the accumulations of such receipts from time to time until they amount to, at least, Rs. 50,000—after deducting certain expenses—as security for the 'due maintenance and observance of the conditions of the agreement.'

"I feel a doubt as to whether the instrument should be treated as an 'agreement not otherwise provided for by the Act,' so as to be chargeable with a duty of annas 8 under art. 5 (c), sch. I,

* Referred Case No. 2 of 1887.

or as a mortgage under art. 44 (a) of the same schedule with reference to Board's Proceedings, No. 371, dated 4th February 1884. I am, however, inclined to view it as falling under the latter head 'Mortgage' (vide cl. 13, s. 3, and art. 44 (a), sch. I), inasmuch as it stipulates for certain monies made over from time to time to the trustee by the parties to the deed, being formed into a fund to be held by him as security for performance of the conditions of the engagement entered into. If the Board agree with me in this view, then the question arises as to what amount should be taken as the consideration for the mortgage for the purposes of calculating stamp duty. Although the amount, existing at the time of execution of the document, and over which a right is created thereby at that time in favor of the trustee for the performance of the engagement (vide cl. 13, s. 3), is almost nothing, and will not be so much as Rs. 50,000 for some time hereafter, still, as the document is intended to cover at least that sum ultimately as the amount of security, provided the combination continues till the accumulations reach that figure and does not cease meanwhile owing to the arising of a contingency specified, I would take that sum (Rs. 50,000) as the consideration money, and levy the stamp duty accordingly under art. 21, sch. I."

The Board's resolution on the letter was as follows:—

"The Collector of Madras forwards a certain document to the Board of Revenue under s. 45 of the Stamp Act, and asks

"(i) under what article of sch. I of that Act it should be stamped; and

"(ii) if at an *ad valorem* rate, on what amount.

"The Board themselves are not unanimous in the matter, and, under s. 46, they beg, therefore, to refer the Collector's questions to the High Court for an authoritative answer.

"The document evidences an agreement which certain cotton press companies at Tinnevely have made with each other to prevent under-bidding and competition. Its main condition is that all the profits, which each individual member may make, are to be shared in fixed and rigid proportions by all; but, incidentally, a proviso has been inserted that, before any distribution of profits at all is permitted, a sum of Rs. 50,000 shall accumulate in the hands of trustees to be held as security for the due maintenance and observance of this agreement."

REFERENCE
UNDER STAMP
ACT, s. 46.

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 instrument in question is a declaration of trust and an agreement not otherwise provided for, and that the intended fund, indicated as security, is in this case not specified property within the meaning of s. 2, cl. (13).

APPELLATE CIVIL.

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

1887.
Oct. 21.

VENKATARATNAM AND OTHERS (DEFENDANTS), APPELLANTS,
and

KAMAYYA (PLAINTIFF), RESPONDENT.*

Limitation Act; s. 20—Payment of interest—Prescribed period—Extension of period.

Thetwords "prescribed period," used in s. 20 of the Limitation Act, 1877, mean the period prescribed by the Act.

The contention that only one extension of the period of limitation is given by payment of interest is unfounded.

APPEAL from the decree of J. Thomson, Acting District Judge of Ganjam, reversing the decree of M. Visvanatha Ayyar, Acting District Múnsif of Berhampore, in suit No. 128 of 1886.

Plaintiff sued to recover Rs. 1,169-2-8, the balance due on an unregistered bond, dated 14th March 1879, payable on the 26th March 1880.

The Múnsif dismissed the suit on the ground that, although the suit was instituted within three years from the date of the last payment of interest, such payment was not made within the prescribed period, i.e., three years from 26th March 1880.

On appeal, the District Judge remanded the suit, holding that as each payment of interest had been made within three years of the last preceding it, the suit was not barred.

Defendants appealed.

* Appeal against Order No. 103 of 1887.

Mr. *Michell* for appellants.

Bhāshyam Ayyangār for respondent.

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

JUDGMENT:—The bond A was executed in 1879 and the date fixed for repayment was the 26th March 1880. Interest was paid in June 1880, in November 1882, and in March 1884. The present suit was brought in 1886. It is contended by the defendants' counsel that the words "prescribed period" in s. 20, Act XV of 1877, mean the period prescribed in the contract for repayment, and it is also contended by the defendants' counsel that the debt is barred by limitation, that s. 20 of Act XV of 1877 only gives one new period of limitation of three years, and that, as the last payment within the three years was made in November 1882, the debt was time-barred in November 1885.

Section 20 provides that, when interest on a debt is paid before the expiration of the prescribed period, a new period of limitation shall be computed from the time when such payment was made, and there is no doubt but that the prescribed period is the period prescribed by the Act and not by the contract. It is also clear that each payment of interest gives a fresh starting point, and neither the language of the section nor the intention which may reasonably be inferred from it affords ground for the contention that the section has application to only one payment of interest.

We also find the same view had been taken by the High Courts of Calcutta and Bombay—see *Mohesh Lal v. Busunt Kumaree*(1) and *Atmaram v. Govind*(2).

The claim is, therefore, not barred by limitation, and the appeal is dismissed with costs.

(1) I.L.R., 6 Cal., 340.

(2) I.L.R., 11 Bom., 292.

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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.
April 15.
Nov. 27.

MANISHA ERADI (DEFENDANT, No. 2), PETITIONER,

and

SÍYALI KOYA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 622—Court acting without jurisdiction.

A Small Cause Court, which had jurisdiction under Act XI of 1865 to entertain suits for rent only where the claim was founded on contract, erroneously assumed that a sub-tenant, by entering on land with notice that his lessor was bound to pay rent to the landlord, became liable by an implied contract to pay the rent to the landlord, and passed a decree against the sub-tenant for the rent in arrears:

Held that, under s. 622 of the Code of Civil Procedure, the High Court had power to set aside the decree—*Amir Hassan Khan v. Sheo Baksh Sing* (I.L.R., 11 Cal., 6) discussed and explained.

APPLICATION, under s. 622 of the Code of Civil Procedure, to set aside the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in Small Cause suit No. 446 of 1886.

On the 16th April 1887, the Court (Muttusámi Ayyar and Brandt, JJ.) referred the case to a Full Bench.

The facts are set out in the order of reference, which was as follows:—

“The plaintiff sued one Tharaka Peetikayil Assen Koya as defendant No. 1, the petitioner, Eradi, as defendant No. 2, and another (who was exonerated), for rent claimed as due from the defendants.

“Defendant No. 1 allowed the suit to go *ex parte*. The petitioner did not dispute the liability of defendant No. 1 to pay rent to the plaintiff, but pleaded that, whatever the petitioner's liability to the defendant No. 1, there was no privity of contract between him, the petitioner, and the plaintiff, the petitioner having contracted to pay, and having, as he alleged, paid rent to defendant No. 1.

“The ‘pattam-chit,’ on which the suit was based, was executed by the defendant No. 1 alone.

* Civil Revision Petition No. 321 of 1886.

“The Subordinate Judge gave decree against defendant No. 1 and the petitioner with costs, on the ground that ‘though there was no privity of contract between defendant No. 2 and the plaintiff,’ the petitioner must be held to have taken the land on lease from defendant No. 1, with notice of the liability of defendant No. 1 for the rent sued for, and that there was an implied contract on the part of the petitioner to see that the rent payable by defendant No. 1 was paid.

“There is no foundation in law for implying any contract, such as is suggested, but the error is an error of law as applied to the facts of the case.

“It is contended that the proceedings of the Subordinate Judge should be revised on the ground that, but for the mistake in law, the Subordinate Judge had no jurisdiction to make a decree against the petitioner, and we are referred to a case decided by a Divisional Bench of this Court—*Ráma v. Kunji*(1), which appears to afford some ground for the contention in the case before us; but having regard to *Amir Hassan Khan's case*(2), decided by the Privy Council, and to a more recent case by this Court—*Jirraji v. Pragji*(3)—it appears to us desirable to have an authoritative decision on the point, which is one of importance and of frequent occurrence.

“The questions referred may be stated as follows:—Does a Judge act without jurisdiction, within the meaning of the word ‘jurisdiction,’ as used in s. 622 of the Code of Civil Procedure, when he passes a decree against a party on the basis of a decision which is the result of an error of law applied to the facts of the case? Does a Judge in such case ‘act illegally or with material irregularity’ in the sense in which those words are used in the said section?”

Sankara Menon for petitioner.

The Acting Advocate-General (Mr. Spring Branson) for respondent.

On the 22nd November 1887, the Full Bench (Collins, C.J., Kernan, Muttusámi Ayyar, Brandt, and Parker, JJ.) delivered the following judgments:—

COLLINS, C.J.—This was a case decided by the Subordinate Judge of South Malabar in a Small Cause suit No. 446 of 1886.

(1) I.L.R., 9 Mad., 375.

(2) I.L.R., 11 Cal., 6.

(3) I.L.R., 10 Mad., 51.

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The decision of the Subordinate Judge is manifestly bad in law, but the question to be decided is—"Has the High Court power to interfere under s. 622 of the Civil Procedure Code?" It becomes, therefore, necessary to consider if the court has exercised a jurisdiction not vested in it by law, or has acted in the exercise of its jurisdiction illegally, or with material irregularity. The facts of the case, so far as they are material, are as follows. The plaintiff brought a suit against the first and second defendants for arrears of rent. It appears that the first defendant executed a pattam-chit on the 22nd February 1878, agreeing to pay a certain rent to the plaintiff. The second defendant is a sub-mortgagee under the first defendant and is in possession of the property. He has paid the rent agreed upon to the first defendant, who, however, has not paid his rent to the plaintiff. The Subordinate Judge held that, although there was no privity of contract between the second defendant and the plaintiff, the second defendant took the property from the first defendant with notice of the first defendant's liability for the rent, and that there was an implied contract on his part, as the party in beneficial occupation of the property is bound to see that the burden of paying rent is fully discharged; and he, therefore, held that both the first and second defendants were jointly liable for the rent.

It is clear that, under Act XI of 1865 (Small Cause Court Act), s. 6, the Subordinate Judge sitting in a Small Cause Court has jurisdiction to deal with claims for arrears of rent only when the claim was founded on contract—*K. Venkatachala v. Narayana*(1). The Subordinate Judge has found that no privity of contract existed between plaintiff and second defendant, but has erroneously assumed, as a matter of law, that there was an implied contract between the parties on the ground that, as the second defendant is in possession, he is bound to see that the burden of paying the rent, which is admittedly due by the first defendant, is discharged. The question then is—"Can the Subordinate Judge by taking an erroneous view of the law (in this case by assuming that a contract existed between plaintiff and second defendant) give himself jurisdiction over the cause?"

No contract, either in fact or in law, existed between the plaintiff and second defendant. Without such contract a Small Cause Court had no jurisdiction to try the cause. Can it be said, there-

fore, that, because the Subordinate Judge assumed, as a matter of law, that which in fact had no existence in law, he could give himself jurisdiction over the matter of the suit. I am of opinion that the Subordinate Judge had no jurisdiction to try the cause and that the High Court has power to interfere under s. 622, Civil Procedure Code.

KERNAN, J.—The questions referred to the Full Bench are—"Does a Judge act without jurisdiction, within the meaning of the word 'jurisdiction,' as used in s. 622, Civil Procedure Code, when he passes a decree against a party on the basis of a decision which is the result of an error of law applied to the facts of the case? Does a Judge in such case 'act illegally or with material irregularity' in the sense in which those words are used in the said section?"

The plaint in the referred case did not show on the face of it that the Small Cause Court had jurisdiction to entertain the suit as against the second defendant. In the plaint, it was alleged that the plaintiff made a lease to the first defendant at a certain rent and that a sum specified was due as arrears of rent. It then alleged that the second defendant was a mortgagee of the interest of the lessee and alleged that the second defendant thereby became liable to pay the rent claimed. It was further alleged that the first defendant's interest in the lease was set up for sale and was purchased by the third defendant, and rent was claimed against the third defendant. A decree for payment was made against the second defendant. A plaint filed within any limited jurisdiction should on the face of it show the jurisdiction of the court to entertain the suit. As the plaint did not show jurisdiction in the Small Cause Court to entertain the suit against the second defendant, the Small Cause Judge had no jurisdiction to act, except to have returned the plaint for amendment by omission of the name of the second defendant, or at the hearing to dismiss the suit as against the second defendant, on the ground that he had not jurisdiction to try the case as against the second defendant. The Small Cause Judge acted without jurisdiction in entertaining the suit against the second defendant, and his decree was made without jurisdiction and was a nullity, and it may be revised under s. 622, Civil Procedure Code. The case is entirely different from many cases that might be cited where a Small Cause Court having jurisdiction to entertain a suit made a decision erroneous in point of law, but did

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(1) 4 M.H.C.R., 393.

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not exceed its jurisdiction. The above being my opinion in this case, it is not probably necessary to answer the abstract questions referred.

MUTTUSAMI AYYAR, J.—The facts of the case, which has given rise to this reference, are sufficiently stated in the order recorded by the Divisional Bench, by which the reference has been made. The petitioner was the second defendant in the suit, which the respondent instituted on the small cause side of the Subordinate Court at Calicut to recover certain arrears of rent due under a pattam or rent-chit executed by the first defendant in favor of the plaintiff—respondent on the 22nd February 1878. The plaint contained no specific averment as to the liability of the petitioner for the rent due by the first defendant. It appears, however, that the former was a sub-kanamdār and a sub-tenant under the latter to whom the respondent (plaintiff) had previously demised his land on kanam. The petitioner's defence was that he had paid rent to the first defendant due up to the year 1059 or 1884, and that he was ready and willing to pay rent for 1060 and 1061 or 1885 and 1886. The facts found by the Small Cause Judge were that there was no privity of contract between the petitioner and the respondent, but that the former took the property from the first defendant with notice of his liability to pay the rent sued for. He then observed that the obligation to pay rent was correlated to the right of beneficial enjoyment and that there was, therefore, an implied contract, whereby the second defendant was bound, as the party in beneficial occupation, to see that "the burden of paying rent which was correlative to the right of beneficial enjoyment was fully discharged." He observed also that the petitioner or sub-tenant "might well have withheld payment of rent to his own landlord, the first defendant, in view of the respondent, the superior landlord, coming upon him for rent." He remarked further that the first defendant had been insolvent for some time and that "it was, therefore, more than under ordinary circumstances the petitioner's duty to see that the janmi's dues on the regular payment, of which his security was dependent, were discharged." In advertence to the foregoing observations, he passed a decree for the rent sued for with costs as well against the petitioner as against the first defendant. It was argued for the petitioner that admittedly there was no contract between him and the respondent, that, unless there was a contract, express or implied, the Small Cause Court had no jurisdiction to

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entertain a suit for arrears of rent, and that under s. 622 of the Code of Civil Procedure the decree should be set aside so far as it relates to the petitioner as one made without jurisdiction. There is no doubt that, under s. 6, Act XI of 1865, which constituted Small Cause Courts, it was not competent to the Subordinate Judge to take cognizance of a claim for arrears of rent in the exercise of small cause jurisdiction unless the claim rested on a contract. This was decided so early as 1869 in *K. Venkatachala v. Narayana*. In the case before us there was admittedly no contract by the petitioner to pay rent to the respondent. It is not alleged, and there is no evidence on the record to show, that there was any communication before suit between the petitioner and the respondent in regard to payment of rent, or that the former attorned to the latter by reason of the first defendant's insolvency or any other circumstance. It is clear then that the Subordinate Judge considered that a contract might be implied, as a matter of law, on the part of the sub-tenant to see that rent was duly paid by his own landlord to the superior landlord. The statement by the petitioner that he was willing to pay rent for 1060 and 1061 did not amount, upon the facts found, to an admission of a prior contract, but it was intended to be a promise to obey the decree of court, if one should be made as the rent due for those years had not been previously paid to the first defendant. The material question then is whether in cases which a Small Cause Court in erroneously implies a contract as a matter of law and over which, but for that error, it would have no jurisdiction, the High Court may interfere as a Court of Revision under s. 622. It is provided by that section that the High Court may call for the record of any case in which no appeal lies to the High Court, if the court by which the case is decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally, or with material irregularity, and may pass such order in the case as the High Court thinks fit.

Three questions require to be considered for the purposes of this reference in connection with the interpretation which has to be placed on this section, viz., (1) What is the sense in which the term "jurisdiction" is used? (2) What is the scope of the words "act illegally or with material irregularity in the exercise of juris-

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diction?" (3) How is it to be decided in particular cases that jurisdiction is or is not vested by law?

As to the first question, it is clear that the term "jurisdiction" is used in contradistinction to the "merits," and that it denotes a tribunal designated by the legislature as competent to entertain the case under reference. The course of legislation in India is conclusive on this point.

The first provision of law to which I may refer is s. 350, Act VIII of 1859. In regulating the powers of the appellate courts it provided that no decree should be interfered with for any error, defect or irregularity not affecting the merits of the case or the jurisdiction of the courts. This is a clear indication that the legislature used in that enactment the term "jurisdiction" in contradistinction to the expression, "the merits of the case."

I shall next refer to s. 35, Act XXIII of 1861. It enabled the late Sadr Court to call for the record of any case decided on appeal by any subordinate court, in which no further appeal lay to the Sadr Court, and to set aside its decision or pass any other order if the subordinate court appeared, in hearing the appeal, to have exercised a jurisdiction not vested in it by law. This is important as the first section in the Code of Civil Procedure, which created a power of revision when no appeal was allowed by law and limited it to cases in which the lower appellate court exercised a jurisdiction not vested in it by law.

The third provision of law on the subject is s. 622 of Act X of 1877, as amended by Act XII of 1879, s. 92. Section 35 of Act XXIII of 1861 was not only re-enacted but also amplified. The power of revision was extended to three classes of cases, viz., (1) when the court by which the case was decided exercised a jurisdiction which was not vested in it by law; (2) when it failed to exercise a jurisdiction so vested; and (3) when the subordinate court acted in the exercise of its jurisdiction illegally or with material irregularity.

The power was further extended to cases decided by every subordinate court in which no appeal lay to the High Court. I do not here refer to s. 15 of the Charter Act, 24 & 25 Vic., c. 104, or to s. 25 of the recent Small Causes Court Act of 1886 as it is not necessary for my present purpose to do so. I may also add

that the last clause in s. 622 "acts illegally or with material irregularity" was first introduced by Act XII of 1879.

According to the course of decisions in this Presidency, no doubt was ever entertained as to the sense in which the term "jurisdiction" is to be understood. It was always taken to refer to the *status* of a tribunal as the proper *forum* designated by the legislature to adjudicate on the case under reference. It is evident then that a court has or has not jurisdiction according as, upon the facts found, the conditions specified in the enactment which gave the jurisdiction are or are not satisfied. Doubt was, however, entertained as to the scope of the words "acted illegally or with material irregularity in the exercise of its jurisdiction." It was said that it was not enough to show that there was an error of law or a material irregularity in the exercise of jurisdiction, but it was necessary to go further and prove that such error or irregularity crept in otherwise than in good faith, or as the result of arbitrary action on the part of the subordinate court in a case which it had jurisdiction to decide. It was also urged that, unless the words were so limited, there would practically be a second appeal in every case in which the law does not allow an appeal to the High Court. This view led to the Full Bench decision of this Court in Civil Revision Petition No. 255 of 1882. It was held in that case that, according to the plain meaning of the words, the legislature gave the High Court a discretionary power of revision in every case in which the subordinate court had jurisdiction and in which there was an error of law, or a material irregularity which affected the decision on the merits. See also the decision in *Pugardin v. Moidin*(1). As to the objection that such construction would practically allow a second appeal in every case in which an appeal was not allowed by law, it was held that the power of revision was a discretionary power and that the legislature considered it probably necessary to confer such power upon the High Court in order to prevent injustice in the very large number of small causes finally decided by inferior courts. In this connection it may not be amiss to draw attention to s. 25 of the recent Mufassal Small Cause Court Act, which gives the High Court a power of revision in order to enable it to see that the decision of the Small Cause Courts is in accordance with law.

(1) I.L.R., 6 Mad., 414.

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It is clear then that the words "in the exercise of its jurisdiction" were taken by the Full Bench to refer to a case over which the subordinate court had jurisdiction.

After the Full Bench decision, the scope of s. 622 was considered by the Privy Council in *Amir Hassan v. Sheo Baksh Sing.* The facts of that case were shortly these. Raja Amir Hassan Khan sued Theo Baksh to redeem the mortgage of a three-quarter share in the taluk of Khanpur. The suit was commenced in the Court of the Extra Assistant Commissioner in Oude. The questions raised for decision were whether the suit was not barred by ss. 13 and 43 of Act X of 1877, whether the plaintiff was entitled to represent the mortgagors, and whether it was competent to him to claim to redeem the mortgaged property. There was no dispute as to the jurisdiction of the Assistant Commissioner to take cognizance of the suit. He decided the case in favor of the plaintiff therein. On appeal, the District Judge of Sitapur confirmed his decision. As no further appeal was allowed under the Oude Civil Courts Act, the Judicial Commissioner called for the record under s. 622 and reversed the decisions of the courts below on the ground that they were erroneous. It was argued before the Privy Council that the words "act illegally or with material irregularity in the exercise of its jurisdiction" did not comprehend cases of "erroneous decision." The Judicial Committee upheld this contention and said: "The question then is—Did the Judges of the Lower Courts in this case in the exercise of their jurisdiction act illegally or with material irregularity? It appears that they had perfect jurisdiction to decide the question which was before them and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case, and even if they decided wrongly they did not exercise their jurisdiction illegally or with material irregularity. The Judicial Commissioner had no jurisdiction in the case under s. 622." What class of cases was then intended to be comprehended by the words "act illegally or with material irregularity" was not explained by the Privy Council in that judgment, but it was distinctly observed that "even if they decided wrongly they did not exercise their jurisdiction illegally or with material irregularity." As some effect must have been intended to be given to those words, which are to be found in s. 622, the reasonable inference is that the words "act illegally or with material irregu-

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larity" were not considered by the Judicial Committee to presuppose a case as was considered by the Full Bench of this Court which the lower court had jurisdiction to decide, but in which its decision on the other questions raised therein was tainted with illegality or material irregularity; but that those words were taken to have reference to the mode in which the lower court came to the conclusion that it had jurisdiction over the case.

If this view is correct, the words "act illegally or with material irregularity" apply to those cases only in which there is an error of law or a material irregularity in the procedure by reason of which the subordinate court concludes that it has or has not jurisdiction. The majority of the decisions passed in this Presidency, subsequent to the decision of the Privy Council, are in accordance with that view, though it cannot be said that there are no decisions in conflict with it. In *Erajabi v. Mayan*(1), a Divisional Bench of this Court set aside in September 1885 the decision of a Village Munsif on the ground that the Village Munsif failed to consider that the suit was barred by limitation. It is difficult to reconcile this decision with that of the Privy Council. In *Kunhamed v. Chathu*, decided in April 1886, the High Court set aside an order made under s. 315 of the Code of Civil Procedure, directing a refund of the purchase money, on the ground that the judgment-debtor had some saleable interest and that the District Munsif was in error in supposing that in such a case he had power to order a refund. The principle it suggests is that the District Munsif concluded by an error of law that he was competent to order a refund, though, upon the facts found, he was not competent to do so. In *Rama v. Kunji*(2), the High Court set aside the decree of a Subordinate Judge dismissing a suit by a pleader to recover his fee and directed him to decide the case on the merits on the ground that he was in error in supposing that a contract in writing was necessary to sustain such suit under the Legal Practitioner's Act, while upon its true construction it was not necessary. I may also refer to *Jivaji v. Pragji*(3), *Seshadri v. Krishnan*(4), *Sanjivi v. Ramasami*(5).

There is no reason then to doubt that the term "jurisdiction" is intended to denote the competent forum. There is also no doubt

(1) I.L.R., 9 Mad., 118.

(2) I.L.R., 9 Mad., 375.

(3) I.L.R., 10 Mad., 51.

(4) I.L.R., 8 Mad., 192.

(5) I.L.R., 8 Mad., 494.

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that the words, "act illegally or with material irregularity in the exercise of its jurisdiction," must be taken, on the authority of the Privy Council, not to comprehend erroneous decision in cases which the subordinate court has jurisdiction to decide, but to refer to what goes before and to the mode in which the lower court comes to the conclusion either that it has or that it has not jurisdiction.

As to the third question how is it to be decided whether jurisdiction is or is not vested in a court by law, it is important to bear in mind that the Civil Courts derive their jurisdiction from general law or a special enactment, and that in the case of a Small Cause Court or any other court of limited jurisdiction, the jurisdiction must appear upon the facts found to be exercised within the limits prescribed by the enactment which gave jurisdiction. In revision we are no doubt bound to accept the facts as found by the subordinate court, provided that they are so found upon legal evidence and there is no material irregularity in the procedure, but at the same time we are not bound to accept their errors of law or to overlook any material irregularity affecting their decision on the question of jurisdiction. The decision in *D. Tilakchand v. B. Govind Shet*(1) takes the same view of the scope of s. 622.

The law then as now applicable may be thus formulated. In cases in which the subordinate court exercises a jurisdiction which is not vested in it by law, or fails to exercise a jurisdiction which is vested in it by law, or assumes or declines jurisdiction in consequence of some error of law or of some material irregularity in its procedure, the High Court may interfere under s. 622. In cases in which, upon the facts found by the subordinate court that court has jurisdiction according to law and there is no material irregularity in its procedure affecting the question of jurisdiction, the High Court is not competent to interfere though, its decision on the merits or on any other preliminary question is erroneous in law.

Applying these principles to the case before us, I consider that it is one in which it is competent to us to interfere under s. 622. The fact found by the Subordinate Judge is that there was no contract and there was therefore no privity of contract between

(1) I.L.R., 9 Bom., 82.

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the petitioner and the respondent. This being so he had no inherent jurisdiction to entertain the suit for arrears of rent against the petitioner. It must also be observed that, as a matter of law, no contract can be implied on the part of a sub-tenant to see that his own landlord punctually pays the rent due by him to his superior landlord, and on default to pay it himself. In implying such a contract the Subordinate Judge has, by an error of law, supposed that an implied contract existed and thereby acted illegally in regard to a matter which is the basis of his jurisdiction. The Subordinate Judge having no inherent jurisdiction upon the facts as stated by him, he cannot give himself a jurisdiction which the law does not give him by an erroneous statement of their result in law. Nor can a party give jurisdiction by consent to a tribunal which has no inherent jurisdiction. The observations of the Privy Council in regard to the right of a party to waive his objection to jurisdiction in the case of *Minakshi v. Subramanya*(1) decided on the 16th June last are pertinent. In that case the Judicial Committee held that no appeal lay to the High Court from the order made by the District Judge under Act XX of 1863, but it was urged by Counsel that by reason of the course pursued by the parties in the High Court they waived the right which they might otherwise have had to raise the question of want of jurisdiction. The Judicial Committee observed that the view suggested was untenable, that no amount of consent could confer jurisdiction where none existed, that, when the court had no jurisdiction over the subject-matter of a suit, the parties could not by their mutual consent convert it into a court of competent jurisdiction, though they might constitute the Judge their arbitrator. The conclusion I come to is that no error of law, as applied to the facts found by the subordinate court, no misstatements in the plaint, no waiver of the objection to want of jurisdiction in a Small Cause Court, which, upon the facts found, has no inherent jurisdiction over the subject-matter of the suit so far as it relates to a particular defendant, can convert it into a proper *forum*. The reason is that the Small Cause Court is a court of limited jurisdiction, that it has or has not jurisdiction according as the conditions designated by the legislature do or do not exist, and that when a contract is necessary, and when there is none, it can have no jurisdiction.

(1) L.R., 14 I.A., 160; s.c. I.L.R., 11 Mad., 26.

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It remains for me to notice the objection that was referred to at the hearing. It was said that we might hold the Subordinate Judge considered that there was an implied contract and accept it as a finding on a question of fact by a court of final jurisdiction. This view appears to me to be untenable for several reasons. In the first place, the Subordinate Judge did not intend to find an implied contract as a matter of fact, but stated expressly that there was no privity of contract. Again, he propounded a theory of an obligation on the part of the sub-tenant to see that his landlord paid rent to the superior landlord as arising from the relation supposed to exist between rent and beneficial enjoyment. This makes it clear that he intended to infer an implied obligation from a rule of law which had no existence. Further knowledge by the sub-tenant that his landlord was in arrear of rent, or that he was in insolvent circumstances and his omission to withhold payment of rent which he was bound to pay constitute together no legal evidence of a contract by the sub-tenant to pay rent to the superior landlord in any event, and the absence of legal evidence in support of a finding is a legitimate ground for interference, though, when there is some legal evidence, neither the weight due to it nor its sufficiency is a ground for interference.

For these reasons, I am of opinion that the case under reference is one in which we may interfere under s. 622.

BRANDT, J.—The question, which the order of reference in this case raises, is whether the High Court has or has not power under s. 622 to revise the decree made by the Subordinate Judge on the ground that the latter had not jurisdiction within the meaning of the word as used in that section.

It is, I think, clear that the word "jurisdiction," as used by the Privy Council in *Amir Hassan Khan's case*, in the sentences—"The question then is did the Judges of the lower courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity," and "it appears they had perfect jurisdiction to decide the question before them," was used in the sense that the court of first instance and the appellate court had legal authority to hear and determine the suit; but unreservedly accepting that decision as determining that, when a court is duly invested with such authority, the High Court is not empowered to inquire into the correctness of the law with reference to which the decision is given, or, of the findings on the facts, is the question

now before us expressly or by implication determined by that case? I think not.

In that case the lower courts unquestionably had jurisdiction, that is to say, they had authority both in respect of territorial and pecuniary jurisdiction properly so called, and in respect of the subject-matter of the suit, the suit was of a class properly instituted in those courts and they had authority to hear and determine the matters in dispute. In the case before us, it may be assumed—it is indeed apparent—that as regards the second defendant the plaintiff's suit was one, which, as disclosed in the plaint, the Subordinate Judge could not legally entertain on the small cause side of his court. The material allegations in the plaint are that the plaintiff demised certain land to the first defendant on *kānam*; that rent was due in arrears; that the second defendant was in possession as a *kānamdār* or sub-mortgagee under the first defendant; and that the defendants are liable for the rent. The second defendant said that he held under, and was responsible to, the first defendant only for rent due from him to the latter. The Subordinate Judge found, as a fact, that there was no privity of contract between the second defendant and the plaintiff; the plaint disclosing nothing to constitute a suit for rent by the plaintiff as against the second defendant, maintainable in a Court of Small Causes, the Subordinate Judge had not jurisdiction in the suit as a small cause suit; but he proceeded, for reasons stated by him, to give a decree against the second defendant as well as against the first defendant. To determine the question, whether the allegations contained in a plaint constitute a case which a Judge is empowered by law to try, is a question which the Judge has no doubt jurisdiction to determine, jurisdiction, that is, in the sense that he is empowered and bound by law to receive all plaints (subject to certain conditions as to value, class of suits, &c.), purporting to show a cause of action upon which the plaintiff is entitled, and in some cases, if entitled, is required to sue in his court; and in respect of plaints so filed, the Judge must determine whether the plaint discloses *prima facie* a case, in respect of which the plaintiff is entitled to relief, and which he may or must bring in the Judge's court, but it is not this power and correlative duty on the part of the Judge which gives jurisdiction; the jurisdiction is conferred on him by superior authority, while the duty of determining, *e.g.*, whether a suit is one of a class triable by him on the small cause side, is the

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result of having been invested with such authority, and must be exercised before he proceeds to deal with the case further in the exercise of his jurisdiction.

It appears to me then that a Judge cannot give himself jurisdiction by wrongly determining the preliminary question, and that the High Court has authority to inquire whether such preliminary question is rightly or wrongly decided, and, if wrongly decided against the plaintiff, to direct the Judge to exercise his jurisdiction, and if wrongly decided in the plaintiff's favor, to set aside the decree or order as passed without jurisdiction.

PARKER, J.—I concur with the judgment of Muttusámi Ayyar, J.

APPELLATE CIVIL.

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

MONAPPA (APPELLANT),

and

SURAPPA (RESPONDENT).*

1886.
Sept. 13.
1887.
Nov. 14.

Civil Procedure Code, s. 317—Suit against benámi purchaser at court-sale, by owner, to recover the land after ejectment.

If after obtaining a certificate of sale in execution of a decree, the purchaser acknowledges that his purchase is benámi and gives up possession, or does some act which clearly indicates an intention to waive his right, or restores the property to the real owner, such act may, by reason of the antecedent relation of the parties, operate as a valid transfer of property. Defendant acted benámi in buying certain land at a court-sale for plaintiff, paid part of the purchase money for plaintiff, and allowed plaintiff to remain in possession on the understanding that defendant was to transfer the property on repayment of the balance of the purchase money. Defendant having ejected plaintiff, plaintiff sued to recover the land:

Held that s. 317 of the Code of Civil Procedure was no bar to plaintiff's suit.

APPEAL from the decree of H. M. Winterbotham, Acting District Judge of South Canara, confirming the decree of U. Babu Rau, District Munsif of Kandapur, in suit No. 73 of 1884.

The plaintiff sued to recover from the defendant certain land. She alleged that the defendant had purchased the land on her account on the 14th September 1876 at a sale in execution of a decree, and that she had obtained possession, and that the defend-

* Second Appeal No. 1058 of 1885.

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ant being certified purchaser had brought a suit in 1880 and ejected her. Defendant denied that the purchase was on plaintiff's behalf and plaintiff's dispossession, and pleaded that plaintiff was barred from maintaining suit by s. 317 and also by s. 13 of the Code of Civil Procedure, inasmuch as she was a party to the suit of 1880.

The suit was dismissed, the District Judge holding that it was barred by s. 317 of the Code of Civil Procedure.

Plaintiff appealed. She died, and the appeal was prosecuted by her brother and representative, Monappa.

Mr. Subramanyam and Srinivasa Rau for appellant.

Ramachandra Rau Saheb for respondent.

On the 13th September 1886, the Court (Muttusámi Ayyar and Brandt, JJ.) directed the District Court to return a finding on the issue—

“Did the defendant's conduct ever amount to a transfer or waiver in favor of plaintiff, of his title and possession under the purchase, before he got possession under the ejectment decrees of 1880?”

The District Court having returned a finding on this issue, the Court delivered the following

JUDGMENT :—The respondent purchased the land in dispute at a court-sale in September 1876, and the appellant's case was that the purchase was made benámi for Lingamma Shettati, his sister, and with her money. He alleged further that, though the respondent obtained the sale certificate, he agreed to transfer it to Lingamma Shettati and allowed her to continue in possession though he obtained formal delivery until he ejected her in March 1883. The third issue recorded for decision was whether the purchase was benámi, whether it was made with the plaintiff's money, and whether the respondent's conduct amounted to a transfer to Lingamma Shettati of his title as purchaser. It is found by the Judge that the respondent acted benámi for the appellant's sister in buying the property, that Rs. 600 paid as deposit belonged to her, that the respondent paid himself the balance of the purchase money (Rs. 1,650), and that the appellant's sister was allowed to continue in possession until March 1883 on the understanding that the respondent was to transfer the property back on his being paid the balance of the purchase money.

Though the respondent objects to the finding and contends that he only agreed to resell for Rs. 3,600, we see no sufficient

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reason to doubt the correctness of the conclusion at which the Judge has arrived. It must be observed that the facts, as now found, support neither the appellant's nor the respondent's case. According to the appellant, the purchase was benámi and it was paid for with his sister's money; and, according to the respondent, there was only an agreement to resell for Rs. 3,600 and that the purchase was made on his own account and with his own money. The question which we have to decide is whether the appellant is entitled to any and what relief upon the facts actually found, regard being had to s. 317 of the Code of Civil Procedure. That section enacts that no suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person or on behalf of some one through whom such other person claims. There is thus a statutory direction that a benámi purchase at an auction sale in execution of a decree shall not be accepted as the sole ground of a suit against the certified purchaser. In *Mussamat Buhuns Kowur v. Buhoorec Lall*(1), the Judicial Committee observed, with reference to the corresponding s. 270 of Act VIII of 1859, that it should be construed strictly and literally, and that it was applicable only to a suit brought against a certified purchaser to assert the benámi title against him; that the statute did not make benámi purchases illegal; and that the real owner for whom the purchase was made, if in possession, might defend a suit brought by the holder of the certificate and show that the latter was an apparent owner only and a mere trustee. The Judicial Committee referred with approval to a passage in the judgment of the High Court at Calcutta (11 Suth., W.R.F.B., 20), in which the learned Chief Justice Sir Barnes Peacock, in delivering the judgment of the High Court; held in effect that if the certified purchaser was really a benámidár or trustee for another person, and after the certificate of sale did some fresh act to put the purchaser in possession, that might operate as a transfer of the property to him. The Court observed that "if a person who has gained a title by limitation waives that title in favor of the real owner and gives up possession to him as the rightful owner, such act would probably be held to amount to a waiver of the right, which he had gained by limitation, and to confer it upon the real owner. In like manner, if a benámidár should acknowledge the purchase to have been made

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benámi and waive the right conferred upon him by ss. 259 and 260, and give up possession to the real purchaser as the rightful owner, such act would probably amount to a transfer of the title as well as of possession to the real purchaser." The Judicial Committee observed, with reference to the foregoing passage, that when possession is given by one party to another, it is material to inquire whether by reason of the antecedent relation between the parties, it was meant to operate as a transfer of the property. It is obvious, therefore, that, when after obtaining the certificate of sale, the purchaser acknowledges that his purchase is benámi and gives up possession, or does some act which unequivocally indicates an intention to waive his right, or to restore the property to the real owner, the fresh act might, by reason of the antecedent relation between the parties, operate as a valid transfer of property, the reason being that benámi purchases are not made illegal, though the real purchaser is disabled from maintaining a suit against the certified purchaser at an auction sale in execution of a decree on the sole ground that he was only a benámidár.

We accept the finding of the Judge and decree that, on payment of Rs. 1,650 by the appellant to the respondent within three months from the date of receipt by the lower appellate court of a certified copy of the decree of this Court, the respondent do deliver up possession to appellant of the property in suit, and, failing such payment, that this suit do stand dismissed; and we allow mesne profits only from date of our decree, the amount to be determined in execution; and there will be no costs throughout as the case of neither party is wholly true.

(1) 14 M.I.A., 496.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

1887.
Sept. 29.

MADRAS EQUITABLE ASSURANCE COMPANY (APPELLANT),

and

THE PRESIDENT, MUNICIPAL COMMISSION, MADRAS,
(RESPONDENT).*

City of Madras Municipal Act, sch. A—Liability of Mutual Assurance Company to taxation.

The investment for interest of the funds of a Mutual Insurance Company by its directors constitutes "carrying on business for gain" and the premia paid by insurers and the profits from investments thereof constitute the "capital" of the company within the meaning of sch. A of the City of Madras Municipal Act, 1884.

CASE stated, under s. 193 of the City of Madras Municipal Act, by the Presidency Magistrates, Black Town, as follows:—

"This appeal was preferred by the Madras Equitable Assurance Society, under s. 192 of the City of Madras Municipal Act I of 1884, from the decision of the President of the Madras Municipality passed on the 10th December 1886 under s. 190, assessing it to the payment of a tax of Rs. 175 for the first half of the year 1886-87 under class I (B) of sch. A.

"The appeal was heard by us, and, after taking time to consider the facts of the case and the arguments of counsel, we delivered judgment, modifying the decision of the President by declaring that the Madras Equitable Assurance Society was liable to be taxed under class I (C), sch. A.

"After the adjudication of the appeal, the appellants through their solicitors intimated their desire in writing that a case should be stated to the High Court under s. 193 of the said Act. In compliance with such desire, we beg to submit, for the decision of the Honorable Judges of the High Court, the following points which were raised on the hearing of the appeal before us:—

"(a) Whether the society is liable to be taxed under the Madras Municipal Act, 1884?

* Referred Case No. 2 of 1887.

"(b) If so, on what capital, whether on Rs. 16,64,439, which sum represents the general fund as it stood on the 1st January 1886, or on that sum, less Rs. 6,75,744, the amount apportioned amongst the policy-holders?

"For reasons given at length in our judgment, we found that (a) the society was liable to be taxed, and that (b) the tax should be levied on Rs. 9,88,665, being the difference between Rs. 16,64,439, which represents the entire general fund, and Rs. 6,75,744, the amount divided amongst the policy-holders in accordance with the recommendation of the actuary."

The material portion of the judgment of the Magistrates (Mir Ansur-ud-din and J. M. Maskell) was as follows:—

"Before entering upon the grounds of this appeal, it is necessary to look at the constitution of the society, its funds, and the mode in which they are administered. The affairs of the society are regulated by Madras Act VI of 1869. In the preamble of this Act, it is stated that the society was formed on the 1st January 1842 for the purpose of mutual assurance of lives, and that it took over the business of the Fifth Madras Laudable Assurance Society, together with a sum of Rs. 29,979 belonging to that society. Under s. 4, a 'general fund' was created, consisting of the sums standing in the books of the society to the credit of the premium fund and of the reserve fund, respectively, at the date when the Act came into operation, and also of the sums from time to time received by the society on account of premiums on policies, or from any other source. This fund is to be applied in discharging the expenses of conducting the society and to the payment of the claims from time to time falling due upon, and to the purchase of, policies; and after retaining out of the said general fund so much as shall, in the discretion of the directors, be deemed from time to time necessary to defray the matters aforesaid, the remainder of the said fund is to be invested in the names of three of the directors of the society in certain securities therein particularised, such securities or the proceeds thereof being applied, under the order of the directors, to any of the purposes to which the said general fund is applicable. Under s. 5, the affairs of the society are, at the expiration of every five years, to be submitted to an actuary of London for the purpose of valuing its assets and liabilities. The balance of profit appearing upon every such valuation, or so much thereof as the directors shall deem expedient, is to be divided

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among the holders of policies subsisting on the last day of the period embraced in every such valuation, according to the amount of premium paid on such policies, respectively, within such period; and the proportion of profit so apportioned to each policy is to be applied in reduction of the premiums accruing due during the succeeding period of five years. From the last actuarial report on the society's affairs (exhibit S), for the quinquennium (1880-85), which has been published by the Secretaries and Treasurers, Messrs. Arbuthnot and Company, it is shown that the lives in force on the 31st December 1885 numbered 737; that the sum assured was Rs. 40,40,270; that the annual premium payable in respect of the aforesaid lives amounted to Rs. 2,20,306; and that the general fund had risen to Rs. 16,64,439. In accordance with the recommendation of the actuary, the directors apportioned the sum of Rs. 6,75,744 out of the general fund amongst the policy-holders, whose policies were in force on the 31st day of December 1885 as profits under s. 5.

"Having set out briefly the main principles under which the equitable is worked, we shall next proceed to the questions calling for a decision in this appeal which are as follows:—

"(1) Whether the society is liable to be taxed under the Madras Municipal Act I of 1884?

"(2) If so, on what capital, whether on Rs. 16,64,439, which sum represents the entire general fund as it stood on the 1st of January 1886, or on that sum, less Rs. 6,75,744, the amount apportioned amongst the policy-holders.

"Upon the first point, it has been argued by Mr. Michell, counsel for the appellant, that, in the first place, the society possesses no 'capital' in the sense in which that word is used in company law; that the capital of a company is the aggregate of the sums paid by the shareholders of that company; that the society has no shareholders; and that its general fund being made up of the contributions of the policy-holders, cannot be regarded in any sense as 'capital.' It is to be regretted that no definition of 'capital' is given in the Municipal Act, neither are we aware of any such definition being given in any other Indian Act; but it appears to us that the word, as used in Madras Act I of 1884, has a more extended and comprehensive meaning than the restricted definition contended for by Mr. Michell. It seems

to be used in sch. A. as a general term to signify the paid-up capital, or the funds of the several joint stock companies and other companies described therein used in the business of the association, upon which the profits may be said to arise. In other words, and considering that we are dealing with a fiscal Act, it may be described as a term used to express or include the money value of a company for the purposes of taxation. In short, the term capital is so appropriate to designate in one word the other expressions, money-value, funds, &c., that one can understand its being used in the schedule, and it must, accordingly, be treated to have a very general significance for the purposes of the Act. In this sense, we also find an eminent actuary, Mr. Peter Hardy, employing it in the preamble of the Society's Act (VI of 1869) in reference to the general fund. He says the society "is during its infancy too largely dissipating those funds, which ought to form an accumulating capital, in order to provide for the ultimate payment of the sums assured." We are, therefore, of opinion in regard to Mr. Michell's first argument that the general fund of the society must be regarded as capital within the meaning of the Madras Municipal Act.

"Secondly, it is contended that the society is an association for the mutual assurance of lives, in which there are no shareholders, and in which the assurers and the assured are the same, and that it is not a joint stock company or other company within sch. A, class I (A). Our attention has been drawn to the definition of joint stock company given, in s. 226 of the Indian Companies Act, 1882, as being 'a company having a permanent paid-up or nominal capital of fixed amount, divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of shares in such capital, or the holders of such stock, and no other persons;' and to the fact that companies are divided by the said Act into three classes, viz., (1) companies limited by shares, the amount of whose capital must be divided into shares of a certain fixed amount (s. 8); (2) companies limited by guarantee (s. 9); (3) unlimited companies (s. 10). This argument, though not devoid of weight and having its own significance in relation to the Act in which it is found, appears to us to place too narrow a construction upon the words 'joint stock companies' and 'companies' used in the City

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of Madras Municipal Act, more particularly when they are read with the very indefinite words that follow 'carrying on any trade or business having gain for its object, or as benefit societies.' There appears to us to be a very great resemblance between the society and a joint stock company, and that the one might be regarded as synonymous with the other. The policy-holders, the premiums, the accumulated premiums forming the joint fund or the general fund, and the quinquennial profits of the one may be compared with the shareholders, the shares, the joint stock, and the dividends of the other. Even assuming that the society does not strictly fall under the denomination of joint stock company, is there any doubt as to its coming within the scope of the words 'other companies carrying on any business as benefit societies?' The terms 'joint stock company' and 'company' are not defined in the City of Madras Municipal Act, but reading s. 103, where, in point of fact, the liability to the tax is prescribed, we find that the tax is leviable from every 'person,' who within the city exercises any one or more of the arts, professions, trades or callings, or holds any one or more of the offices or appointments specified in sch. A. Turning next to the definition of the word 'person' in s. 3, class (C), it is as follows:—'Person shall include any company or association or body of individuals whether incorporated or not.' In the opinion of James, L.J., in *Smith v. Anderson* XV, Ch. D, 273, company and association are synonymous terms and mean, as distinguished from partnership, a combination in which the partners can change from time to time without the necessity either of consent as between the partners or of novation as regards the creditors. Turning then to sch. A, we see that the persons to be taxed are either (1) companies or (2) individuals. How then can the Madras Equitable Assurance Society, which is an association or body of individuals, escape from taxation? In 1867, when necessity for amending Act IX of 1865, the then existing Municipal law in force in the town of Madras, was brought to the notice of Government by the Municipal Commissioners with particular reference to that part of the Act which provides for the levy of tax on trades and callings, they complained that they experienced the gravest difficulty in the application of (the then) sch. (C) to the several classes liable to the tax on trades and callings, in consequence of the provisions of the schedule being vague and indefinite. The Bill framed, which subse-

quently passed into law as Act IX of 1867, provided, *inter alia*, for the revision of Act IX of 1865, 'in such a manner as to leave no room for reasonable doubt as to the classes which come within its scope.' One of the important amendments made in sch. C was the enlargement of class I (A) by the addition to the simple expression 'joint stock company' of the words 'whether registered under any English or Indian Act or Acts, and other companies, whether incorporated by Royal Charter, Act of Parliament, or Act of the Council of the Governor-General, or of the Governor, or Lieutenant-Governor of any of the Presidencies, and carrying on any trade or business having gain for its object.' Next when Act V of 1878 repealed Act IX of 1867 we observe that the phraseology of class I (A), sch. A, was only modified so far as to omit all reference to the several modes of registry and incorporation of the companies therein referred to; but the rest of the clause was retained and the words 'or as benefit societies' added, and the definition of the word person was for the first time introduced in the Act. This language has been followed in the Act now in force, and there can be no doubt that one of the essential objects of an enactment of the character under consideration would be to impose a tax on every person residing within its jurisdiction, whose means of livelihood are drawn from following any of the callings named in the schedule. It is clear, therefore, from s. 103 and sch. A of the present Municipal Act that every company, which has pecuniary gain for its object, or which secures benefit to its members mutually, is liable to be taxed; and in order that no company should, by any chance, escape taxation, it will be observed that the schedule begins with a description of the taxable companies and societies and ends with class IV, which includes 'all companies not hereinbefore provided for,' so that no company or society is exempted unless its object is not gain or benefit. The only conclusion then is that the society is liable to be taxed as a company within sch. A of the Act.

"The second question raised is as to what should be regarded the capital of the society for the purpose of taxation; and for the purposes of our decision we have limited ourselves to the figures of the last actuarial report, which brings us as near as possible to the period for which the tax has been claimed. Section 5 of the Madras Equitable Assurance Society's Act renders the matter one of easy solution. In pursuance of that section, the directors,

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in accordance with the recommendation of the actuary, divided Rs. 6,75,774 of the general fund (Rs. 16,64,439) as profits amongst the policy-holders, whose policies were in force on the 31st December 1885, and though we find that, under art. 20 of the old Regulations (see preamble of the Act), the share of each policy-holder, was held to be the 'individual property' of the policy-holder, and was at the discretion of such policy-holder, either to be paid out to him in cash, or applied in reduction of his future premium, and that, according to the present method of appropriation, the amount is not placed absolutely at the disposal of the policy-holders to be applied at their will and pleasure, still since it went in abatement of their premiums for the next quinquennium, we are of opinion that by such division the general fund was reduced to Rs. 9,88,665.

"The result is that we are of opinion that the Madras Equitable Assurance Society is liable to be assessed under sch. A, class I (C) to the payment of a tax of Rs. 100 for the half year ending 30th September 1886, and we do hereby direct that the difference between that sum and the amount paid to the municipality be refunded.

"The conclusion at which we have arrived in regard to the capital of the society falling within the division (C) of class I and not division (B), the division under which the society was assessed by the municipality, renders it unnecessary to express any opinion in regard to Mr. Michell's contention that the society not being a 'joint stock company,' is exempt from liability to taxation under the latter division, because division (C) takes in 'companies of any of the descriptions mentioned in division (A) of this class, the capital of which is more than five but does not exceed ten lakhs of rupees."

Mr. *Michell* for appellant.

Mr. *Shaw* for respondent.

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

JUDGMENT :—Under s. 103 of the City of Madras Municipal Act, "if the commissioners determine to levy a tax on arts, professions and callings (not being a military profession or calling) and on offices and appointments, every person, who within the city exercises any one or more of the arts, professions, trades or callings . . . &c., specified in sch. A" is liable to taxation, and, under

s. 3, cl. (c) "person" includes any company or association or body of individuals whether incorporated or not. *

The Madras Equitable Assurance Society is, in the opinion of two of the Presidency Magistrates, liable to taxation under sch. A, cl. (c); but the Magistrates concerned have stated a case and referred it to the decision of the High Court under s. 193 of the Act.

It is conceded, for the purposes of this reference, that the society is not a joint stock company, but if it is a company carrying on any trade or business having gain for its object, or as a benefit society, and has a capital exceeding five but not exceeding ten lakhs of rupees, it is liable.

It is contended that the society is not a company within the meaning of the Act, that it does not carry on any trade or business having gain for its object, or as a benefit society, and that it has no capital in the sense in which that word is used in the Act. If any or more of these contentions is sound, the objection must prevail.

The origin and constitution of the society are sufficiently set out in the statement of the case.

There is, in our opinion, no foundation for the contention that to render the company liable to taxation under the Madras Municipal Act, it must be a company of the character defined in the Indian Joint Stock Companies Act, that is, that it must have "a permanent paid-up or nominal capital of fixed amount, divided into shares, &c., and having for its members the holders of shares in such capital." A company carrying on business as a benefit society clearly need not be and ordinarily is not such company; but such a company, if it carries on business for gain, is liable to taxation under the Act. In the case of such societies the aggregate of the sums contributed by those associated for the common purpose, e.g., in the case of industrial and provident societies for the relief and maintenance during sickness or infirmity of members and their families, or in the case of assurance societies, the premia paid by the insurers and the profits from investments of such sums would constitute in an ordinary language the capital of the society; and having regard to the inclusion of benefit societies as liable to taxation under the Act, we entertain no doubt that the word "capital" is used in the more general and not in the limited and technical sense suggested. All companies carrying on business

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having gain for their object are liable to taxation. The assurance society, with which we are concerned, certainly carries on business. It is not a partnership, but it is an association of persons having a common object and interest, viz., the mutual assurance of lives. Does it then carry on its business for gain? In *re Arthur Average Association*(1), the Master of the Rolls observes, with reference to somewhat similar words in an English statute, that gain means acquisition, something obtained or acquired and is not limited to pecuniary gain, still less to commercial profits.

In the case before us, the insurers contribute their money with a view to making provision for those in whom they are interested, and the statement of the case further shows that the available funds of the association are invested, being lent out at interest; and a certain proportion of the gain or profits derived from such investment is, under the Act by which its affairs are regulated, divisible among the subscribers at stated periods, and it is immaterial that such proportion of the funds is to be applied in reduction of the premia accruing due during the succeeding period. The liability to pay less consequent on there being an available surplus is as distinctly a gain as the division of the profits would be, even if it be not an equal gain.

We are then of opinion that the conclusion come to by the Magistrates is correct.

APPELLATE CIVIL.

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

RAMANNA (DEFENDANT, No. 1), APPELLANT,

and

VENKATA (PLAINTIFF), RESPONDENT.*

*Hindu law—Gift of ancestral property by father to stranger—
Suit by minor son to recover.*

Where a Hindu made a gift of certain land, which he had purchased with the income of ancestral property, and a suit was brought to recover the land on behalf of his minor son, who was born seven months after the date of the gift:

(1) L.R., 10 Ch., 546.

* Second Appeal No. 241 of 1887.

Held that the gift was invalid as against the plaintiff and that he was entitled to recover the land from the donee.

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THE plaintiff, Kolluri Venkata Subbarayadu, a minor, by his next friend (his paternal uncle) alleging that his father, defendant No. 3, at the instigation of his mother, defendant No. 4, executed a registered deed on 13th April 1880 in favor of defendant No. 1, purporting to make a gift of the family inam land, sued to recover the land and mesne profits and to cancel the deed of gift.

The District Munsif of Cocanada, A. F. Elliot, dismissed the suit and found that the land had been purchased before plaintiff's birth out of the income of the family property, and held that plaintiff had, therefore, no right to question the gift. It was admitted that the plaintiff was born two months after the sale.

On appeal, the Subordinate Judge, T. Ramasami Ayyangar, reversed this decree on the ground that the gift having been made when the plaintiff was in the womb was invalid and decreed possession to plaintiff.

Defendant No. 1 appealed on the following grounds:—

The Lower Appellate Court ought not to have allowed this suit to be instituted by the minor's next friend, who is not his natural guardian, at the instigation of the minor's father and lawful guardian for setting aside a gift made by himself.

The land mentioned in the plaint having been purchased by plaintiff's father before the plaintiff was begotten, he acquired no right by birth in the same.

The suit is not maintainable, inasmuch as the plaintiff and his father are undivided and living together.

The gift, which is valid against the father, is equally valid against the plaintiff who was not born at the time.

The Sub-Judge ought to have held that the property mentioned in the plaint is not the ancestral property of the plaintiff in the sense that he could impeach its sale or alienation.

As this suit is in reality conducted by the plaintiff's father after having failed in two former attempts to revoke the gift, this suit ought to have been dismissed.

The alienation in question ought, under the circumstances of the case, to have been held valid at any rate to the extent of the father's share in the property.

Bhāshyam Ayyangār for appellant.

Ramasami Mudaliar for respondent.

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

JUDGMENT:—We entertain no doubt that property acquired by means of income derived from ancestral property is also ancestral and that the son acquires a joint interest in it with his father by birth under the Hindú law. Any other view is inconsistent with Mitakshara, chap. I, s. iv, cl. i, which defines self-acquired property. It is suggested by the appellant's pleader that the father may spend the income at his pleasure, and, therefore, if he invests it in land, he is at liberty to alienate it at his pleasure.

We are, however, of opinion that the father is not liable to be called upon to account for the income of family property during coparcenary not because he has an absolute disposing power either over the family property or its income, but because it is presumed from the continuance of the coparcenary that the expenditure has been acquiesced in by the coparcener. If the father saves any part of the income, the saving is clearly part of the property of which the son can demand a partition. In the case of a childless Hindú widow, the income derived from her husband's property constitutes part of the widow's estate, but in the case of a joint family, the income of a family estate is, unless it has been expended *bonâ fide* in the ordinary course of management, part of that estate. The observations of Mr. Justice Mitter in *Gunga Prosad v. Ajudhia Pershad Singh*(1) are a mere dictum. We overrule the contention that the property in dispute is the third defendant's self-acquisition for the purposes of this suit.

It is then urged that the appellant is not entitled to recover the whole of the land alienated and to maintain this suit for that purpose though he may sue for partition. Under the Mitakshara law, the son has a power of interdiction and is at liberty to continue in coparcenary and at the same time to exercise this power in respect of ancestral property improperly alienated. During coparcenary, the ancestral property vests in the joint family, and if any coparcener dies before partition, the property vests in the other coparceners as if he was never born. In the case of a sale, the alienation is upheld to the extent of the alienor's share as a matter of equity, which the purchaser is considered to be entitled to insist upon, but in the case of gift there is no such equity. It

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has already been decided by a Full Bench of this Court that the gift by a coparcener of his undivided interest in ancestral property cannot be supported at all even to the extent of the donor's share. We cannot, therefore, hold that the power of interdiction vesting in the son cannot be exercised in the case of an invalid gift otherwise than by suing for partition.

It is then said that the suit already brought by the father to set aside the gift has failed and that if the son's claim is now decreed, the former will be thereby enabled to recover through his son what he could not recover himself and what he would be stopped from recovering by a suit instituted in his own right. There is no doubt this is an apparent anomaly, but the real question is whether the property in question continues to vest in the joint family. The gift is not binding on the family either in part or in whole, and the property in the subject of gift originally vesting in it is not divested by it, and we are, therefore, of opinion that the power of interdiction includes a right to see that the family estate is preserved for the family until a partition is made and that the donee, who accepts the gift subject to this right of a coparcener, is not entitled to complain of its enforcement to his prejudice. It is conceded that, if the father dies in coparcenary, the son may then set aside the gift and recover back the property improperly alienated, but, in our judgment, the decision must depend not on the question whether the father or the son may happen to die in coparcenary, but whether the gift was valid at the time when it was made and whether it operated to transfer the property in the subject of the gift from the family to the donee either in part or whole.

This second appeal fails and we dismiss it with costs.

(1) I.L.R., 8 Cal., 131.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar,
Mr. Justice Parker, and Mr. Justice Wilkinson.

QUEEN-EMPRESS

against

BELLARA.*

1887.
Sept. 7.
Nov. 23.
1888.
Jan. 17.

Abkari Act (Madras), ss. 29, 55 (c)—Rule forbidding delegation by licensee of authority to draw toddy, ultra vires.

Under s. 29 of the Madras Abkari Act, the Governor in Council made and published a rule on 8th February 1887, whereby it was declared that no licensee could delegate his authority to draw toddy, unless under exceptional circumstances, to any person :

B, the son of a licensee, drew toddy with his father's permission. He was convicted under s. 55 (c) of the Act :

Held that the rule was *ultra vires* and the conviction bad.

CASE referred, for the orders of the High Court, under s. 438 of the Code of Criminal Procedure, by S. H. Wynne, Acting District Magistrate of South Canara.

On the 7th September 1887, the case was referred to a Full Bench by Collins, C.J., and Parker, J.

The facts necessary, for the purpose of this report, are set out in the judgment of the Full Bench (Kernan, Muttusámi Ayyar, Parker, and Wilkinson, JJ.).

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

JUDGMENT.—One Bellara has been convicted under s. 55, cl. (c) of the Madras Abkari Act for drawing toddy under cover of a license granted to another person and sentenced to a fine of Rs. 15, or, in default, to fifteen days' rigorous imprisonment.

Bellara was the son of the licensee, and said that he was drawing the toddy, because his father had a boil on his arm and could not ascend the tree.

The case is a similar one to that decided by Muttusámi Ayyar and Brandt, JJ., in December 1886 (Criminal Revision Case No. 645 of 1886), in which it was held that the license was sufficient authority for the drawing of toddy by the agent of the licensee, or

by a person acting under his authority. If this ruling is to be followed, the conviction should be set aside ; but since the ruling above referred to, the Governor in Council has, under s. 29 of the Act, framed and published the following rule for the drawing of toddy in the district of South Canara (*vide* Fort St. George Gazette, 8th February 1887, Part I, page 102) :—

"(3). A license-holder may tap and draw toddy from any number of trees within the area mentioned in his license, but no tree may be tapped or toddy drawn by any person other than himself under cover of his license. Provided that, when the licensee becomes unable by prolonged illness to draw toddy, the potail of the village may, at his request and subject to the approval of the tahsildar, allow a relative or servant named by him to tap and draw toddy in his stead."

In this case, therefore, the son committed no offence, unless the rule made by the Governor in Council operates to create one, and the question is whether the Governor in Council has power to make a rule forbidding the drawing of toddy by any person other than the licensee except in the case of prolonged illness, and then only subject to the approval of the tahsildar.

Section 29 of the Act gives power to the Governor in Council to frame rules (cl. o) "generally to carry out the provisions of this Act ;" but, as pointed out by the Division Bench in Criminal Revision Case No. 645 of 1886, s. 64 of the Act, read in connection with s. 55, clearly shows that the intention of the legislature was to prohibit the drawing of toddy without a license—not to prevent the delegation of the actual work to a servant or agent.

Section 21 declares that, when the exclusive privilege of manufacturing toddy has been granted under s. 16, the Governor in Council may declare that the written permission of the grantee to draw toddy shall have, within the area to which the privilege extends, the same force and effect as a license from the Collector for that purpose under s. 12. It was thus clearly the intention of the legislature that no toddy should be drawn except under the authority of a Collector's license or of a renter's permit, the intention being to protect the exclusive right of manufacturing toddy by the holder of a license. Such a condition precedent is not, however, inconsistent with the power of delegation of the actual work.

The Public Prosecutor refers to s. 11, which deals with permits

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for the transport of liquor, and contends, with reference to the last clause, that where the legislature has intended permits to include servants and agents, it has expressly said so. He admits, however, that the second clause of s. 64 cannot be reconciled with his construction of ss. 12 and 21.

The Act should be construed so as to give effect to all its provisions, and we cannot admit that the second clause of s. 64 shall be limited in its application to the holders of permits for the transport of liquor only. Such a construction is not permissible under the plain words of the section.

It is then urged that the licensee has accepted a license under s. 24, in which the provisions embodied in the rule have been reproduced; but if it was *ultra vires* for the Governor in Council to frame the rule, it was equally *ultra vires* to insert the same conditions in the license.

We were referred to the decision of a Division Bench of this Court in Criminal Revision Case No. 141 of 1887, and it must be admitted that this decision is inconsistent with that in Criminal Revision Case No. 645 of 1886, which was decided by a different Bench; but in Criminal Revision Case No. 141 of 1887, the Public Prosecutor was not instructed to appear, and the case was not argued. The former ruling was not, therefore, brought to the notice of the Bench, and after hearing the point argued, we are not prepared to assent to it.

It appears to us that the Act clearly contemplates the delegation of work by the holder of a license or permit to draw toddy, and we apprehend that the power given to the Governor in Council to frame rules "to carry out the provisions of the Act" must be exercised within the limit which the Act recognizes. On this ground, we set aside the conviction and direct that the fine be refunded.

APPELLATE CRIMINAL.

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

JENNINGS

against

THE PRESIDENT, MUNICIPAL COMMISSION, MADRAS.*

Madras Municipal Act, 1884, s. 103—Exercise of calling—Investment of funds of society—Sch. A, class 1 (A), (B)—Benefit society.

The business of investing the funds of a society for interest is a calling within the meaning of s. 103 of the Madras Municipal Act, 1884.

A society established to provide by the subscriptions of its members for pensions for their widows and children is a benefit society within the meaning of sch. A class 1 (A) of the said Act.

Where the context discloses a manifest inaccuracy, the sound rule of construction is to eliminate the inaccuracy and to execute the true intention of the legislature.

CASE stated under s. 193 of the Madras Municipal Act, 1884, by the Presidency Magistrates, Black Town.

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

The Acting Advocate-General (Mr. Spring Branson) for Jennings.

Mr. Brown for the Municipal Commissioners.

JUDGMENT.—The questions referred for our opinion have reference to the liability of the Madras Widows' and Orphans' Fund to be taxed under the Madras Municipal Act I of 1884. The fund mentioned above appears to have existed for more than half a century. It has not, however, been registered as an association, nor does it hold a certificate of association. The object with which it was instituted was to provide pensions for the widows and legitimate children of subscribers. It is divided into two branches, called the widows' and the children's branch. Each branch is divided into a specified number of classes, and payment of certain donations, premia, and subscriptions is prescribed for admission into each class. The income derived from those sources is applied first to meeting the claims on the fund, and the surplus is invested from time to time so as to constitute a funded capital. This

1887.
Sept. 20.

* Referred Case No. 1 of 1887.

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fund stands in the joint names of three trustees, and it is managed by twelve directors elected at a general meeting of the subscribers. In 1885, the funded capital stood at Rs. 12,90,821, the interest derived from it amounted to Rs. 53,487, and the subscriptions and donations, &c., in that year amounted to Rs. 51,705, whilst pensions aggregating Rs. 99,068 were paid to 359 widows and 93 children.

Two questions were raised for decision before the Magistrates for the City of Madras, and the first was whether the fund was liable to be taxed under the Municipal Act, and the second was whether it was liable to be taxed under class 1 (B), sch. A, attached to that Act. The Magistrates decided both questions in the affirmative and stated a special case for our decision.

It is provided by s. 103 of Act I of 1884 that, if the Commissioners determine to levy a tax on arts, professions, trades, and callings (not being a military profession or calling) and on offices or appointments, every person, who within the city exercises any one or more of the arts, professions, trades or callings, or holds any one or more of the offices or appointments specified in sch. A, shall pay in respect thereof the sum specified in the said schedule as payable by the persons of the class in which such person is placed, subject to the provisions of s. 110, which have, however, no bearing on the special case before us. The portion of sch. A. which is material to our present purpose, is class 1 (A) to (D).

- (A) Joint stock companies and other companies carrying on any trade or business having gain for its object or as benefit societies and the capital of which exceeds 20 lakhs of rupees .. 500
- (B) Joint stock companies of any of the descriptions mentioned in division (A) of this class, the capital of which exceeds 10 lakhs but does not exceed 20 lakhs of rupees .. 350
- (C) Companies of any of the descriptions mentioned in division (A) of this class, the capital of which is more than 5 but does not exceed 10 lakhs of rupees .. 200
- (D) Companies of any of the descriptions mentioned in division (A) of this class, of which the capital is more than 3 but does not exceed 5 lakhs of rupees .. 150

Again, companies of any of the descriptions mentioned in class I, of which the capital is more than 2 lakhs but does not exceed 3 lakhs of rupees and of which the capital is more than one lakh but does not exceed 2 lakhs of rupees, are placed in the second and third classes with a yearly tax of Rs. 100 and Rs. 50 respectively. All companies not hereinbefore provided for are included in class IV as liable to a yearly tax of Rs. 35.

As to the first question whether the fund is liable to be taxed under s. 103 of Act I of 1884, we are of opinion that it must be decided in the affirmative. According to s. 103, every person who exercises any profession or calling is liable to pay the tax specified in sch. A, and the word "person" is declared by s. 3 (c) of the said enactment to include any company, association or body of individuals whether incorporated or not. The investment of the surplus income from time to time for interest so as to augment the funded capital constitutes in our judgment the exercise of a calling, and as the incorporation of the association is expressly declared to be immaterial, the fact that the fund is not registered cannot support a claim to be exempted from taxation, provided that the subscribers exercise a calling through the directors elected at their general meeting. Referring to the terms of sch. A in connection with s. 103, we see no sufficient reason to hold that the association now under consideration is not included therein. It may not be a joint stock company, or a company such as is contemplated either by Acts XIX of 1857 and VII of 1850, or by the Indian Companies Act X of 1865, or by 25 & 26 Vic., ch. 89, ss. 4 and 184. In these, it is declared that the object must be the acquisition of gain by the company, the association or the partnership or the individual members thereof. The expression "having gain for its object," used in cl. I of sch. A, appears to us to refer to personal gain, and, therefore, we accede to the suggestion that the subscribers to the fund cannot be said to carry on business, of which the object is pecuniary gain to themselves. We must, however, hold that they do carry on business as a benefit society, although the benefit contemplated is that of their widows and legitimate children, who have a claim upon the association on the death of the subscriber to be paid certain pensions. Further, the words "as benefit societies" are used in contradistinction to the words "having gain for its object," and we do not consider that the benefit which the society is formed to confer must always

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be personal. It seems to us that the expression is used in the same sense in which the words "friendly society" are used in 38 & 39 Vic., ch. 60. A society established to provide by voluntary subscriptions of the members thereof, with or without the aid of donations, relief or maintenance, for the subscribers or for their husbands, wives, children, fathers or brothers, &c., in certain events, is therein designated a friendly society, the principle on which it is constituted being that of mutual helpfulness of a provident character and of securing certain pecuniary benefit, if not to the subscribers, to their widows and children. The terms "benefit society" distinguish it from a society of which the object is purely benevolent and charitable or the promotion of social intercourse and convivial enjoyment. The business of investment for interest resulting in gain is a calling within the meaning of s. 103 and the fact that the gain is not personal but that it redounds to the benefit of those in whom the subscribers are interested does not render it the less a calling or a business. It is important to remember that the tax payable under s. 103 is a tax on professions or callings and not on the income resulting to the individual who exercises the profession or calling. We answer the first question, therefore, in the affirmative.

As to the second question, we are of opinion that the fund was properly taxed under class I of schedule A. Reading clauses (A) to (D) and s. 103 together, we entertain no doubt whatever that the companies intended throughout are of the descriptions mentioned in clause (A), and that the expression joint stock was inaccurately inserted in (B). The clauses are framed to provide a sliding scale of taxes with reference to the amount of the capital employed in the business carried on by the companies described in I (A). That such was the intention is plain from the context; and it would be absurd to hold that a company with a funded capital of less than 10 lakhs or over 20 lakhs is liable to be taxed and that the same company is not liable to be taxed when its capital is 12 lakhs. Although, in construing fiscal enactments, we should ordinarily insist upon the subject taxed being clearly within the words of the law and decline to extend its scope when there is an ambiguity, we cannot exclude from our consideration the fact that the context discloses a manifest inaccuracy. In such a case, the sound rule of construction is to eliminate the inaccuracy and to execute the true intention of the legislature. The conclusion we

come to is that the fund was properly taxed under sch. A, class 1 (B). The result is that the decision of the Magistrates is right.

Solicitors for Jennings—*Branson & Branson*.

Solicitors for the Municipal Commissioners—*Barclay & Morgan*.

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APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

QUEEN-EMPRESS

against

ELLA BOYAN.*

1887.
August 9.

Penal Code, s. 330—Causing hurt to constrain a person to satisfy a demand.

E.B., in order to constrain his wife to satisfy his demand that she should return to his house, voluntarily caused hurt to her. He was convicted under s. 330 of the Indian Penal Code:

Held, on appeal, that the conviction under that section was bad.

APPEAL against the sentence of C. W. W. Martin, Sessions Judge of Salem, in Calendar Case No. 19 of 1887.

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

The prisoner was not represented.

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

JUDGMENT.—The Judge convicted the prisoner under s. 330 of the Indian Penal Code of causing hurt in order to constrain the wife to obey a demand of the prisoner to return to his house and sentenced him to five years' rigorous imprisonment. We, however, do not think such a demand is within s. 330, which apparently refers to some demand in respect of property.

However, the prisoner cut, though slightly, his wife, with an instrument for stabbing or cutting within s. 324.

We reverse the conviction and sentence under s. 330, and convict him under s. 324 and sentence him to three years' rigorous imprisonment.

* Criminal Appeal No. 154 of 1887.

APPELLATE CIVIL.

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

VYDINADA (PLAINTIFF), APPELLANT,
and

NAGAMMAL (DEFENDANT No. 2), RESPONDENT.*

Hindu Law—Will—Construction—Gift to husband and wife—Joint tenancy—Survivorship—Alienation by husband to creditor invalid.

A Hindu, by his will, granted jointly to his brother's son and Nagammal, the wife of latter, certain land with power of alienation. The recitals in the will showed that the husband was included in the gift not because of his relationship to the testator but because he was the husband of Nagammal.

Held that the grantees were joint tenants and not tenants in common and that the joint tenancy was not severed by an alienation of the land by the husband to a creditor.

APPEAL from the decree of D. Irvine, District Judge of Trichinopoly, reversing the decree of A. Kuppusami Ayyangár, District Munsif of Trichinopoly, in suit No. 368 of 1886.

Ramasami Pillai, by his will, dated 29th February 1884, made a gift of his land to his brother's son, Rangasami, and Nagammal, the wife of Rangasami, jointly. On the 26th April 1885, Rangasami mortgaged this land to the plaintiff to secure the repayment of Rs. 450-4-0 and died shortly afterwards.

This suit was brought to recover the money due under the mortgage-deed (exhibit A).

Nagammal pleaded that her husband had no power to alienate the land.

The Munsif held that, even if Nagammal had a joint right over the land, her husband had also a right of disposition over it, and decreed the claim.

On appeal, the District Judge held that Rangasami had no separate interest in the land and dismissed the suit.

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

Subramanya Ayyar for appellant.

Bhádshyam Ayyangár for respondent.

* Second Appeal No. 473 of 1887.

The following authorities were cited:—*Rewun Persad v. Mussamat Radha Beeby*(1), *Hirábdi v. Lakshmibdi*(2), *Dias v. DeLivera*(3), *Caldwell v. Fellowes*(4), *Mathurá Naikin v. Esu Naikin*(5), and *Williams' Real Property*, ed. 15, p. 166.

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

JUDGMENT:—The question before us is as to the right construction of the will (exhibit B). It is addressed by Ramasami to his deceased brother's son, Rangasami, and recites that the testator had protected Nagammal since she was an infant of three months old and had married her to Rangasami; that both of them had remained under his protection; and that they were now protecting him in his old age. The will then goes on "after my death you and the said Nagammal shall enjoy after me all the nanja, punja, &c., free of obstruction from generation to generation with power of alienation and shall remain in good condition. You, Rangasami (in the singular), shall enjoy without any objection as an heir to my assets and liabilities."

The words of gift are distinctly in favor of both and include a power of alienation also in favor of both. The recitals clearly indicate that Rangasami was included in the gift, because he was the husband of Nagammal and not because he was the testator's nephew. The execution of the document to him as well as the last clause may be accounted for by the fact that Rangasami was a grown-up man, while Nagammal was a young girl; but we are clearly of opinion that the testator's intention was that Nagammal as well as Rangasami should take under the will. The question remains whether they took as joint tenants or as tenants in common. It is contended on appeal that they took as tenants in common and that, even if they took as joint tenants, the tenancy has been severed. In support of these contentions, we were referred to *Rewun Persad v. M. Radha Beeby*(1), *Hirábdi v. Lakshmibdi*(2), *Dias v. DeLivera*(3), *Caldwell v. Fellowes*(4).

In *Rewun Persad's* case, an estate was left to a tenant for life, and then to the testator's brother B, and his sons C and D, B and C died during the life of the tenant for life and it was held that

(1) 4 M.I.A., 137.

(3) I.L.R., 5 App. Ca., 123.

(5) I.L.R., 4 Bom., 573.

(2) I.L.R., 11 Bom., 69, 573.

(4) L.R., 9 Eq., 410.

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C and D took vested interests as tenants in common, the actual enjoyment of the expectant interest being postponed till the termination of the life estate; so that C's widow (C and D being divided brothers) was entitled to succeed to C's share, but in this case the Privy Council was of opinion that the instrument itself would have operated as a division so as to prevent D from succeeding to his deceased brother's share as an undivided brother.

In *Hirábái v. Lakshmibái*, the testator left his widow, Hirábái, and adopted son, Nathu, as the "heirs of his property." On the death of Nathu without issue, his widow claimed his share and the Courts held that the two heirs had taken as tenants in common, but that Hirábái only took a Hindú widow's interest in the moiety. The principle enunciated was that laid down by the Privy Council in *Mahomed Shumsool v. Sheerukram* (1) that the intention is to be looked at for guidance, and the meaning to be attached to the words of the will may be affected by the surrounding circumstances. It was there considered that the words of the will did not give, and it was repugnant to general Hindú custom to presume that the testator intended to give his widow more than the qualified interest of a Hindú widow in her moiety.

Against this authority, we are referred to the judgment of Couch, J., in *Mathurá Naikin v. Esu Naikin*; but in that case the co-heiresses were daughters of a dancing-girl and the will declared they should be "mutual heiresses to one another should anything happen to either."

Applying the principles enunciated by the Privy Council to the present case, the words of the testator clearly imply a gift of the whole estate to both with power of alienation to be enjoyed by both. Having regard to surrounding circumstances, the objects of the gift were husband and wife, it is probable that the testator did not contemplate the eventuality which has arisen, but believed and intended they would both jointly enjoy the property during their lives and that their children would take it afterwards. We think that the tenancy which they took was distinguished by unity of possession, of interest, of title, and by unity of the time of the commencement of such title, and these are the four unities of a joint tenancy. An application of the same principles of decision, which led the Bombay High Court in *Hirábái v. Lakshmibái* to

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find that in that case a tenancy in common was intended, would lead us in the special circumstances of this case to believe that the intention was to create a joint tenancy.

The question then remains whether the tenancy has been severed by the parties. We think it has not, and that no intention to effect such severance can be presumed from the execution of exhibit A. The case to which we are referred (*Caldwell v. Fellowes*) was a very different one, in which three sisters, who were joint tenants, had their interests in the joint estate settled upon them by their marriage settlements, and it was held that the joint tenancy had been severed by the settlements.

On these grounds, we are of opinion that the whole estate has now vested in Nagammal by survivorship and dismiss this second appeal with costs.

APPELLATE CIVIL.

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

KALIANASUNDRAM AND OTHERS (PETITIONERS), APPELLANTS,
and

EGNAVEDESWARA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 583—Claim for mesne profits on reversal of decree for possession of land executed.

A decree for possession of immovable property having been executed was reversed on appeal. The defendant applied under s. 583 of the Code of Civil Procedure for restitution of the mesne profits taken by the plaintiff. The lower courts dismissed the application on the ground that the proper remedy was by suit:

Held that the defendant was entitled to the relief claimed.

APPEAL against the order of J. A. Davies, Acting District Judge of Tanjore, confirming the order of T. A. Krishnasámi Ayyar, District Munsif of Mannargudi, in execution of the decree in suit No. 439 of 1881.

Mr. Powell for appellants.

Seshagiri Ayyar for respondent.

The facts appear from the judgment of the Court (Collins, C.J., and Parker, J.).

1887.
Oct. 28.
Nov. 4.

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WARA.

JUDGMENT.—The plaintiff obtained a decree for the possession of immovable property and was placed in possession in execution. The decree was subsequently reversed on appeal and the plaintiff's suit dismissed with all costs. In execution of the decree in appeal the court of first instance has replaced defendants (appellants) in possession of the land, but has refused restitution of mesne profits under s. 583 of the Code of Civil Procedure on the ground that a separate suit must be brought for the same. The order of the District Munsif was confirmed on appeal by the District Judge.

We are of opinion that the terms of s. 583 are wide enough to permit the recovery in execution proceedings of mesne profits, to which the defendants may be entitled by way of restitution. It has already been held by this court that interest may be awarded under s. 583 upon an amount found on appeal to have been improperly levied—*Ayyavayyar v. Shastram Ayyar*(1)—and that mesne profits may also be awarded has been held by the Calcutta High Court in *Mookoond Lal Pal Chowdhry v. Mahomed Sami Meah*(2). It by no means follows that, because a separate suit to recover those mesne profits may not be barred under s. 244 of the Code—see *Ram Ghulam v. Dwarka Rai*(3)—the defendant is precluded from resorting to the remedy given in execution proceedings by s. 583.

The orders of the courts below are reversed with costs and the District Munsif is directed to entertain the application.

(1) I.L.R., 9 Mad., 506.

(2) I.L.R., 14 Cal., 484.

(3) I.L.R., 7 All., 170.

APPELLATE CIVIL.

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

MOIDIN (DEFENDANT No. 2), APPELLANT,

and

AVARAN AND ANOTHER (PLAINTIFF AND DEFENDANT No. 1),
RESPONDENTS.*

1887.
Dec. 6, 20.

Contract to sell land—Rescission—Resale by registered deed.

A sued to recover certain land which he claimed under a registered deed of sale executed by the owner. Prior to the date of this sale to A, M. had been put in possession of the land under an agreement to purchase the land for Rs. 300. The sale-deed to M had not been executed because only Rs. 200 of the purchase money had been paid to the owner:

Held that A could not recover, as it was not open to his vendor to rescind the contract with M.

APPEAL from the decree of V. P. deRozario, Subordinate Judge at Palghat, confirming the decree of B. Kamaran Nayar, District Munsif of Betutnad, in suit No. 364 of 1885.

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

Srinivasa Rau for appellant.

Sankara Menon and Rajarathna Mudaliar for respondents.

JUDGMENT.—The plaintiff sues on a deed of sale executed to him by first defendant on 10th September 1885. The second defendant is in possession of the property and has been in possession since 1881. Both courts find that he was put into possession by first defendant under a contract of sale on his promise to pay Rs. 300 for the land. He has only paid Rs. 200, and, in consequence, the sale-deed in his favor, though it has been drawn up, has never been executed or registered. It is found that the sale to plaintiff was *bonâ fide* and for valuable consideration, and that the transaction between defendants 1 and 2 was not completed in consequence of second defendant's failure to pay the balance of the money within the time stipulated to Pakelt Mana on behalf of first defendant.

* Second Appeal No. 262 of 1887.

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The question is whether the property passed to second defendant. It is found that part of the purchase money has not been paid, but on account of this it is not open to the vendor having given possession to rescind the contract and recover possession, though he may have a lien upon the property for the unpaid balance of the purchased money—see *Trimalāc Raghavendra v. The Municipal Commissioners of Hubli*(1). The appeal must be allowed and the decrees of the courts below reversed, the plaintiff's claim being dismissed with all costs throughout.

APPELLATE CIVIL.

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

DAVUD BEG (DEFENDANT), PETITIONER.

and

KULLAPPA (PLAINTIFF), RESPONDENT.*

Small Cause Court Act (Mysal), 1865—Rent Recovery Act, 1865—Suit to recover movable property.

A suit to recover movable property attached under colour of the Rent Recovery Act (Madras Act VIII of 1865) is cognizable by a Court of Small Causes constituted under Act XI of 1865.

APPLICATION, under s. 622 of the Code of Civil Procedure, to set aside the decree of P. V. Rangacharyar, District Munsif of Sholinghur, in Small Cause suit No. 34 of 1887.

On the 25th January 1887 defendant, purporting to act under the provisions of the Rent Recovery Act, 1865, and alleging himself to be plaintiff's landlord, seized a buffalo calf for arrears of rent.

Plaintiff sued defendant in a Small Cause Court to recover the calf, or its value Rs. 2, and Rs. 2-4-0 damages. Defendant, *inter alia*, objected to the court's jurisdiction. The objection was overruled and plaintiff obtained a decree for the calf and costs Rs. 5.

(1) I.L.R., 3 Bom., 172.

* Civil Revision Petition No. 100 of 1887.

Defendant now applied to set aside this decree on the ground that—

- (1) the court had no jurisdiction;
- (2) the attachment was legal.

Mr. *Mitchell* for petitioner.

Rangacharyar for respondent.

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

JUDGMENT:—The suit is to recover a buffalo or its value, and the plaintiff's success in the suit would necessarily involve the cancellation of the attachment without any decree for that relief. The buffalo had been attached by the defendant under colour of the Rent Recovery Act.

It is first urged that plaintiff could have had recourse to his remedy under the Rent Recovery Act, but, though plaintiff might have sought that remedy had he chosen, the jurisdiction of the ordinary courts is not ousted.

The decision in *Janakiammal v. Vithenadien*(1) is a similar case, in which it was held that such a claim as this being "one for personal property" is cognizable by a Small Cause Court. It is true that ruling is under Act VIII of 1859, but we do not see that the new Procedure Code affects the principle of the decision.

The Full Bench of the Allahabad High Court in *Godha v. Naik Ram*(2) have no doubt dissented from the Madras and Bombay decisions. The facts of that case were, however, not the same as in the present case, for there an objection had been made and disallowed under ss. 278—281 of the Code of Civil Procedure.

We are of opinion that the Small Cause Court had jurisdiction and dismiss this petition with costs.

(1) 5 M.H.C.R., 191.

(2) I.L.R., 7 All., 152.

APPELLATE CIVIL.

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

KRISHNA (PLAINTIFF), APPELLANT,
and

RAMAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Civil Courts Act, s. 12—Court Fees Act, sch. II, art. 17, s. vi—Suit to remove
a karnavan—Valuation for jurisdiction.*

Although, for the purposes of the Court Fees Act, a suit to remove the karnavan of a Malabar tarwad is incapable of valuation and subject to the fee prescribed by s. vi, art. 17, of sch. II of that Act, yet, for the purposes of determining jurisdiction under s. 12 of the Civil Courts Act, the right of management, which is the subject-matter of the suit, must be valued. If the value is estimated *bona fide* by the plaintiff, the court should adopt it.

APPEAL against the order of P. P. de'Rozario, Subordinate Judge at Palghat, rejecting a plaint in suit No. 5 of 1887.

Anantan Nayar for appellant.

Sankara Menon for respondents.

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

JUDGMENT.—The plaintiff, on 11th January 1886, presented a plaint in the Court of the District Munsif of Angadipuram, in which he stated that he was the karnavan of the tarwad, and his suit was brought to cancel and set aside a razinama entered into by his predecessor in the office of karnavan, by which he, the then karnavan, agreed that defendant No. 1 should manage the tarwad property jointly with himself. The razi was dated 3rd September 1867, and the then karnavan has since died. The plaint bore a stamp value of Rs. 10 under the Court Fees Act and declared that the valuation of the plaint for purposes of the suit was Rs. 1,564-3-2.

On the 22nd March 1886, the District Munsif returned the plaint for presentation in another court, holding that the value of the suit, for purposes of jurisdiction, was the aggregate value of the tarwad properties. He found that the plaintiff had not included

* Appeal against Order No. 90 of 1887.

the value of a temple belonging to the tarwad, which value (Rs. 3,000) added to the Rs. 2,010 shown in the plaint to be the value of other tarwad properties, brought the value of the suit beyond the jurisdiction of the District Munsif.

The plaintiff then presented his plaint in the Subordinate Judge's Court, but the Subordinate Judge held that the suit was cognizable by a District Munsif and returned the plaint on the 11th August 1876, observing that, as the family property need not be valued in a suit to remove the karnavan or sole manager—*Govindan Nambiar v. Krishnan Nambiar*(1) *a fortiori*—it need not be valued in a suit to remove a joint manager and to cancel a razi which provided for joint management.

The plaintiff then appealed to the High Court in appeal against order No. 131 of 1886, when the order of the Subordinate Judge was set aside, the Court observing that "the Subordinate Judge must determine what is the value of the subject-matter of the suit for purposes of jurisdiction. It does not follow that, because the court-fees payable on the plaint amount only to Rs. 10, the suit is within the jurisdiction of the District Munsif."

The Subordinate Judge has now again refused to entertain the plaint and has returned it for presentation in the District Munsif's Court on the ground that the High Court has held in *N. C. Kunhi Raman v. N. C. Puttalathu Kimhunni Nambiar*(2) that, for the purposes of jurisdiction, a suit to remove a karnavan is not a suit for the recovery of tarwad property and to be valued as such, but a suit which asks for a relief which is incapable of valuation. The Subordinate Judge goes on to say that, as the suit is incapable of valuation, it cannot be said to be beyond the pecuniary limits of a District Munsif's jurisdiction. Against this order, the plaintiff has now again appealed, the District Munsif having in the meantime again refused to entertain the plaint.

The Subordinate Judge has, in our opinion, failed to give effect to s. 14 of the Civil Courts Act and is mistaken in considering that the valuation of the relief claimed is necessarily the same as the valuation of the subject-matter of the suit for purposes of jurisdiction. In *Govindan Nambiar v. Krishnan Nambiar*(1), the sole question referred for decision was under what provision of the Court Fees Act, a suit for the removal of the karnavan should be

(1) I.L.R., 4 Mad., 146.

(2) I.L.R., 4 Mad., 314.

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valued for the purposes of stamp duty. It is true that the learned counsel pointed out that the courts below seem to have made no distinction between valuation for the purposes of jurisdiction and valuation for the purpose of ascertaining the court fee leviable; but the High Court restricted the decision to the sole question which was referred under s. 617 of the Code of Civil Procedure.

In that case, it was, however, observed that it would be clearly erroneous to value such a claim as if it were a claim for the recovery of possession of land, for the possession of the property is throughout in the tarwad and is not affected by a change in the person who fills the office of manager. This suggests that the court regarded the right to manage and not the ownership in the land and the consequent right to possession as the subject-matter of the suit. Again, in *N. C. Kunhi Raman v. N. C. Puttalathu Kimhunnai Nambiar* (1), it was held that a suit to remove a karnavan is not a suit to recover tarwad property and to be valued as such, but is a suit which asks for a relief that is incapable of valuation, and that the value put on it by the parties was the one to be adopted.

These decisions proceed on the view that possession is always in the tarwad and that the subject-matter of the suit is not the land but an interest in it, namely, the right of management which is not capable of valuation. But it does not follow that a District Munsif has jurisdiction over every suit for the removal of a karnavan though the tarwad property to be managed is very considerable in value. The right of management must, from the nature of things, rise in value in proportion to the value of the property to be managed. It is not, therefore, unreasonable to take into consideration the value of the property and to see that the value put by the parties on the right of management for the purpose of jurisdiction is *bona fide*, and, if *bona fide*, to adopt it as the value of the subject-matter for purposes of jurisdiction. The Subordinate Judge was wrong in holding that, because the subject-matter is incapable of precise valuation, the District Munsif had necessarily jurisdiction over the suit.

We set aside the order of the Subordinate Judge and direct him to entertain the plaint. Costs of these proceedings will be costs in the cause.

(1) I.L.R., 4 Mad., 314.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

PACHAYAPPAN (PLAINTIFF), APPELLANT,
and

NARAYANA (DEFENDANT), RESPONDENT.*

1887.
Oct. 21.
Nov. 10.

Civil Procedure Code, ss. 313, 315, 586—Suit to recover purchase money—Suit by purchaser at court-sale of nature cognisable by Small Cause Court—Orders made not final.

A suit brought, under s. 315 of the Code of Civil Procedure, by a purchaser at an execution sale to recover the purchase money, when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, is not a suit of a nature cognizable by a Small Cause Court constituted under Act XI of 1865.

P. bought certain land at a sale in execution of a decree. Before the purchase money was paid, P. applied to the court by petition to set aside the sale and return the deposit money on the ground that the judgment-debtor had no saleable interest in the land. The court rejected the petition and confirmed the sale on the 15th March 1881. The sale was subsequently set aside by a decree obtained by V. in a suit against P., and the judgment-creditor. P. then sued the judgment-creditor to recover the purchase money. The District Judge dismissed the suit on the ground that P. was debarred from suing by the order of 15th March 1881:

Held, that the order did not conclude P. from bringing this suit.

APPEAL from the decree of C. W. W. Martin, District Judge of Salem, reversing the decree of S. Ponnusami Mudali, District Munsif of Krishnagiri, in suit No. 503 of 1884.

Ramachandra Rau Saheb for appellant.

Bhaskhyam Ayyangar for respondent.

The facts are set out in the judgment of the Court (Kernan and Parker, JJ.).

JUDGMENT.—On the 8th of January 1881, the appellant purchased at auction in suit No. 236 of 1879 a moiety belonging to the judgment-debtor in a certain garden for Rs. 300, and having paid into court a deposit of Rs. 75, applied by petition on the 18th of January 1881 to the Munsif to set aside the sale and return the deposit on the ground that the judgment-debtor had no saleable interest in the garden. On the 15th of March 1881,

* Second Appeal No. 5 of 1887.

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the Munsif made an order refusing to set aside the sale. The purchaser did not appeal, and completed his purchase by paying the balance of purchase money into court, and the purchase money was paid by the court to the execution-creditor, the now respondent. Subsequently, a suit was filed by Vadamayammal and another (No. 588 of 1881) against the execution-creditor and the purchaser to set aside the sale, and a decree was made on the 21st of June 1882 (confirmed on appeal), setting aside the sale on the ground that the judgment-debtor had no interest in the garden which could be pledged or sold. The appellant brought this suit as plaintiff against the execution-creditor to recover Rs. 450, being the amount of the purchase money and interest. The Munsif decreed for the plaintiff, but the District Judge reversed the decree and dismissed the suit on the ground that plaintiff (appellant) was concluded by the order of the 15th of March 1881, refusing to set aside the sale.

This is a second appeal filed by the plaintiff on the ground that the District Judge was wrong in deciding the point of law as he did. A preliminary objection is made by the respondent that the suit is one of the nature cognizable in a Small Cause Court, and there is no second appeal, the subject-matter being less than Rs. 500—s. 586, Civil Procedure Code. To support this objection, it was contended that the plaintiff's (appellant's) claim was on contract within s. 6 of the Small Cause Court Act XI of 1865. There was certainly no express contract between the appellant and respondent in relation to the money, and no facts are stated which would give rise to any presumption that any implied contract existed between them. The premises were put up for sale under the orders of the court (ss. 286, 287, Civil Procedure Code) by its own officer. The money was paid into court and was paid out by the court to the purchaser. Section 315 provides that, when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is therefore deprived thereof, the purchaser shall be entitled to receive back his purchase money from any person to whom the purchase money has been paid. It is under the right conferred by this portion of s. 315 that this suit is brought. The right to recover back the money being conferred, a suit may be brought therefor (s. 11). This power was given to the purchaser for the first time by s. 315. Prior to that, no provision was made

in the Code, enabling a purchaser to recover purchase money, paid by him into court at an auction sale, on the ground that the judgment-debtor had no saleable interest in the property which purported to be sold. Cases (L.R., 5 I.A., 215; L.R., 10 I.A., 116; L.R., 2 Bom., 258) were cited in argument to the effect that an action on contract would lie by a purchaser against an execution-creditor, where he guaranteed the title by a statement specially made at his request in the proclamation, or where the Sheriff, at the execution-creditor's request and risk, sold property which he had no right to sell; but the principle on which these cases were decided was that the Sheriff was in fact the agent of the execution-creditor and guaranteed the title. There is no such fact here. It was further contended that the word "contract" in the Small Cause Court Act had been decided by a Full Bench of this Court to be one of which application is not confined to express or implied contracts, but to claims to enforce obligation *quasi ex contractu*, and that this suit is one *quasi ex contractu*. The Full Bench case referred to is *Govinda Muneya Tiruyan v. Bapu*(1). That was an action in a Small Cause Court for contribution by co-debtors who had paid a debt in which they and the defendant were jointly liable. The Chief Justice held that the action was founded on an implied contract between the debtors and gave his reasons at large. He stated he was aware of cases where the doctrine of implied contract had been widely applied, viz., in suits to recover money paid by mistake and in suits where a plaintiff is at liberty to waive a tort committed and sue in *assumpsit* for money recovered as the result of the tort, and to cases where the circumstances precluded presumption of implied promise or request; but he stated that such obligations could be said to rest on implied contracts only by pure fiction, and that they were merely obligations *quasi ex contractu*. He stated it would be a strained construction to hold that such claims were "on contract" within the meaning of s. 6. He expressed his opinion that this obligation to contribute rested on implied contract according to the term of the English decisions, and was one to which s. 6 applied. Mr. Justice Bittleston concurred in the opinion that the Small Cause Court had jurisdiction, the suit being based on *contract* within the meaning of the Act.

(1) 5 M.H.C.R., 200.

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Mr. Justice Holloway referred to the case of *Batard v. Hawes*(1), which was an action by co-debtors for contribution. At p. 296 of the judgment in that case, Lord Campbell says: "In a joint contract for the benefit of all, each takes upon himself the liability to pay the whole debt consisting of the shares which each contractor ought to pay between themselves and each in effect takes upon himself a liability for each to the extent of the amount of his share. Each, therefore, may be considered as becoming liable for the share of each one of his co-contractors at the request of such co-contractor, and on being obliged to pay such share, a request to pay it is implied as against the party who ought to have paid it." Mr. Justice Holloway says "being certain that the terms used in the Act were used in the sense of English lawyers, I answer without hesitation that the demand in this case is a demand due on contract."

In a prior part of his judgment, he said "what an English lawyer did and does mean by contract is not a contract at all, but obligation which happens to correspond pretty nearly to the Roman obligation of contract, and *quasi ex contractu*." He then states his idea of what the obligation is, and ends by referring to Roman law authority and says "with this a whole string of similar obligations will disappear if contract is only to mean obligations *ex contractu*."

It seems to us that he agreed with the decision of Lord Campbell and with the judgment of the Chief Justice that there was an implied contract between the co-debtors, and that the action was supported thereby and that the action was not founded on an obligation *quasi ex contractu*. Mr. Justice Collett agreed that the case was cognizable by the Small Cause Court, but gave no judgment in detail. Mr. Justice Innes was of opinion that in the use of the word "extent" the Small Cause Court Act had in view all obligations classed as contracts under the English law, viz., express and implied contracts and obligations *quasi ex contractu*; but he considered that the obligation to contribute was one which could not be classed as an implied contract (or an obligation arising out of an agreement inferred from the conduct of the parties), but that it was an obligation *quasi ex contractu* arising simply *ex debito justitiæ*, so that Mr. Justice Innes would appear

(1) 2 E. & B., 296.

to stand alone in his judgment and to differ from the Chief Justice PACHAYAPPAN and Mr. Justice Bittleston, and we think from Mr. Justice NARAYANA. *Harihara v. Subramanya*(1) was cited to prove that contracts *quasi ex contractu* were within the term "contract" in the Act. That was a case in which the question was whether an action by an execution-creditor, who was entitled to rateable distribution of assets under s. 295 and who was not paid, could be maintained in a Small Cause Court. On appeal, it was held by the High Court that such action was one *quasi ex contractu* and within the meaning of the term contract. However the claim in that case was under s. 72 of the Contract Act, being money paid by mistake and under s. 295, chapter 5 of the Contract Act treats of "certain relations resembling those created by contract." It is, therefore, distinguishable from this case. The Court referred to the Full Bench case as a decision that actions *quasi ex contractu* were within the term "contract" in the Act. However, we can see no reason why the action under s. 315 should be on contract, express or implied, or *quasi ex contractu*.

The suit is founded on the application of s. 315 to the facts, and if the facts are stated in the plaint the legal right appears; no presumption of contract of any sort arises or is necessary to support the action. The Appellate Court decided in this case that the action could not be maintained, inasmuch as the petition and motion of the appellant to set aside the sale under s. 313 was refused. The lower court interpreted the decision of the High Court (Allahabad) in *Munna Singh v. Gajadhar Singh*(2) to mean that if a purchaser applied under s. 312 or s. 313 to set aside the sale and failed, he could not maintain an action under s. 315 even if it was afterwards found that the judgment-debtor had no saleable interest. We do not think such was the decision or the effect of the decision. On the contrary, the Chief Justice says that the words "when it is found" contemplates some previous proceeding in which it was found the judgment-debtor had a saleable interest, and that both remedies were open to the purchaser. The s. 315 appears to contemplate that such motions of a summary nature, if refused, would not prevent the purchaser bringing a suit if it was found that the debtor had not such interest.

(1) I.L.R., 9 Mad., 250.

(2) I.L.R., 5 All., 577.

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It was contended that, as the order under s. 313 was not appealed against, it is final and amounts to a decision of a suit under s. 13; but the Act does not declare that an order under s. 313 or an order on appeal from it is final. Where the Act contemplated that orders on applications should be final, it expressly provides so (see s. 283, Civil Procedure Code). The order under s. 313 is not a final decision in a former suit within the meaning of s. 13. The petition of the appellant to have the sale cancelled was not a former suit between the same parties within s. 13. It was an application in a suit in which the appellant was not a party.

We set aside the decree of the Lower Appellate Court, and, as the Judge decided the case on a preliminary point, remand it to him for trial on the merits. Costs of this appeal to be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

SETHU (PLAINTIFF), APPELLANT,

and

SUBRAMANYA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Limitation Act, s. 10—Suit against dharmakarta of temple to recover money misappropriated.

Plaintiff, as dharmakarta of a Hindé temple, alleging that the defendant, a former dharmakarta, who had been removed from office, had, when in office, misappropriated certain temple funds held by him, sued to recover a certain sum alleged to have been misappropriated:

Held that the defendant was a person in whom the temple funds had become vested in trust for a specific purpose within the meaning of s. 10 of the Limitation Act, 1877, and that as the plaint disclosed a right to follow trust funds in his hands, the suit might be treated as a suit for that purpose.

APPEAL from the decree of K. R. Krishna Menon, Subordinate Judge at Tinnevely, in suit No. 5 of 1884.

Subramanya Ayyar for respondent.

Bhaskyam Ayyangár and Kallanaramayyar for appellant.

The facts and arguments appear sufficiently, for the purpose

* Appeal No. 120 of 1886.

of this report, from the judgment of the Court (Kernan and Parker, JJ.)

JUDGMENT.—The plaint was filed by Sivan Sethu Rayar, dharmakarta of the temple of Tiruchendur Subramanya Sami Kovil, on the 1st day of February 1884, against first and second defendants to recover Rs. 5,394-1-3. In the plaint it is stated as follows:—that first defendant had been dharmakarta of the temple from 1878 to April 1879, managing the affairs of the temple; that, while he was so managing, he appropriated money from the temple funds and got a note from one Pandian for Rs. 5,000 and was repaid part of the amount; that the first defendant was removed from the office of dharmakarta, and after that the succeeding dharmakarta brought a suit (No. 6 of 1880) against Pandian on the note; and that the Subordinate Judge, and, afterwards, the District Judge in appeal, decreed against the plaintiff in that suit, the dharmakarta, on the ground that the first defendant did not lend money on the note to Pandian; that the amount alleged to be lent to Pandian according to the accounts of the temple kept by him was misappropriated by the first defendant for his own use; that the second defendant is son of the first defendant; and that after first defendant was dismissed, they divided in order to avoid amounts due to others. The defence filed by the first defendant was as follows:—that the suit is not maintainable; that plaintiff has no cause of action; that when the first defendant was dharmakarta, the devastanam committee passed proceedings to the effect that a certain amount from the temple funds should be lent by first defendant on interest to respectable men of the district; that defendant lent Rs. 5,000 of the funds to Pandian, who was a respectable man, and obtained a promissory note from him and forwarded it to the office of the committee; that Pandian paid part; that the accounts of the first defendant as dharmakarta were furnished to the committee and admitted by them; that he acted under the orders of the committee; that he did everything he was bound to do and failed in nothing in the matter; that the dharmakarta, who succeeded him is his enemy; and that it was owing to the laziness and negligence of that dharmakarta that the money was not recovered from Pandian.

Issues were settled—

- (1) whether first defendant during his employment as dharmakarta embezzled funds of the pagoda to the extent of Rs. 2,389;

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- (2) whether the first defendant concealed his embezzlement by keeping on the pagoda records false accounts; and
(3) whether the suit is barred.

The Subordinate Judge, on the 3rd of March 1886, dismissed the suit as being barred by limitation without going into the merits, although he took the evidence. In his judgment, he refers to this suit as being brought by the present trustee of the pagoda against the first defendant, a former trustee, who is said to have misappropriated, and states the substance of the plaint and defence and issues, and records the evidence. Then the Judge proceeds to record that the defendants contended that the case was within s. 10 of the Limitation Act and expressed his opinion that s. 10 did not apply on the ground that plaintiff was not a beneficiary but a trustee, in whom the legal interest in the trust property was vested. (This view was given up on appeal before us.) The Judge held that this suit is not one to follow trust property. To use his words, he said to claim the benefit of s. 10, Limitation Act, the suit against the trustee must be one instituted by the beneficiary or *cestui que trust* for the purpose of following the trust property in his hands, and it proceeds on the assumption that the trust is still subsisting. Hence the suit is not to follow trust property.

The Judge remarks that the promissory note from Pandian was admittedly genuine and was forwarded to the committee, and that it was after the institution of the suit against Pandian that the plaintiff became aware that no money was lent by the first defendant and that the pagoda accounts had been falsified. He held that the suit was one for compensation for loss arising from loss of money dishonestly misappropriated, or for relief on the ground of fraud, and not to recover any specific property, the subject of the trust; that if all that plaintiff declared in the plaint was true, the defendant's conduct amounted to fraud and the limitation applicable appeared to be either art. 48 or 95 of sch. II of the Limitation Act; and that under both articles three years elapsed before suit from the discovery of the fraud and that, on the plaintiff's own showing, the fraud became known when the defendant produced his account A in the former suit. He dismissed the suit with costs.

The plaintiff appeals on the ground that s. 10 of the Limitation Act applied and that the limitation of three years did not apply; but that, if three years' limitation applied under art. 96, the suit was within three years from discovery of the fraud, and

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that art. 120, whereby six years is the limitation, applied. It appears to us that the first defendant was a trustee of the pagoda at the time when it is alleged he misappropriated the money of the pagoda to his own use. It was contended that he was only a manager of the temple appointed by the committee under Act XX of 1863, and that he was only a servant of theirs, as he was appointed by them and could be removed for misconduct. The Act XX of 1863 empowers the committee to appoint a trustee, manager or superintendent. How the first defendant was appointed, whether orally or by writing, does not appear, nor does it appear whether there is any difference in the duties to be performed by a trustee from those to be performed as a manager, and if the question of limitation might be affected by ascertaining the exact terms in which the first defendant was appointed dharmakarta, we should direct inquiry.

But there is no doubt that the first defendant was dharmakarta of the pagoda, and it has been held in more cases than one that a dharmakarta is a trustee *Virasami v. Subba*(1). The defendant then was a dharmakarta appointed by a Collector before the Act XX of 1863 was passed, but he was not a hereditary dharmakarta. He had been removed by the committee, and that suit was brought to recover the possession of the temple and specific movable property within it and also money of the temple recovered by him and not paid to the committee, and which money, it is stated in the judgment, he paid away after he was dismissed. The court said, there was no doubt that the dharmakarta was a trustee and that s. 10 applied and time did not bar the suit. A decree had been made by the Subordinate Judge for delivery of the property sought to be recovered, including the ready cash recovered by him as stated in the plaint and which the defendant had paid away after he was dismissed, and the High Court affirmed the decree. In the case second appeal No. 922 of 1885, it was held by the High Court that a dharmakarta is a trustee. The position of a dharmakarta as a trustee is recognized by the Subordinate Judge who calls the defendant "trustee" of the temple.

It was contended for the defendant that, even if he is to be held to be a trustee, yet that the money of the temple did not become vested in him in trust for any specific purpose. It was

(1) I.L.R., 6 Mad., 54.

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observed that this point was not raised in *Virasami v. Subba*(1). As the first defendant was a trustee of the temple property, including the money, was he not trustee for the specific purpose of applying the property to the use of the temple, for the disposal of it to various purposes to which the property of such temple is usually applied? The accounts furnished by him to the committee clearly prove that such was the specific purpose for which he held the property. The trust was one which was not merely an implied trust, arising from a fiduciary relationship. If the first defendant, being a trustee, had not the property vested in him for the specific purpose above mentioned, then there was no purpose for which he held it.

Kherodemoney Dossee v. Doorgamoney Dossee(2) was cited by the respondent for the expression of opinion at page 465 that the words "vested for some specific purpose" in s. 10, Limitation Act, meant vested for some specific purpose or object as distinguished from an implied trust, or such trust as the law would infer from the existence of particular facts or fiduciary relations. In that case, certain limitations over to the testator's sister's son in a will were held void; and this being so, it was held that the trustee was not a trustee for any specific purpose in respect of the estate limited over, which was held to have failed. The decision in that case does not affect the case as the specific purpose failed.

Saroda Pershad Chattopadhyaya v. Brajo Nauth Bhattacharjee(3) was also cited for the respondent in which the Court in the judgment state—"To claim the benefit of s. 10, Limitation Act, the suit against the trustee must (amongst other things) be for the purpose of following property in his hands; the plaintiff's suit has no such purpose. It is plain that its object is not to recover any property 'in specie,' but to have an account of the defendant's stewardship, which means an account of receipts and disbursements by the defendant on plaintiff's behalf and to be paid any balance found due to him on taking the account."

That was a suit against a person to whom property was bequeathed in trust that he should hold it during the minority of the plaintiff for his benefit, and to make over as much as remained unexpended to plaintiff on his attaining his age. The defendant accepted the property and the trust and delivered over certain of

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the property, movable and immovable, to the plaintiff, but did not account. The suit was for an account of the trust property. The defendant pleaded that plaintiff's suit was not filed until after three years from his attaining majority. The plaintiff relied on s. 10. The Court, as above stated, held that s. 10 did not apply, but that art. 120 did. It has been contended that the Court in using the word "in specie" meant to decide, and that the true construction of s. 10 is, that unless the trustee has in hands the identical property which the trustee received of the trust estate, and that if he parted with the possession of that identical trust property, no suit to follow trust property can lie; but we do not think such was the intention of the Court, which appears to us to have used the words "in specie" in contradistinction to a suit for an account. A suit to follow trust property not in possession of the trustee will be under various circumstances, viz., if the trustee parted with it to another person not for value (see s. 10), or if the trustee has converted the trust property into other property held in his own name, or in the name of an assignee not for value.

In like manner, trust money used by a trustee in his own trade without authority and trust funds mixed up by the trustee with his own funds can be followed. See *Blake v. Bunbury* and *Tidd v. Lister*(1). In this case the plaintiff states that the trustee received the property held for specific purpose, and the first defendant admits the fact, but says that he lent the money as directed by the committee. The plaintiff does not state (as plaintiff is apparently not aware) whether the defendant still retains that money or has invested it or any other facts which would admittedly entitle the plaintiff to follow the trust fund. However is it not to be presumed, until the contrary is shown by the first defendant, that he still has in possession the trust fund, either in its state as he originally had it, or in some other form of property into which he has converted it? In this view, is not the plaintiff entitled to follow the trust fund? If the plaintiff is not entitled to file a suit to follow the trust property upon such facts as appear in this case, the result may be very serious loss to trust estates in many cases, as the trustee may, by committing a breach of trust and concealing the trust property, or giving no information in respect of it, evade the continuous liability of s. 10 of the Limitation Act.

(1) I.L.R., 6 Mad., 54.

(2) I.L.R., 4 Cal., 455.

(3) I.L.R., 5 Cal., 910.

(1) Hewin, p. 577.

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The facts stated in the plaint and the relief prayed, viz., "a decree that plaintiff do recover from the first and second defendants" the money would be suitable to a claim for compensation or for repayment; but if the right to follow the trust fund is thereby disclosed, though not referred to in express terms on the plaint, there seems no reason why the suit should not be taken as one to follow the trust property. We think therefore that this suit may be treated as one to follow the property entrusted to the first defendant for a specific purpose, and that we should hold that s. 10 of the Limitation Act applies.

We reverse the decree of the Subordinate Judge and remand the suit for a hearing on the merits. The appellant must have the costs of this appeal, but the costs in the court below will abide and follow the result.

APPELLATE CIVIL.

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

CHATHU (PLAINTIFF), APPELLANT,

and

KUNHAMED (DEFENDANT No. 3), RESPONDENT.*

Decree—Execution—Assignment of interest of judgment-debtor in surplus proceeds of sale—Attachment by creditor of judgment-debtor—Suit for declaration of assignee's title—Civil Procedure Code, s. 266 (k)—Contingent interest.

In execution of a decree in a District Munsif's Court, certain property having been sold, a balance, after satisfying the decree, remained in favor of the judgment-debtor X. After the date of sale, but before the whole of the purchase money had been paid into court, X applied to the court by petition, praying that the amount due to him might be paid to A, to whom, he alleged, he had assigned it. Before any order was made on this petition, B, C, D, and E, in execution of separate decrees against X, attached the sum in court. The District Munsif ordered that B, C, D, and E should be paid before A. A brought a suit against B, C, D, and E in another District Munsif's Court for a declaration that he was entitled to the money and to set aside the said order. The Munsif set aside the order and declared the plaintiff to be entitled to the amount. B, C, D, and E severally appealed against this decree, and the District Court passed a decree in each appeal, dismissing A's suit. A presented one second appeal, making B, C, D, and E parties thereto, against the four decrees of the District Court:

* Second Appeals Nos. 990 of 1883 and 1168 to 1160 of 1886.

Held (1) that A was bound to file a separate appeal against each of the decrees passed by the District Court;

(2) that A (having by permission of the Court amended his second appeal and filed three more second appeals) was entitled to a decree, declaring his title to the amount claimed.

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APPEALS from the decrees of H. T. Ross, Acting District Judge of Tellicherry, reversing the decree of P. J. Ittियerah, District Munsif of Tellicherry, in suit No. 245 of 1884.

The Acting Advocate-General (*Mr. Shepherd*) and *Anantan Nayar* for appellants.

Mr. Wedderburn and *Mr. Brown* for respondents in S.A. 990 of 1885 and 1168 and 1169 of 1886.

Mahadeva Ayyar for respondent in S.A. 1160 of 1886.

It was argued, for the respondents, that the plaintiff had a separate cause of action against each of the defendants and that the suit was therefore bad for misjoinder; that the plaintiff should have sued in the Chavacherry District Munsif's Court and was not entitled to any decree setting aside the order of that court; that he was bound to bring an appeal against each decree of the District Court, and his remedy was now barred by limitation.

The facts appear from the judgment of the Court (Collins, C.J., and Parker, J.).

JUDGMENT.—A decree was obtained against Govindu Poduval and Vasu Poduval in suit No. 186 of 1882 in the Chavacherry District Munsif's Court, in execution of which there was a balance of Rs. 687 to the credit of the judgment-debtors after paying the plaintiff. On 29th August 1883, Govindu Poduval transferred his right to this amount to plaintiff, and by a joint petition (B) they prayed that the amount be paid to plaintiff. The sale had taken place on 27th August, and on the date of the petition (29th Aug.) only 25 per cent. of the sale amount had been deposited. No orders were passed till 11th December, but in the meanwhile the amount had been realized, and before 11th December the amount had been attached by the four defendants in execution of decrees obtained by them in the Subordinate Court. By his order of 11th December 1883, the Chavacherry District Munsif held that the decree-holders had priority over the assignee and refused to pay the amount to plaintiff. The plaintiff then brought this suit on the file of the District Munsif of Tellicherry to cancel the order of the Chavacherry Court and for a declaration against the

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decree-holders in all the four suits that he was entitled to the Rs. 687. No objection was taken as to misjoinder, or as to the jurisdiction of the court, and the District Munsif decreed in plaintiff's favor with costs. Against this decree, the defendant preferred four separate appeals, and the Acting District Judge, on the ground that a contingent interest only was transferred on 29th August and that the sum was attached before the contingency became vested, reversed the District Munsif's decision and dismissed the plaintiff's suit with costs throughout.

Against these four decrees, the plaintiff has now preferred one second appeal only. It was argued for him by the Acting Advocate-General (1) that the only ground of defence (collusion) having been abandoned, the plaintiff should have had a decree; (2) that if no sum could be assigned on the ground that it was a contingent interest only, so also none could be attached, and that in any case the assignment had priority; (3) that costs had been wrongly given in the four appeals.

Viewing the suit as one for a declaratory decree, we are of opinion that no objection can be properly taken to its being brought in the Tellicherry Court and against all four defendants. Should plaintiff succeed in establishing his title by declaratory decree, he could then carry his decree to the court by which the order of attachment was issued, and such court would be bound to recognize the adjudication and act accordingly—see *Kolasherri Ilath Narainan v. Kolasherri Ilath Nilakandan Nambudri* (1)—but four decrees have been passed by the lower appellate court, and against them only one second appeal has been preferred. We are of opinion that this course cannot be adopted and that a second appeal must be preferred from each decree, though the decision in one second appeal will govern the rest. We will, therefore, allow the plaintiff, as the omission appears to have been due to a mistake, to put in three more second appeals and to amend the present one by limiting it to one of the decrees only, and will allow him a month's time for this purpose. If this be done, we shall be in a position to dispose of the whole case, but if it is not done, this second appeal must fail.

The appellant having now (25th July 1887) put in three more second appeals, we now proceed to dispose of the other points raised.

(1) I.L.R., 4 Mad., 131.

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We can see no reason why the assignment of the interest to the plaintiff should not be upheld. The same objection now raised would equally apply to the attachment as to the assignment of the interest.

We must reverse the decree of the lower appellate court and restore that passed by the District Munsif with the exception of the words "it is ordered that the order on petition 1387 of 1883, passed by the District Munsif of Chavacherry on 11th December 1883, be, and the same hereby is, set aside." In other words, we allow the declaration only. We will allow the appellant half costs in this Court and full costs in the lower appellate court.

This governs second appeals 1158, 1159, and 1160 of 1886.

APPELLATE CIVIL.

Before Sir Anthon J. H. Collins, Kt., Chief Justice, and
Mr. Justice Muttusami Ayyar.

ATHAVULLA (DEFENDANT), APPELLANT,

and

GOUSE (PLAINTIFF), RESPONDENT.*

1886.
Nov. 10.
1887.
Sept. 12.
1888.
Feb. 6.

Pensions Act, 1871, s. 4—Religious Endowments Act, 1863, ss. 14, 15—Yaumia granted to mosque—Suit against co-trustee for declaration of right.

Section 4 of the Pensions Act, 1871, provides that no Civil Court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made by the British or any former government, whatever may have been the consideration for any such pension or grant and whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted:

Held that a yaumia allowance granted to a religious institution did not fall within the purview of the Pensions Act.

Where a trustee of a Muhammadan mosque sued for a declaration of his title as against a co-trustee:

Held that ss. 14 and 15 of the Religious Endowments Act, 1863, were not applicable to the suit.

APPEAL from the decree of K. R. Krishna Menon, Subordinate Judge of Tinnevely, in suit No. 10 of 1884.

The plaint in this suit was as follows:—

* Appeal No. 144 of 1885.

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"Plaintiff's father, Kadar Mohidin Khatib Sahib, Gulam Hydrus, son of Mahomed Gouse, and the defendant's father, Kaja Mohidin Hydrus, were the hakdars to Pirdastagir mosque. The said mosque and the properties appertaining thereto belong to plaintiff's family.

"The properties specified in the schedule hereunto annexed belong to the said mosque. They were granted as inam by the former government to the said mosque in the names of the ancestors of both the parties, so that the income thereof might be applied to the charities of the mosque as specified in sch. I, and the remainder to the maintenance of the hakdars who do service.

"The forefathers of both the parties were enjoying the said properties and were conducting the charities of the mosque with the income thereof. As the aforesaid Gulam Hydrus, son of Mahomed Gouse, among them, conducted proceedings against the right of the said mosque, he was dismissed from the place of hakdar by the Inam Collector; and the inam patta was granted in the names of the fathers of plaintiff and defendant.

"Subsequently, a misunderstanding arose between plaintiff's father, Kadar Mohidin Sahib, and defendant's father, Kaja Mohidin Hydrus, and, under the orders of the Collector, the members of the committee were arbitrators and decided, on the 2nd January 1868, according to the wishes and consent of both of them, that plaintiff, the hakdar, should be manager of the said mosque, receive the income of the properties and conduct the charities, and that the defendant and Kadar Shah the plaintiff's step-brother, should do service in the said mosque. The said Kadar Shah went abroad without performing service, &c.

"Thereupon, plaintiff himself was conducting the charities of the mosque out of the income of the said inam properties and out of his own (funds). The defendant also was, in accordance with the said order, doing services for a short time.

"Under such circumstances, the defendant wrongfully alienated some of the properties of the mosque and did not join the plaintiff in drawing yaumia allowance from the taluk (treasury), and further he ceased to do the services of the mosque.

"Moreover, in the suit brought by plaintiff before the Revenue officer about the attempt made separately by the defendant to draw the yaumia of the mosque from the taluk treasury, the defendant deposed in the Tinnevely taluk kachari on the 8th and

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15th of July 1880, that he was the man doing the services of the said mosque, that plaintiff alone was the hakdar to the mosque, and that, if he wrongfully alienated the charity properties in future, he would forfeit his right; and, thereupon, in July 1880, the plaintiff drew from the taluk treasury, on giving a receipt, the yaumia allowance for the amount he had spent out of his own funds in 1879, and plaintiff alone paid the quit-rent due up to fasli 1289.

"Subsequently, the defendant, without properly doing the services of the mosque in accordance with the said deposition, has unlawfully alienated the properties and prevented the tenants from paying the varam. Consequently, plaintiff himself has been conducting the charities of the mosque out of his own funds and the tenants have been paying the quit-rent for plaintiff.

"The defendant obtained rent-deeds from some of the tenants who cultivated the inam lands belonging to the said mosque, alleging fraudulently that he was the hakdar to the mosque; and to recover the melvaram due under them, the defendant brought Small Cause suits Nos. 8 and 41 of 1883 on the file of the Subordinate Court of Tinnevely, in which the plaintiff put in a petition stating that he was the hakdar to the said Pirdastagir mosque, that he was entitled to receive the said melvaram, and that he should, therefore, be included as a party, and that the defendant was not entitled to the place. Thereupon, the court ordered on the 24th November 1883 that this plaintiff should establish his right by means of a regular suit. The mosque in question and the properties appertaining thereto are under the management of plaintiff.

"The cause of action arose on the 24th November 1883 at Tinnevely.

"The plaintiff, therefore, prays the court

- (i) that it may be declared that plaintiff is hakdar to Pirdastagir mosque specified in sch. I and all the properties appertaining thereto and entitled annually to draw from the taluk treasury the yaumia allowance fixed for the said mosque as specified in sch. V, that defendant shall have no connection with them, that plaintiff alone has right to the whole management of the properties, and that the defendant, who has made wrongful alienation, has no right to the mosque, &c.;

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- (ii) that plaintiff may draw the remaining yaumia allowance for faslis 1290, 1291 and 1293, which is in deposit in the Tinnevely taluk (treasury), viz., Rs. 131-15-1 as specified in sub-No. 1 of sch. VI, and that plaintiff may recover from defendant the yaumia allowance for faslis 1291, 1292, and 1293, which the defendant has drawn, viz., Rs. 133-10-2 as specified in sub-No. 2 of sch. VI, and the sum of Rs. 42-5-9 which the defendant has obtained under the decree in Small Cause suit No. 8 of 1882 on the file of the Subordinate Court of Tinnevely and which is specified in sch. VII;
- (iii) that plaintiff may recover from defendant the costs of this suit;
- (iv) and that such other reliefs may be granted as the court may deem fit under the circumstances of the case."

The Subordinate Judge decreed part of the claim.

Defendant appealed.

Kalianaramayyar for appellant.

Rama Rau for respondent.

The further facts necessary, for the purpose of this report, appear from the judgment of the Court, (Collins, C.J., and Muttusami Ayyar, J.) the material portion of which was as follows:—

As to the preliminary objections, neither s. 14 of Act XX of 1863 nor s. 539 of the Code of Civil Procedure has any application. This is a suit by a trustee against the co-trustee to enforce his vested hereditary right, and it cannot be said that he has simply an interest, such as is defined by s. 15 of the Religious Endowments Act, XX of 1863, nor is it to be considered that Regulation IV of 1831, or the Pensions Act XXIII of 1871, which repealed the above Regulation is applicable to a yaumia allowance granted to a religious institution. As to the contention that the suit was not maintainable, it being a declaratory suit, and that the appellant being in possession, the respondent ought to have claimed consequential relief, the finding is that both are in joint possession as co-trustees, and that the possession of neither was adverse to the other. We do not consider the objection to be well-founded. We dismiss this appeal with costs.

Memorandum of objections is not pressed, and is also dismissed with costs.

APPELLATE CIVIL.

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

KRISHNAYYA (PLAINTIFF), APPELLANT,

and

PICHAMMA (DEFENDANT), RESPONDENT.*

1887.
Oct. 10, 31.

Hindú Law—Inheritance—Bhandu—Daughter's son's son.

N., the daughter of J., inherited his property under Hindú law. N. had a son, who predeceased her, leaving a son K.:

Held that K., being a bhandu, was entitled to the property of J. on the death of N. in preference to the daughters of N.

APPEAL from the decree of T. Ramasami Ayyangar, Subordinate Judge of Cocanada, reversing the decree of K. Ramalinga Sastri, District Munsif of Narsapur, in suit No. 659 of 1884.

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

Subba Rau for appellant.

Srirangacharyar for respondent.

JUDGMENT.—In this case the house in dispute belonged to one Jogaiya, and, upon his death, it devolved on his daughter, Narasamma. Narasamma had a son, named Krishnaya, but he predeceased her, leaving him surviving a minor son, who is the appellant before us. The respondents are Narasamma's daughters, and, on her death, the appellant claimed the house as Jogaiya's next heir. The respondents alleged a gift to them, but it was found by both courts that there was no gift. Narasamma inherited the house from her father, and, upon her death, his heirs are entitled to succeed. The respondents are his daughter's daughters, and, as such, they are not in the line of his heirs. The appellant is only the son of Jogaiya's daughter's son, and it is conceded that he is not entitled to inherit as a sapinda; but it is contended that he is entitled to succeed at least as a bhandu. This contention appears to us to be well founded. The father's maternal uncle

* Second Appeal No. 1304 of 1886.

KRISHNAYYA and his son are the father's cognates, because the father's maternal grandfather is the person to whom they and the father offer funeral oblations, and though they belong to different families they are, on that ground, bhinna gotra sapindas. It follows, then, that the father's maternal grandfather, who is nearer to the father than his maternal uncle, is a bhinna gotra sapinda or bhandu as explained in Mitakshara, ch. II, s. v. 4. We, therefore, set aside the decree of the Subordinate Judge and restore that of the District Munsif with costs.

APPELLATE CIVIL.

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

1887.
Dec. 9, 20.

LAKSHMINARAYANA (DEFENDANT), APPELLANT,
and

DASU (PLAINTIFF), RESPONDENT.*

Hindú Law—Grant by widow for religious benefit of husband.

Where two widows of a zamindár granted a small portion of the zamindari to a brahman who had been brought up by them with a view that he should perform the funeral and annual ceremonies of their deceased husband:

Held, that the grant was not *ultra vires*, and could not be resumed by the zamindár's successor.

APPEAL from the decree of C. L. B. Cumming, Acting District Judge of Ganjam, confirming the decree of K. Murtirazu, Acting District Munsif of Berhampore, in suit No. 734 of 1884.

On the 2nd December 1863, two widows of an Uriya zamindár in Ganjam granted certain land valued at Rs. 140, a portion of the zamindari, to the plaintiff on condition of paying a kattubadi or quit-rent of Rs. 1-8-0 to the estate.

The deed recited that plaintiff had performed ceremonies for the late zamindár, that the land should be enjoyed for ever, and concluded with the following sentence: He who appropriates any gift made by himself or another shall suffer in hell as a worm for 60,000 years.

In 1883, the defendant, who had been adopted by the widows,

dismissed the plaintiff and resumed the land. Plaintiff sued to recover the land.

The Munsif found that it was customary among the Uriya zamindárs to appoint a brahman to perform funeral and annual ceremonies and not to perform them in person. The brahman so appointed was styled a "pro-son brahman."

The late zamindár had appointed one Lakshmana Panda as "pro-son brahman" to the family, and on his death the widows got the plaintiff, a brahman boy aged 7, and brought him up.

The plaintiff had performed the ceremonies and was willing to continue to perform them. The defendant contended that the grant was a service inam, and as such resumable.

It was stated in the District Court that it was necessary that the boy should be brought into the gotra of the zamindár whereby he ceased to be a brahman. The Judge held that under the circumstances the widows were bound to make a permanent provision for him.

Both the Lower Courts held that the grant could not be resumed.

Defendant appealed.

Ramachandra Rau Saheb and Venkoba Rau for appellant.

Rama Rau for respondent.

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

JUDGMENT:—On the death of one Lakshmana Panda, pro-brahman in the family of the late zamindár of Budaresingu, the widows of the zamindár brought plaintiff into the family for the performance of that office, and, on December 2nd, 1863, executed to him a deed of gift (A), which stated that, as he had performed the pro-brahman karma for their late husband, they have given him the land specified on a kattubadi of Rs. 1-8-0 per annum, which he was to enjoy from generation to generation as long as the sun and moon endure.

It is conceded that the gift was made rather for future than for past services and the extent given is only small.

About seven years after the grant defendant was adopted by the ladies, but plaintiff continued to perform the annual ceremonies as pro-brahman and to enjoy the land (paying the kattubadi) till June 1883, when defendant dismissed him and resumed possession of the land, to recover which plaintiff now sues.

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* Second Appeal No. 284 of 1887.

LAKSEMI-
NARAYANA
v.
DASTU.

The defendant's contention is that plaintiff is a mere servant whom he (defendant) can dismiss at pleasure, and that the gift of the land to plaintiff by the widows of the late zamindár was beyond the scope of the authority of a Hindú widow.

We cannot assent to this view of the plaintiff's position. The widows were the owners of the estate for the time being, and, in the lawful exercise of their rights of management, made an alienation of a very small piece of land for an indispensable religious necessity, not for their own sakes, but for that of their late husband. Such alienations under similar circumstances are recognized—vide *Rama v. Ranga*(1), *Paran Dai v. Jai Narain*(2), also *The Collector of Masulipatam v. Cavalry Vencata Narrainapah*(3).

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

1887.
Nov. 15, 23.

PATTAT AMBADI MARAR AND OTHERS (PLAINTIFFS),
APPELLANTS,

and

KRISHNAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Suit to recover money due on a promissory note by assignee of rights of payee not being endorsee.

K. executed a promissory note on demand for Rs. 6,000 in favor of S. in 1882. In 1884 S., by an agreement in writing, assigned all her property, including the promissory note, to M., but did not endorse over the promissory note to M. M. assigned his rights in the promissory note to a bank in payment of a debt. In a suit by M., and the bank against K. and S. to recover the principal and interest due under the note:

Held, that the plaintiffs could not maintain the suit.

APPEAL from the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in suit 33 of 1885.

The plaintiffs in this suit were (1) Pattat Ambadi Marar, (2) Raman Marar, and (3) E. Sherman, Agent of the Bank of Madras at Tellicherry.

(1) I.L.R., 8 Mad., 552.
(3) 8 M.I.A., 550.

(2) I.L.R., 4 All., 482.
* Appeal No. 158 of 1886.

The plaint contained the following allegations:—

- (1) First defendant promised to pay second defendant Rs. 6,000 on demand under a promissory note, dated 6th November 1882, now overdue.
- (2) First defendant has not hitherto paid that amount.
- (3) First defendant is the karnavan of his tarwad. The said amount is payable by him (first defendant) in capacity of karnavan as also in his private capacity. Therefore he, as well as (other) members of his family, and the properties of the tarwad, are liable to discharge this debt.
- (4) By a karar, dated 14th August 1884, entered into among plaintiffs 1 and 2 and second defendant and other members of their family, the plaint promissory note and other properties of second defendant were given with consent by him (second defendant) to (his) tarwad in consideration of the tarwad undertaking to discharge the debt due by him (second defendant), then, to the Madras bank, &c.
- (5) Under the said karar, it was agreed that all the acts in connection with the tarwad be done by plaintiffs 1 and 2.
- (6) On condition to credit the amount of his promissory note on recovery thereof to the (tarwad) debt, the right of the tarwad over it (promissory note) was assigned to third plaintiff.
- (7) The cause of action arose on 9th November 1882 at Thiruvangat within the jurisdiction of this court.

	RS.
Principal	6,000
Interest at 6 per cent. from 6th Nov.	
1882	1,080
	—
Total ..	7,080
	—

It is therefore prayed that a decree may be passed directing first defendant in the capacity of karnavan of the tarwad, as also in his private capacity, to pay the said amount and the future interest at 6 per cent. from this date till payment and also costs with interest to third plaintiff (on behalf of the bank).

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The Subordinate Judge dismissed the suit on the ground that under the Negotiable Instruments Act, 1881, the plaintiffs acquired no valid right to the property in the note.

Plaintiffs appealed, *inter alia*, on the following grounds:—

- (1) The suit was brought by the plaintiffs as assignees of the debt itself due to second defendant from first defendant, and not merely as holders and transferees of the promissory note, and the Court below was wrong in confining itself to the question whether the plaintiffs could sue as transferees of the note.
- (2) The decision of the Court below on the issue whether the plaintiffs, or any of them, have the right to sue upon the pro-note in question is erroneous in law.
- (3) A promissory note, payable to order, is transferable otherwise than by endorsement.

Mr. *Mitchell* for appellants.

Mr. *Brown* and *Anantan Nayar* for respondents.

The Court (*Muttusami Ayyar* and *Brandt, J.J.*) delivered the following judgment:—

MUTTUSAMI AYYAR, J.—On the 6th November 1882 the first respondent, *Krishna Nambiar*, made a promissory note in favor of the second respondent, *Sungunni Marar*, for Rs. 6,000, payable on demand. In 1884 it was arranged between the second respondent and other members of his tarwad that the tarwad was to discharge his debts and that he was to give up to it all his properties, inclusive of the promissory note; and in pursuance of that arrangement the promissory note evidenced by document A, was delivered by the second respondent to the first and second appellants. By document C, dated the 17th September 1884, the first and second appellants assigned their right to the third appellant. Although the promissory note was payable to *Sungunni Marar, or order*, it was not endorsed by him in favor either of the first and second appellants or of the third appellant. The first respondent, having failed to pay to the appellants the amount of the note, they brought the suit from which this appeal arises, to recover it. Both respondents resisted the claim and one of the questions raised for decision was whether the appellants, or any of them, were entitled to sue upon the promissory note A. The Subordinate Judge of North Malabar held that they could not maintain the suit, on the ground that

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there could be no valid transfer of a promissory note payable to order, otherwise than by both endorsement and delivery. It is urged in appeal that endorsement is not indispensable, and that a negotiable instrument may be transferred, like any other *chase in action* by a deed of assignment, and that, assuming that there was no valid transfer, the appellants were still entitled to a decree upon the original consideration.

I am of opinion that the decision of the Subordinate Judge is right. Document A, purports to be a negotiable instrument payable to the second respondent or order, and, until the latter endorses and delivers it, the property in the promissory note continues to vest in him. The learned counsel for the appellants admits that he cannot refer us to any case in support of his contention, and having regard to ss. 8 and 9 of the Negotiable Instruments Act, which define a holder of a promissory note and a holder in due course, and to s. 46, which declares that a promissory note payable to order is negotiable by the holder by endorsement and delivery. I entertain no doubt that it cannot be negotiated by the mere execution of a deed of assignment. I do not desire to be understood as holding that the appellants may not sue to compel the second respondent to endorse the promissory note, and after getting it endorsed, put it in suit against the maker, the first respondent, but that is not the relief prayed for in this suit, nor do I find either in the plaint or in the record of the suit any statement of the original consideration on which this action can be supported. It is also to be remembered that the appellants are not the payees. This being so, they cannot maintain an action on the original consideration between the second and first respondents until the property in the promissory note is divested from the second respondent, or until he is restrained from suing upon or negotiating it. The suit, as framed at present, must fail and I would dismiss this appeal with costs.

BRANDT, J.—I concur.

APPELLATE CIVIL.

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

1888.
Feb. 14, 29.

BASAVAYYA (PLAINTIFF), APPELLANT,
and

SUBBARAZU (DEFENDANT), RESPONDENT.*

Contract Act, s. 74—Penalty—Payment of higher rate of interest from date of bond on breach.

Where a mortgage-deed provided for repayment of the debt in four instalments with interest at 6 per cent. and in default of payment of any instalment on the due date, for interest at 12 per cent. from the date of the bond:

Held, following *Balkishen Das v. Run Bahadur Singh* (I.L.R., 10 Cal., 305) that the stipulation being reasonable, the plaintiff was entitled on default to recover the higher rate of interest from the date of the bond.

APPEAL from the decree of Venkata Rangayyar, Subordinate Judge at Ellore, confirming the decree of G. Hanumantha Rau, District Munsif of Tanuku, in suit 333 of 1885.

The facts and arguments appear from the judgment.

Subba Rau for appellant.

Respondent did not appear.

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

JUDGMENT:—The respondent executed in favor of the appellant the mortgage-bond A on the 21st October 1882. The bond provided for repayment of the debt in four instalments with interest at 6 per cent. per annum and stipulated that interest was to be paid at 12 per cent. per annum from the date of the bond in default of payment of instalments on the due dates. Both the lower courts held that the stipulation was penal and decreed interest only at 6 per cent. per annum. It is contended for the plaintiff in second appeal that the stipulation is not penal and whether it ought to have been enforced is the only question that arises for decision in this case.

In *Arulu Mastry v. Wakuthu Chinnayan*(1) decided in 1864 it was held by this Court that a stipulation to pay a higher rate of

* Second Appeal 272 of 1887.

(1) 2 M.H.C.R., 205.

interest on failing to repay the debt in six months was not penal. In that case the bond provided for payment of principal and interest at 1 per cent. per mensem in six months and in default that the rate of interest should be raised to 6½ per cent. per mensem from the due date. The Court observed that the plaintiff had a right under his contract to the higher rate of interest and that there was no ground for treating the higher interest as a penalty. In *Mackintosh v. Crow*(1) the High Court at Calcutta expressed a similar opinion. In that case, however, a distinction was made between a bond in which the contract is merely that if the money is not paid at the due date it shall thenceforth carry interest at an enhanced rate and a bond of which the provision is that in default of payment on the due date a higher rate of interest shall be payable from the date of the contract. The Court observed that in the last-mentioned case the provision was penal and referred to s. 74 of the Contract Act and to *Rasaji Davlaji v. Sayana Sagdu*(2), *Mazhar Alikhan v. Sardarmal*(3), and *Muthura Persad Singh v. Luggun Kooer*(4). In *Muthura Persad Singh v. Luggun Kooer* it was observed that when the agreement was to pay an increased rate of interest from a future day it might well be regarded as a substantive part of the contract, not as a penalty for its breach; but where, as in that case an increased rate of interest was made payable from the date of the bond in case of default, it could not be regarded in any other light than as a sum named in the contract to be paid in case of breach within the meaning of s. 74 of the Contract Act. In *Jaganadham v. Ragunadha*(5) an agreement to pay higher interest from the date of default was held not to be penal and *Mackintosh v. Crow* was approved.

The result of the foregoing decisions, so far as they bear on the question before us, was that an agreement to pay an enhanced rate of interest on default from the date of default was not penal, because such agreement was a substantive part of the contract, but that an agreement to pay higher interest on default from the date of the bond was penal, because it was an agreement to pay a sum mentioned in the contract in case of breach. The question, however, ultimately came under the consideration of the Privy Council

(1) I.L.R., 9 Cal., 693.

(3) I.L.R., 2 All., 769.

(2) 6 Bom. H.C.R., A.C., 7.

(4) I.L.R., 9 Cal., 615.

(5) I.L.R., 9 Mad., 276.

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BASAVAYYA
v.
SUBBARAYU. In *Balkishen Das v. Run Bahadur Singh*(1). In that case as in the one before us, the agreement was to pay on default higher interest at one rupee per cent. per mensem from the date of the solehnama. Adverting to the contention that such an agreement was penal, the Judicial Committee said, "it was not a penalty, and even if it were so, the stipulation is not unreasonable, inasmuch as it was a mere substitution of interest at 12 instead of 6 per cent. per annum in a given state of circumstances." The true test is not whether the agreement is a contract to pay a given sum on its breach, but whether it is reasonable in the circumstances of the case or only substitution of a higher for a smaller rate of interest in a given state of circumstances. Following the decision of the Privy Council, we modify the decrees of the courts below by awarding to the plaintiff interest at 12 per cent. instead of 6 per cent. per annum from the date of the bond A to the date of realization, and his whole cost throughout, and confirm the decrees in other respects.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

VELAN (DEFENDANT No. 4), APPELLANT,

and

KUMARASAMI AND ANOTHER (DEFENDANT No. 2 AND PLAINTIFF),
RESPONDENTS.*

*Civil Procedure Code, 1859, s. 259—Certificate of sale—Registration Act, 1866, s. 49—
Proof of title without production of certificate—Omnia presumuntur rito esse
acta.*

Assuming that s. 49 of the Registration Act, 1866, required that a certificate of the sale of land in execution of a decree passed under the Civil Procedure Code, 1859, should be registered, a plaintiff who has purchased land at such a sale is not bound to rely on the certificate to prove his title.

If it is proved *aliunde* that the sale took place and that possession was given, the Court should presume, after long lapse of time and possession by a mortgagee of the purchaser, that the sale was duly made by the Court.

APPEAL from the decree of C. Venkoba Rau, Subordinate Judge of Madura (West), reversing the decree of P. A. Lakshmana Chetti, District Munsif of Tirumangalam, in suit 525 of 1885.

(1) I.L.R., 10 Cal., 305.

* Second Appeals 165 and 307 of 1887.

The facts necessary for the purpose of this report appear sufficiently from the judgment of the Court (Kernan and Wilkinson, J.J.).

VELAN
v.
KUMARASAMI.

Bhashyam Ayyangar for appellant.

Subramanya Ayyar for respondent No. 1.

JUDGMENT.—This is a suit to recover possession of certain lands in the possession of the defendants on payment of the mortgage amount.

The plaint lands originally belonged to the zamindar of Padamatur.

The plaintiff's case is that Kanaka Nachiar, the widow and representative of Gourivallaba Tevar, the last zamindar of Padamatur, who died in 1861, mortgaged the lands in 1866 to Pingala Krishna Rau (exhibit D); that in 1869 the lands having been attached in execution of a decree obtained by one Odayappa Chetti against the zamindar, Sethu Rau, the son of the mortgagee, purchased them; that after the death of Krishna Rau and Sethu Rau their heir and representative Krishnammal alias Sithabhai Ammal relinquished all her rights in favor of Rathabhai Ammal (exhibit B), who, in 1885, sold the lands to plaintiff (exhibit A), subject to a mortgage lien of Rs. 812-12-0 due under the mortgage bond executed by Sethu Rau to defendant No. 3 (exhibit M).

Defendant No. 2 (appellant in S.A. 307) pleaded, *inter alia*, that Sethu Rau acquired no right by the Court sale in 1869—no certificate of sale having been granted, or if granted, the certificate not having been registered, that in 1874 Saluga Tevar, the brother of the late zamindar, having sued defendant No. 3 for the land, a compromise (exhibit K) was entered into, by which defendant No. 3 relinquished all his rights to, and possession of, the land to Saluga Tevar, whose son, Periasami Tevar, assigned his rights to defendant No. 2 in 1882 (exhibit I), since when defendant No. 2 had been in possession as owner.

Defendant No. 4 (appellant in S.A. 165) admitted the validity of plaintiff's purchase from Rathabhai Ammal, but pleaded purchase from Periasami Tevar in 1878.

The District Munsif dismissed the suit on the ground that the plaintiff had acquired no valid title, inasmuch as it was not shown that the sale certificate said to have been obtained by Sethu Rau in 1869, though liable to compulsory registration, had been

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UMARASAMI. registered that it was not proved that plaintiff's vendor ever had possession.

The Subordinate Judge reversed the decree of the Munsif, holding that the production of the sale certificate was not necessary; that the registration of the sale certificate was not compulsory, and that Sethu Rau obtained a valid title under the Court sale.

The first question raised in second appeal is that, as no interest passed by the alleged sale in execution of the decree in Original Suit 5 of 1866, the plaintiff has no valid title. Original Suit 5 of 1866 was a suit instituted by Odayappa Chetti against the late zamindar, Kumarasami Peria Udayar Tevar, and his younger brother, Gouri Vallaba Tevar, and, as appears from (exhibit E), what was sold in execution of the decree obtained by Odayappa Chetti and purchased by Sethu Rau was "the right, title, and interest of the said zamindar alone." It is contended that the defendants in the said suit, who were cousins of the late zamindar, had no right to be treated as his representatives, and that as Kanaka Nachiar, the widow and sole representative of Gouri Vallaba Tevar, was no party to the suit, the sale in execution of that decree conferred no title on the purchaser, Sethu Rau. It does not appear that this objection was raised in either of the Courts below; defendant No. 2 (appellant in S.A. 307) relying on the invalidity of plaintiff's title owing to the non-registration of the certificate and his purchase from Periasami Tevar in 1882. The Courts below have held that that purchase was good and valid, and, if it be found that plaintiff acquired no valid title by the purchase in Court sale, it will be unnecessary to decide the question mentioned above. No doubt the Full Bench decision, *Srinivasa Sastri v. Seshayyengar*(1) was that the sale certificate under the Code of 1859 was the instrument whereby a transfer of the title and interest of the execution debtor was made, and that, therefore, under the Registration Act XX of 1866, s. 49, that certificate should be registered, and that, as it was not registered, evidence could not be given of it. If, therefore, it was necessary in this case to decide the same question, we are bound to follow that decision, or to refer the point for further consideration of a Full Bench.

In that case the decision in *Mussumat Buhuns Kowur v. Lalla Buhooree Lall*(2) was not brought to the notice of the Full Bench,

(1) I.L.R., 3 Mad., 37.

(2) 14 M.I.A. 500

nor did the Court consider it. Again the Privy Council held that the certificate did no more than create statutory evidence of the transfer in place of transfer by bill of sale. If that case was now considered by a Full Bench the Court would probably hold that neither the production of the certificate nor its registration was necessary when proof of the Court sale and delivery of possession was made (see the observation of Innes and Muttusami Ayyar, JJ., in *Velliyammal v. Katha*(1)). See also *Narasayya v. Jungam*(2), decided by the Chief Justice and Muttusami Ayyar, J., in which it is stated: "The language of Act VIII of 1859, which might have given colour to the contention that a certificate was a conveyance, was construed otherwise by the Privy Council."

However the question which we have to consider is whether the plaintiff is obliged to rely on the certificate. It has been found as a fact by the Munsif and by the Subordinate Judge that Sethu Rau purchased the property in the Court sale on 22nd October 1868, and that the sale was complete, that, on the same day, he mortgaged the lands to defendant No. 3, who was, after the date of his mortgage, in possession.

Plaintiff's title as transferee of Sethu Rau's title (subject to the legal question) is established by both Courts from the documents proved.

Defendant No. 3 got possession from Sethu Rau.

The question, therefore, is whether the purchase by Sethu Rau was not well proved without reference to the certificate. On principle it seems to us it was. There was a sale completed and possession was given. The rule of presumption, *omnia rite acta*, applies especially after such lapse of time, and long possession under the sale by the mortgagee from the purchaser, and recollecting that the principal documents to prove the confirmation order may have been either lost or destroyed under the order for destruction of records.

On authority also, we think it was not necessary for the plaintiff to prove either the certificate or registration of it. In *Velliyammal v. Katha*(1), above referred to, the Court, in giving judgment, remarks as follows on the decision in 14 More, p. 453: "If this be the effect of the grant of the certificate, it is clear such certificate is not necessary to pass the title. But then the question

(1) I.L.R., 5 Mad., 561.

(2) I.L.R., 7 Mad., 420.

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comes whether a purchaser at a Court sale can recover in a suit without producing the certificate. If it is admitted, as is the case here, that the Court auction did take place, and that the property was sold to the person whom plaintiffs now represent—that would seem to be a sufficient admission that the title passed to that person."

In that case the sale by the Court was proved by the admission of the defendant. Defendant No. 2 here denies the sale, but the fact is proved against him. An admission by a party dispenses with other proof. But it is a form of proof (see Evidence Act, s. 17 and 31). When no admission is made of a relevant fact it may be proved *aliunde*. In *Jagan Nath v. Baldeo*(1), a Full Bench held that it was not incumbent on the purchaser to produce a certificate of the sale to him, and it was competent to him to prove his purchase *aliunde*. The Court observed that the confirmation of the sale to the purchaser under Act VIII of 1859 was *prima facie* evidence of his title, and was sufficient to pass such title to him, of which a certificate, if afterwards obtained, would be merely evidence that the property so passed. In *Doorga Narain Sen v. Baney Madhub Mozoomdar*(2), and *Tara Prasad Mytee v. Nund Kishore Giri*(3), the fact of sale was admitted, and the Court held that the production of the sale certificate was not necessary, and that the order of confirmation passed the title. If we are right that the presumption we have above referred to is now to be made that all things were done by the Court, to give the purchaser a title, such as confirmation order, then this case stands on the same footing as those cases decided in Allahabad and Calcutta. We are therefore of opinion that on this main question we may confirm the Subordinate Judge's decision.

We dismiss both appeals.

(1) I.L.R., 5 All., 305.

(2) I.L.R., 7 Cal., 207.

(3) I.L.R., 9 Cal., 842.

APPELLATE CIVIL.

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

VENKATASAMI (JUDGMENT-CREDITOR), APPELLANT,
and

NARAYANARATNAM (JUDGMENT-CREDITOR), RESPONDENT.*

Civil Procedure Code, ss. 228, 239, 344, 360—Application to be declared insolvent made to Court to which decree was transferred for execution.

Where a decree had been transferred for execution from the Court of the District Munsif of E, to that of the District Munsif of B, and an application was made by the judgment-debtor under s. 344 of the Code of Civil Procedure to be declared an insolvent and entertained by the latter Court :

Held, that the District Munsif of B. had no jurisdiction to entertain the application.

APPEAL against an order of E. Subbarayadu, District Munsif of Bezwada, passed under s. 344 of the Code of Civil Procedure, declaring one Golla Narayanaratnam, defendant in suit 99 of 1882, on the file of the District Munsif of Ellore, an insolvent.

The appeal was preferred by Simakurti Venkatsami, an opposing creditor, on the ground that the Court held no jurisdiction to entertain the application.

Parthasaradi Ayyangar for appellant.

Venkata Subba Rau for respondent.

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

JUDGMENT.—A decree was passed against the respondent in the Court of the District Munsif of Ellore, and was transferred for execution to the Court of the District Munsif of Bezwada. On the respondent being arrested, he applied to the District Munsif of Bezwada to be declared an insolvent, and has been so declared.

The ground taken in appeal is that the District Munsif of Bezwada acted without jurisdiction in entertaining the insolvency application.

The second paragraph of s. 360 of the Code of Civil Procedure provides that any Court invested by the Local Government with

* Appeal against Order No. 56 of 1887.

1887.
Aug. 26,
Sept. 1.

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the powers conferred on District Courts by s. 344-359 may entertain any application under s. 344 by any person arrested in execution of a decree of such Court. In the present case the decree in execution of which the respondent was arrested was passed by the Court of the District Munsif of Ellore, and not by the Court of the District Munsif of Bezwada.

But it is contended that an application to be declared an insolvent, when made on an arrest, is part of the proceedings in execution, and that under s. 228 of the Code of Civil Procedure the Court executing a decree has the same powers as if the decree had been passed by itself. We cannot accede to this contention. The procedure for declaring a judgment-debtor an insolvent falls under a different chapter of the Code, and may be resorted to without the judgment-debtor having been first arrested.

The powers of a Court executing the decree of another Court are limited, and, we think, the proper procedure for the District Munsif of Bezwada would have been to stay proceedings under s. 239 for a reasonable time in order to enable the judgment-debtor to apply to the District Court to be declared an insolvent, such discharge would not under s. 241 have prevented the person of the judgment-debtor being retaken in execution, if his application to be declared an insolvent was eventually dismissed. The terms of s. 360 preclude a District Munsif from entertaining insolvency application by a person arrested in execution of a decree of any other Court than his own.

We must allow the appeal and set aside the order declaring respondent an insolvent, but as the point is a new one and the objection was not taken in the Court below, we will make no order as to costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

BHASHYAM AND OTHERS (DEFENDANTS), PETITIONERS,

and

JAYARAM (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 622—Error of law—Material irregularity—Personal decree against minors for debt of deceased Hindu father.

In a suit to recover a debt incurred by the deceased father of a Hindu family, the District Judge gave a personal decree against the sons of the debtor, of whom two were minors:

Held, that under s. 622 of the Code of Civil Procedure, the decree against the minors should be reversed, but that the Court had no power to revise the decree against the other defendants.

APPLICATION under s. 622 of the Code of Civil Procedure to set aside the decree of S. T. McCarthy, District Judge of Chingleput, modifying the decree of P. Dorasami Ayyar, District Munsif of Chingleput, in suit 73 of 1886.

Plaintiff by his next friend sued to recover from defendants Rs. 408, principal and interest, due under a promissory note executed on 15th February 1882 by the (deceased) father of defendants 1, 2, 3 and 4 and by Narasimhulu Naidu, the (deceased) undivided brother of defendants 5 and 6. The Munsif decreed that plaintiff should recover the amount claimed and costs from the self-acquired property of Narasimhulu Naidu, deceased, "if he has any."

On appeal the District Judge decreed that defendants 1 to 4 and their share of the undivided family property should be held liable for the amount sued for.

This application was made by defendants 1 to 4, defendants 3 and 4 being minors.

Mr. Ramasami Raju for petitioners.

Parthasardi Ayyangar and Srirangacharyar for respondents.

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

JUDGMENT:—The defendants 1 to 4 were bound by their father's debt to be recovered out of any assets of their father or out of

1887.
Dec. 19.

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ancestral property of the father and sons. Under the circumstances it may have been illegal for the Judge to make a personal decree against any of the defendants 1 to 4. But the word "illegal" in s. 622 has been held by the Privy Council not to mean an error of judgment—*Amir Hassan Khan v. Sheo Baksh Singh*(1). The Judge had jurisdiction to determine the question of liability of the defendants to pay the debt, and in the exercise of his judgment he may have decided erroneously, but we cannot interfere as to this. Then did he act with material irregularity? Irregularity refers to procedure. The Judge did not distinguish between the adult and non-adult defendants 1 to 4. In the circumstances procedure did not warrant a personal decree against an infant. As regards the infants 3 and 4 the Judge acted with material irregularity in giving a personal decree against them.

Therefore so far as it did give such personal relief against the infants, the decree is set aside.

APPELLATE CIVIL.

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

ARIYAPUTRI (DEFENDANT No. 1), APPELLANT,
and

ALAMELU AND ANOTHER (PLAINTIFF AND DEFENDANT No. 2),
RESPONDENTS. *

Hindu law—Widow's estate—Mortgage by two co-widows—Sale of equity of redemption in execution of decree against one widow—Suit to redeem by other widow—Decree for redemption of moiety on payment of moiety of mortgage amount.

A mortgage of ancestral estate having been made by A. and B., two Hindu co-widows, the equity of redemption of the said estate was sold in execution of a decree for money against B. only and purchased by the mortgagee:

Held, that A. was entitled to redeem only a moiety of the estate during the lifetime of B.

APPEAL from the decree of J. Hope, District Judge of South Arcot, confirming the decree of C. Suri Ayyar, District Munsif of Cuddalore, in suit 53 of 1886.

(1) I.L.R., 11 Cal., 6.

* Second Appeal 16 of 1887.

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

Subramanya Ayyar for appellant.

Ramachandra Rau Sahib for respondents.

JUDGMENT.—The land in suit lately belonged to one Narrainsami Padayachi, since deceased, and the respondents are his childless widows. In December 1871 they executed a mortgage in appellant's favor for Rs. 500, and it is conceded that that mortgage is valid as against them. In original suit No. 589 of 1873, one Senji Chetti obtained a money decree against respondent No. 2 and her mother-in-law only, and in execution of the same, he attached and brought to sale the equity of redemption. Whilst that decree was under execution, respondent No. 1 objected to the attachment and sale on the ground that her husband and one Malaya Perumal were coparceners, and that upon the death of the former, the latter became entitled to the land in dispute by right of survivorship. Her objection was, however, overruled and the equity of redemption was put up to sale, at which the appellant became purchaser. Malaya Perumal instituted a suit afterwards to set aside the sale and failed. Thereupon respondent No. 1, who was not a party to the decree in original suit No. 589 of 1873, brought the present suit to redeem the mortgage of December 1871. The appellant resisted the claim and relied on the auction sale of the equity of redemption. He contended further that respondent No. 1 was not entitled to maintain the suit, as she disclaimed all interests in the land during the execution of the decree in original suit No. 589 of 1873.

It has been found in this case that the debt decreed in that suit was not one which could bind either respondent No. 1 or Narrainsami's estate. The court sale of the equity of redemption is therefore inoperative as against her and her interest in her husband's property. Nor is she estopped from maintaining this suit by reason of her having disclaimed all interest in the execution proceedings in original suit No. 589 of 1873. Though she then acted in collusion with Malaya Perumal, she did not thereby forfeit the right which she really had to her husband's property. The appellant was clearly not misled by her statement, for he purchased the equity of redemption in spite of it. The plea of estoppel must be overruled. Another contention in appeal is that the respondent No. 1 as one of Narrainsami's two widows can

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only redeem a moiety of the land in question and that the appellant is entitled to remain in possession of the other moiety during the lifetime of the other widow, respondent No. 2; this contention appears to us to be well founded. If Narrainsami left but one widow, and she sold his property for a purpose which was not binding on the reversion, the sale, although invalid as against the reversioner, would be good as against her to the extent of her life-interest. The reason is that she would then be a party to the sale, and, though she could not prejudice the reversion, the sale would certainly bind such interest as she had. We see no sufficient reason to hold that the same principle is not applicable in the case of an alienation by one of two widows. It is true that when there are more widows than one, they take together as a class. It is also true that partition is permitted between them not as in the case of male-coparceners for the purpose of converting a joint estate into two or more separate estates to be held in severally, but for the limited purpose of securing to each widow a distributive enjoyment of the benefit of joint property. In this view partition between them certainly creates no separate property in the portions placed in their separate possession and no disposing power so as to defeat the right of survivorship vesting in the co-widow, but as between them, each widow is entitled to take the income of the portion placed in her possession during her life, and it is to this extent the purchase must be upheld; otherwise, the widow that sells may induce her co-widow to recover the entire property sold and give her back her share so as to defraud the purchaser. Neither in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1) nor in *Gajapathi Nilamani v. Gajapathi Radhamani*(2) it decided that the widow's right to separate possession of her share might not be sold in execution of a decree against her subject to the co-widow's right of survivorship. As observed in both neither widow has disposing power so as to create separate property, but this is not inconsistent with her right of separate beneficial enjoyment during her life being bound by her own voluntary act or by a court sale in execution of a decree against her. We shall therefore modify the decrees of the lower courts and decree redemption of a moiety of the land sued for on payment of a moiety of the mortgage debt and declare the plaintiff entitled to redeem

(1) 3 M.H.C.R., 424.

(2) I.L.R., 1 Mad., 290.

the other moiety on the death of the second respondent and confirm them in other respects. Each party will bear his costs in this court.

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APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

KESAVA AND OTHERS (PLAINTIFFS), APPELLANTS,
and

UNIKKANDA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Malabar Law—Maintenance claimed by anandavans living in tarwad house against karnavan, who had left tarwad house and neglected to maintain family.

Where a suit was brought by an anandravan of a Malabar tarwad living in the family house for maintenance against the karnavan, who had left the family house, resided elsewhere, and neglected to maintain the plaintiffs:

Held that the plaintiffs were entitled to maintain the suit—*Kunhammatha v. Kunhi Kutti Ali* (I.L.R., 7 Mad., 235) distinguished.

APPEAL from the decree of F. H. Wilkinson, District Judge of South Malabar, confirming the decree of S. Subramanya Ayyar, District Munsif of Temelprom, in suit 89 of 1885.

The facts are set out in the judgment of the District Court, which was as follows:—

“This was a suit by certain members of the Naidalath Puthen house, a tarwad governed by Marumakatayam law, against their karnavan and certain others for a separate allotment of maintenance.

“The Munsif held that the suit would not lie, the High Court having in *Kunhammatha v. Kunhi Kutti Ali*(1) ruled that a member of a Malabar tarwad living in the tarwad house cannot bring a suit against the karnavan for a monthly allowance on the ground that the karnavan does not make sufficient provision for his or her maintenance.

“The plaintiffs appeal on the ground that the issue as to whether the suit was maintainable was not founded on the pleadings and that the case is different from that quoted above.

“In the above case the Chief Justice remarked: ‘I can find

* Second Appeal 923 of 1886.

(1) I.L.R., 7 Mad., 235.

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UNIKKANDA. no authority, and none has been cited at the bar, to show that members of the tarwad residing in the tarwad house are entitled either separately or collectively to obtain a decree for the payment monthly of allowance in money on the ground that the karnavan does not make sufficient provisions for their maintenance.

"The mere fact that the plaintiffs in this suit claim maintenance partly in paddy and partly in money is not in my opinion sufficient to take the case out of the above ruling, and so long as that is the law laid down by the High Court, the Munsif was clearly justified in raising an issue as to whether the suit would lie. The plaintiffs are admitted living in the tarwad house and are in possession of considerable tarwad property, but they appear to be dissatisfied because the karnavan lives away from the family house, and because they are of opinion that he has not allowed them a full and proper share of certain prizes which he has recently drawn in lotteries. If so, a suit for removal of the karnavan on the ground of neglect of duty might lie, but a suit for maintenance assuredly does not.

"The appeal is dismissed with costs."

Sankaran Nayar for appellants.

Respondents did not appear.

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

JUDGMENT:—The case, upon the authority of which the Courts below have thrown out the appellants' claim, is not on all fours with the present. In *Kunhammatha v. Kunhi Kutti Ali*(1), the right of anandravans of a Malabar tarwad to receive maintenance is not questioned; but there the parties were living in the tarwad house with the karnavan and were being maintained, but they wanted a special allowance, objecting to the scale of maintenance with which they were provided. Here the case for the appellants is that up to October 1883 they had been maintained by the karnavan in the tarwad house, but that the first respondent then went away from that house to live elsewhere, leaving them unprovided for.

We are not aware of any decided case and are of opinion that there is no principle with reference to which it should be held that the appellants in such circumstances are not entitled to maintenance.

(1) I.L.R., 7 Mad., 235.

We set aside the decrees of the Courts below and remand the case for disposal on the merits by the Court of first instance.

The respondents do not appear, and we direct the costs throughout be provided for in the revised decree.

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan, Mr. Justice Muttusami Ayyar,
Mr. Justice Parker, and Mr. Justice Wilkinson.

KAMARAJU (PLAINTIFF), APPELLANT,

and

THE SECRETARY OF STATE FOR INDIA (DEFENDANT),
RESPONDENT.*

1886.
Sept. 15.
1887.
Nov. 22.
1888.
Jan. 17.

Madras Forest Act, 1882, s. 10—Decision as to title to land, appeal to High Court from decision of District Court on appeal—Boundary Act, 1860, s. 25—Regulation V of 1804—Representation of minor by manager of estate—Decision of Boundary Officer res judicata, if not contested by suit under s. 25.

An appeal lies to the High Court from a decision of a District Court passed under s. 10 of the Madras Forest Act, 1882, on appeal from the decision of a Forest Settlement Officer.

A Survey Officer in 1875 held an enquiry under the Boundary Act, 1860, and demarcated certain land out of a zamindar. At that time the zamindar was a minor under the Court of Wards and he was represented at the enquiry by the manager of his estate appointed under s. 8 of Regulation V of 1804. In a suit brought by the zamindar to recover the land it was contended that the decision of the Survey Officer was not binding on the zamindar because he was not properly represented by his guardian at the enquiry:

Held, that the decision of the Survey Officer was binding on the zamindar, and that the matter in dispute was *res judicata*, no appeal by way of suit as provided by the Boundary Act, 1860, s. 25 having been brought.

APPEAL from the decree of T. Weir, District Judge of Madura, confirming a decision of F. E. Robinson, Forest Settlement Officer, under the Madras Forest Act, 1882.

On the 15th September 1886 the Division Bench (Collins, C.J., and Kernan, J.) referred the case to the Full Bench.

The order of reference was as follows:—

The plaintiff, the zamindar of Bodinayakanur, claimed before the Forest Settlement Officer of Madura to recover from Gov-

* Second Appeal 786 of 1885.

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ernment a tract of forest land called Tambirankaval. In the course of the survey, in 1875, the Deputy Superintendent of Survey, acting under Act XXVIII of 1860, held an enquiry and demarcated the said lands out of the zamindari. The zamindar was then a minor under the Court of Wards, and no appeal by a regular suit was preferred as provided by the said Act to set aside the decision.

The ground of the zamindar's claim is that the decision in question is not final, and that he is not barred by the law of Limitation, as the Government, holding possession through the Court of Wards, were constructively his trustees (s. 10 Limitation Act). The Forest Officer and the District Judge (on appeal) held that possession by the Court of Wards did not constitute the Government as trustees—*Palkonda zamindar v. The Secretary of State for India*(1) and that s. 10, Limitation Act, did not therefore apply; that the decision of 1875 was final and binding as no steps were taken to set it aside within the time allowed by s. 25 of that Act, and that, as that Act provided a specific remedy and fixed a time for it, no other remedy was open and the general rule of 12 years' limitation for recovery of immovable property was inapplicable.

The appellant (zamindar) before this court contends that his claim is not *res judicata* and is not barred by time, that he was no party to, nor was properly represented in, the proceedings before the Survey Superintendent, and that the remedy provided by s. 25 of Act XXVIII of 1860 is not the only one open to him.

The questions referred for the consideration of the Full Bench are:—

- (1) Is there an appeal?
- (2) Is the zamindar bound by the acts of the Settlement Officer under Act XXVIII of 1860?
- (3) Is the claim barred by limitation?
- (4) Is plaintiff entitled to succeed under the present appeal?

Subramanya Ayyar for appellant.

The Government Pleader (*Mr. Powell*), for respondent.

The Full Bench (*Kernan, Muttusami Ayyar, Parker, and Wilkinson, JJ.*) delivered the following

(1) I.L.R., 5 Mad., 91.

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JUDGMENT:—The plaintiff, the zamindar of Bodinayakanur, claimed before the Forest Settlement Officer of Madura a tract of forest called Tambirankaval, which tract of land the Government proposed to constitute a reserved forest, and had included in a notification published under s. 4 of the Madras Forest Act V of 1882. The Forest Settlement Officer rejected the claim under s. 10, and, on appeal to the District Court under the same section (10), the District Judge has confirmed the decision appealed against. Against the decision of the District Court a second appeal has been preferred, and the first point referred to the Full Court by the Division Bench is whether an appeal will lie.

Chapter II of the Madras Forest Act deals with the manner in which land at the disposal of Government may be constituted a reserved forest. A clear distinction is drawn in the Act between lands which are at the disposal of Government and those which are not,—chapter III dealing with the protection of land at the disposal of Government which it is not proposed to include in a reserved forest, and chapter IV with the control over forest and lands not at disposal of Government, or in which Government has a limited interest. In order that land may be constituted a reserved forest, it is necessary that it should first be at the disposal of Government, and chapter II prescribes the mode in which claims may be settled or rights acquired by Government before the final notification under s. 16 declaring the limits of the reserved forest is issued.

The first step to include any land in a reserved forest consists in the issue of a notification under s. 4 in which the lands to be so included are specified, and an officer (called the Forest Settlement Officer) is appointed "to enquire into and determine the existence, nature, and extent of any rights claimed or alleged to exist, and to deal with the same as provided in this chapter." Section 8 provides that the Forest Settlement Officer shall, in the conduct of all such enquiries, record the evidence in the manner prescribed by the Code of Civil Procedure in *appealable* cases, and s. 5 bars the ordinary right of suit in the Civil Courts until the final notification under s. 16 has been published, which publication cannot take place (1) until the Forest Settlement Officer has disposed of all claims which have been made, and (2) until the period for appealing has lapsed and all appeals have been disposed of by the appellate authority, and (3) until lands for which claims

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have been allowed have been acquired under the Land Acquisition Act, 1870.

It is evident from this that the Forest Settlement Officer is constituted a court with special jurisdiction, from which court a regular appeal lies to the District Court, which is a court of regular jurisdiction, from the decrees of which (passed in appeal) a second appeal ordinarily lies to the High Court under the provisions of s. 584 of the Code of Civil Procedure.

The decision of the District Court passed on appeal from the decisions of the Forest Settlement Officer is clearly a decree within the meaning of the Civil Procedure Code, and the second appeal is not taken away by express enactment. It remains to consider whether the second appeal has been taken away by necessary implication on the part of the Legislature. The presumption is against the taking away of a substantive right of a very valuable nature by mere implication, and it may be fairly contended that had the Legislature so intended, it would have expressly said so.

In this view of the case it is pertinent to consider whether the right of ultimate appeal to the High Court is barred with respect to claims which may come up for investigation under this Act other than those which are dealt with under s. 10.

Section 11 deals with the investigation by the Forest Settlement Officer into claims to rights defined in clauses (a)—(d) of s. 10; and s. 14 provides for an appeal from his decision either by the claimant or by the Forest Officer (as representing Government) to a "Forest Court" or to a Revenue Officer specially appointed under that section to hear appeals from such orders. The constitution and procedure of this "Forest Court" is defined by ss. 37—40, and the last clause of s. 14 prescribes that the Revenue Officer hearing such appeals in the absence of a Forest Court shall be guided by the provisions of ss. 39 and 40 in the same way as a Forest Court would be so guided. These two sections enable a Forest Court to state a case for the opinion of the High Court on the arising—at the hearing—of any question of law, or usage having the force of law, or of the construction of a document affecting the merits of the case, and this reference may be made by the court of its own motion, or on the application of any of the parties. It is further provided that the order of the High Court shall be binding on the Forest Court.

It is thus seen that claims to rights described in clauses (a)—

(d) of s. 10 are not made appealable to the regular courts,—but to a specially constituted tribunal, from which a second appeal would not lie to the High Court under the ordinary law,—but that, in making these decisions so appealable the Legislature has been careful to provide a mode for the ultimate determination by the High Court of the very question on which a second appeal would lie had the decision been that of an Appellate Court of regular jurisdiction. It is hardly probable that the Legislature would have provided for the ultimate determination by the High Court of a class of accessory rights over land while intending at the same time to bar the jurisdiction of the High Court in the determination of the title to the land itself.

Further the Act provides for the acquisition by Government of the land itself in cases in which claims have been allowed, and no agreement has been come to with the claimant for the surrender of his rights. For this purpose (s. 10) the Forest Settlement Officer is invested with the powers of a Collector under Act X of 1870 and the procedure of Act X of 1870 is made applicable for the acquisition of such lands. This involves a possible regular appeal to the High Court, if the decision appealed against is that of the District Judge (s. 35, Act X of 1870) and perhaps a second appeal if the decision be that of an inferior court—*Atri Bai v. Arnopoorna Bai*(1). Though under s. 16 of the Land Acquisition Act the land may vest immediately in the Government so that the notification under s. 16 of the Forest Act can issue, the jurisdiction of the High Court for the determination of title is not ousted; and similarly it may be pointed out that though, under s. 16 (b) of the Forest Act the notification may issue when the appeals have been disposed of by the appellate authority (the District Court and Forest Court are here referred to), it is only rights in respect of which no claims have been preferred under s. 6 that are extinguished under s. 17, thus leaving it open to any person whose claim has been disallowed on appeal by the District Court to prosecute any other remedy which may be open to him under the general law. The effect of s. 5 is to substitute for a limited time a special tribunal of first instance (with an appeal therefrom) in the place of the ordinary courts of first instance and regular appeal, but on the issue of the

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notification under s. 16 all rights which are not *res judicata* or extinguished under s. 17 will revive, and may be prosecuted as before by any remedy still available under the ordinary law. The intention of the Act appears to be to compel all persons having claims to bring them forward for settlement under pain of losing them by extinction under s. 17. When once brought forward it is open to Government to acquire them, or to exclude the area over which they are claimed from the limits of the proposed "reserved forest."

On the first question referred to us, we would therefore reply to the Division Bench that a second appeal does lie to the High Court from a decision of the District Court under s. 10 of the Forest Act.

The next question referred to us for consideration is whether the decision of February 1875, under the Boundary Act XXVIII of 1860, is binding on the zamindar. The ground on which it is urged for the appellant that it is not binding, is that the zamindar was no party to, nor was he properly represented in, the proceedings before the Survey Superintendent. It may be observed that this is an entirely new plea raised for the first time in second appeal, the sole contention in the courts below having been that the Government had been constructive trustees for the zamindar and hence that no length of time could bar the zamindar's claim under s. 10 of the Limitation Act. The decision of the Privy Council in the *Palkonda case*(1) is decisive on this point, and it is not again urged on second appeal.

At the time of the enquiry under the Boundary Act the zamindar was a minor under the Court of Wards under the provisions of Regulation V of 1804, and he was represented at the enquiry by the manager of his estate appointed under s. 8 of that Regulation. It is contended that the Collector could not properly represent both the Government and the zamindar in legal proceedings in which the interests of Government and the zamindar were opposed, and that, under s. 23 of the Regulation, the minor should have been represented by his guardian appointed under s. 19. A clear distinction is drawn in the Regulation between the duties of manager and those of the guardian; the manager being entrusted with the care of the estate, and the guardian with

the person of the minor. The guardian has nothing to do with the income of the estate, except that portion of it which is set aside for the maintenance and education of the ward. It would appear therefore that the manager entrusted with the preservation and with the custody of the records of the estates would be a more appropriate person to represent the estate at an enquiry under the Boundary Act than the guardian who was only entrusted with the personal care and education of the ward.

The objection is purely a formal and technical one, for it is not contended that the omission of the guardian to attend at the enquiry caused substantial injury to the ward.

Section 23 provides that disqualified persons, being in the custody of guardians, shall not be liable to be sued on any actions otherwise than as under the protection and in the joint name of their guardians. Strictly speaking, therefore, a claim put forward on behalf of the minor under s. 3, Act XXVIII of 1860, was not a suit on an action against the minor within the meaning of s. 23, Regulation V of 1804.

In support of the contention we were referred by the learned pleader for the appellant to the following cases: *Oolagappa Chetty v. Arbuthnot*(1), *Doorga Persad v. Kesho Persad Singh*(2), *Ganga Prosad Chowdhry v. Umbica Churn Coondoo*(3).

No. 1 was a suit brought by the plaintiff to recover a sum of money alleged to be due to him from the minor's estate, under a *razinama* executed to him by the minor's predecessor in the zamindari. It was therefore a suit to which s. 23 of the Regulation clearly applied, and, accordingly, we find that the minor was represented by (1) the Collector and Agent of the Court of Wards on behalf of the minor; (2) the manager of the estate; (3) the guardian of the minor; and (4) the mother and natural guardian of the minor. The minor was then included as under the protection and in the joint name of his guardian, but the estate was represented also by the Agent of the Court of Wards and the manager appointed by him.

No. 2 was a case arising under Act XV of 1858 relating to minors in Bengal. It does not apply to this Presidency, and the case related to the power of a manager of the estate of an infant not under the protection of the Court of Wards, but subject to the

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(1) I.L.R., 8 Mad., 525.

(1) L.R., 1 I.A., 268.

(2) L.R., 9 I.A., 27.

(3) I.L.R., 14 Cal., 754.

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jurisdiction of the Civil Court. It was held with respect to such manager that he was not the guardian of the infant for the purpose of binding him by a bond or defending suits against him in respect of money advanced with reference to the estate unless he had obtained a certificate of administration under s. 3, Act XV of 1858. This case has therefore no bearing upon the present.

No. 3 is a case in which a suit was brought against a minor widow in which the plaintiff did not procure the appointment of any guardian *ad litem*, nor did any one obtain the permission of the Court to defend the suit on behalf of the minor. It was held that the minor was no party to the suit. Here, of course, the minor was not represented at all.

It appears to us, therefore, that the law does not render it obligatory, that the minor should be represented by his guardian at the enquiry under the Boundary Act, and the Regulation vests the management of the estate in the Collector as Agent of the Court of Wards and the manager appointed by him under s. 8. These were represented at the enquiry and though the zamindar, when he came of age and took charge of the estate gave notice of a civil suit to upset the decision of the Survey Superintendent, no proceedings have been taken, and no further claim was made until the shola was notified as a Forest reserve. We are of opinion therefore that the matter in dispute is now *res judicata*, and that the zamindar is bound by the proceedings under the Boundary Act in 1875.

It is conceded that the question of limitation does not arise.

The result will be that the second appeal must fail and should be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

ANANTHARAMAN (PLAINTIFF), APPELLANT,

and

RAMASAMI (DEFENDANT), RESPONDENT.*

1888.
Jan. 24.

Civil Procedure Code, s. 424—Collector as guardian of ward not entitled to notice in suit to recover money from estate of ward.

In a suit to recover money due on a promissory note executed by a deceased zamindar, out of the estate of the deceased and of his son, the defendant, a minor under the Court of Wards, the Collector, being appointed guardian *ad litem* of the defendant, pleaded that under s. 424 of the Code of Civil Procedure he was entitled to notice before suit, and the suit was dismissed on the ground of want of notice:

Held, on appeal, that s. 424 was not applicable to the case.

APPEAL from the decree of C. Venkobacharyar, Subordinate Judge of Madura (West), in suit No. 39 of 1887.

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

Subramanya Ayyar for appellants.

The Government Pleader (*Mr. Powell*) for respondent.

JUDGMENT.—This is an appeal from a decree of the Subordinate Judge of Madura (West). The appellant was plaintiff in suit No. 39 of 1887 before that Court and alleged that the zamindar of Saptur, deceased, the father of the infant defendant, the new zamindar, executed a pro-note for Rs. 10,000, payable to the father, now deceased, of the appellant, and prayed for payment of the amount of the note out of the estate of the late zamindar and from the estate of the present zamindar, his son.

The infant defendant was at the time of the suit a ward of the Court of Wards, which was in possession of the zamindari. The Collector of Madura was, in his official capacity of Collector, also guardian of the infant defendant, and he filed a written statement, alleging amongst other defences, that no notice of action had been served on him as prescribed in Chapter XXVII, s. 424 of the Civil Procedure Code, issues were framed, including an issue whether such notice was served and whether such notice was necessary.

* Appeal No. 1 of 1888.

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At the hearing, the Subordinate Judge ruled that such notice was necessary and, as he found it was not served, he declined to go into the other issues and dismissed the suit with costs.

The appeal is on the ground that s. 424 was not applicable to the suit.

The s. 424 provides that no action shall be brought against a public officer in respect of an act purporting to be done by him in his official capacity until the expiration of two months next after notice in writing, containing the particulars thereby prescribed.

Now the suit was not one instituted against the Collector in his official capacity, or at all. The Collector, in his official capacity, was the guardian of the defendant, the infant, and as such, he was named as the guardian of the infant defendant.

But no cause of action against him was, stated in the plaint and no relief was prayed for against him; nor could any personal decree for payment of the amount of the note sued for be made against him. Neither is the suit brought on the ground that the public officer did any act purporting to be done in his official capacity. The fact that he did not pay the amount is not an act of omission, on which the suit is brought. It is an action brought on a contract in order to enforce payment from the assets of the deceased zamindar and from the ancestral property of the present zamindar by reason of his obligation to pay thereout the debt of his deceased father. The Collector merely defends as guardian on behalf of the infant.

The case of *Narsinghar Ramchandra v. Luxumanrao*(1) referred to by the Subordinate Judge was not under Chapter XXVII of the Civil Procedure Code, s. 424. It was there only decided that a Collector, acting as guardian for an infant defendant, was acting in his public capacity, and therefore was not subject to the jurisdiction of the Subordinate Judge under the Bombay Civil Court's Act. In *The Collector of Bijnor, Manager of the Estate of Chaudhri Ranjit Singh v. Munurao*(2) also referred to by Subordinate Judge, the Collector, as guardian, illegally seized some property. This is one of the cases to which s. 424 applies and accordingly it was held that notice should have been given.

In *Shahabzadee Shahunshah Begum v. Fergusson*(3) referred to

(1) I.L.R., 1 Bom., 318.

(2) I.L.R., 3 All., 20.

(3) I.L.R., 7 Cal., 499.

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by the Subordinate Judge, but to which he gave no weight without assigning any reason, Mr. Justice Cunningham decided that the intention of Chapter XXVII was to give to Government representation by the Secretary of State and to give public officers in the discharge of their public duties the same protection as English statutes confer on many public officers, viz., that when it is alleged that they have committed an illegality in the discharge of their duties they shall have time and opportunity of making amends before the matter is brought into court. Probably this may have been the intention of the Legislature in framing Chapter XXVII, s. 424. But independent of this intention the language of the s. 424 is clear and requires no notice unless the suit is brought against the public officer in respect of an act done by him purporting to be in discharge of his duty, and it is equally clear this suit is not one of that class.

It is to be regretted that the Subordinate Judge, by making a hasty and ill-considered decision, put the parties to the expense and delay of this appeal. We set aside the decree of the Subordinate Judge, and remand the case for trial on hearing the evidence and merits which the discretion of the Subordinate Judge excluded. We also order that the Collector, as guardian of the minor respondent, do pay to the appellants their costs of this appeal out of the estate of the said minor respondent and that the costs of hearing already had do abide and follow the result.

APPELLATE CIVIL.

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

RAJA (DEFENDANT), APPELLANT,
and

STRINIVASA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, ss. 311, 588 (8).

An application under s. 311 of the Code of Civil Procedure to set aside a sale in execution of a decree having been dismissed for default, the petitioner applied to

* Appeal against Order 169 of 1887.

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the Court to restore the application to the file. The Court having rejected this application, petitioner appealed against this order :

Held, that no appeal lay.

Ningappa v. Gangawa (I.L.R., 10 Bom., 433) followed.

APPEAL against the order of T. Kanagasaba Mudaliar, Subordinate Judge of Tanjore, rejecting a petition to set aside the dismissal of an application in suit No. 9 of 1886.

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

Pattabhi Ramayyar for appellant.

Ramasami Ayyangar for respondent.

JUDGMENT.—The appellant on 21st May 1887 petitioned the Subordinate Court of Tanjore under s. 311 of the Code of Civil Procedure to set aside a sale on the ground of irregularity. On the petition being called on 1st August, the petitioner was not present, and the petition was dismissed for default.

The same day (1st August) appellant presented a petition, explaining that he had been called out of Court at the moment the petition was called and praying that the petition be restored to the file for enquiry. The petition purported to be put in under s. 99 of the Code of Civil Procedure (evidently a clerical error for s. 103). The Subordinate Judge rejected the petition on 2nd August, and it is against that order that this appeal is preferred. A preliminary objection is taken that an appeal does not lie.

The appellant's pleader contends that by s. 647 the procedure of the Civil Procedure Code is made applicable to all proceedings other than suits and appeals; hence that ss. 102 and 103 are applicable and an appeal lies under s. 588, cl. (8) from an order rejecting an application to set aside the dismissal of this petition.

For the respondent it is argued that an appeal is a substantial right and not a mere matter of procedure; that s. 588, cl. (8) gives an appeal only against an order rejecting an application to set aside the dismissal of a suit, and we were referred to *Hureenath Koondoo v. Modhoo Soodun Saha*(1) and *Sultan Ackeni Sahib v. Shaik Bava Malimiyar*(2). The principle on which the first case was decided would appear to be in point, though the question then arose under the now-repealed Act XXIII of 1861, s. 38. In the second case the question was whether the High Court was competent to entertain an appeal from an order

(1) 19 W.R., 122.

(2) I.L.R. 4 Mad. 205.

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made by a District Court under s. 5, Act XX of 1863. The High Court held that, although the Religious Endowment Act made no provision for an appeal, the general law contained in the Civil Procedure Code was by s. 647 extended to all proceedings other than suits and appeals, and that the order passed by the Judge in the proceedings before the Court was analogous to a decree in a suit, and hence that an appeal would lie from such an order in the same manner as an appeal would (under s. 540 of the Code of Civil Procedure) lie from a decree in a suit. In *Minakshi v. Subramanya*(1) the Privy Council observed that they "could not assume that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by statute, or by some authority equivalent to a statute." Their Lordships then proceeded to discuss the order of the District Judge and held that it was impossible to bring the order within the definition of a decree as contained in the Procedure Code, and on these grounds reversed the decision of the High Court.

We have found, however, in the decision of the Bombay High Court a case in which the point was exactly the same as the present, *Ningappa v. Gangawa*(2). In that case also a petition under s. 311 had been dismissed for default and an application for restoration refused under s. 103; and it was held by the Bombay Court, following the principle laid down by the Calcutta Court in *Hureenath Koondoo v. Modhoo Soodun Saha*, that s. 647 did not confer any rights of appeal not expressly given elsewhere by the Code, and that its object was to apply to proceedings other than suits and appeals, the mode of trial and procedure incidental and ancillary thereto.

We are constrained to hold that the weight of authority is against the right of appeal.

It was then urged that an appeal would lie under s. 588, cl. (16) from the order refusing to set aside the sale, but the order of 2nd August, from which the present appeal is preferred, is not such an order. On these grounds we must hold that the appeal fails and dismiss it with costs.

(1) I.L.R., 11 Mad., 31.

(2) I.L.R., 10 Bom., 433.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

TIRUPATI AND OTHERS (DEFENDANTS), PETITIONERS,

and

MUTTU (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, ss. 373, 622—Leave given by District Court on appeal to withdraw suit—Material irregularity.

A District Munsif having dismissed a suit, plaintiff appealed to the District Court, and, at the same time, applied to the Court to allow him to withdraw his suit with permission to bring a fresh suit on the same cause of action.

The District Court granted the application without assigning any reasons for its order:

Held, under s. 622 of the Code of Civil Procedure that the District Court had acted with material irregularity.

APPLICATION under s. 622 of the Code of Civil Procedure to set aside an order made by W. F. Grahame, Acting District Judge of Trichinopoly, in appeal suit No. 257 of 1885.

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

Parthasardi Ayyangar for petitioners.

Srinivasa Rau for respondent.

JUDGMENT.—This is an application under s. 622 of the Code of Civil Procedure presented by the respondents in appeal suit No. 257 of 1885 in the Court of the District Judge of Trichinopoly praying the Court to revise the order passed by the District Judge in the said appeal.

That was an appeal against the decree of the additional District Munsif of Trichinopoly in original suit No. 196 of 1885, a suit in which the District Munsif dismissed the plaintiff's suit with costs. The plaintiff appealed, and, at the same time, applied to the District Court by petition to be allowed to withdraw the original suit (No. 196 of 1885) with permission to bring a fresh suit on the same cause of action. The District Judge apparently, without serving notice upon the defendants, passed the following order on the petition—"Permission granted on the same terms as

* Civil Revision Petition 49 of 1887.

in the other appeal, No. 256 of 1885." What order was passed in appeal suit No. 256 of 1885 is not apparent; but in the printed paper the order passed in appeal suit No. 257 of 1885 is as follows:—"Withdrawn with permission to institute a fresh suit on the same cause of action. Each party to bear his own costs." From the wording of this order, which was passed five days before the order above quoted, it would appear that defendants were present.

We are of opinion that the District Judge acted with material irregularity in permitting the plaintiff to withdraw his suit after a decree had been passed against him in the Court of first instance, without assigning any reasons for acceding to the plaintiff's application. The decree passed by the Munsif has not been set aside and is still valid and operative against the plaintiff.

We set aside the order of the District Judge and direct him to hear and dispose of the appeal (257 of 1885). Costs in this Court will follow the result.

APPELLATE CRIMINAL.

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

MUHAMMAD MUSALIAR (PETITIONER),

and

KUNJI CHEK MUSALIAR AND OTHERS (DEFENDANTS).*

Criminal Procedure Code, s. 147—Dispute concerning right to officiate in a mosque.

Where a dispute likely to cause a breach of the peace is shewn to exist concerning the right to perform a religious ceremony in a mosque the Magistrate may exercise the powers conferred by s. 147 of the Code of Criminal Procedure.

APPLICATION under s. 439 of the Code of Criminal Procedure to revise the proceedings of F. E. K. Wedderburn in charge of the Joint Magistrate's Office, North Malabar.

The facts are set out in the judgment of the Magistrate which was as follows:—

"In 1880 the kazi of the Quilandi Mapillas died and for the following two years there were two candidates for the post.

* Criminal Revision Case 400 of 1887.

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October 28.

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"In 1882 Government appointed one of the candidates, Muhammad Musaliar, as Government kazi, and the Jama mosque was put into his possession.

"The other candidate, Kunji Chek Musaliar, put in several petitions asking that he might be appointed instead; but his petitions were rejected by the District Magistrate. From this date, down to the present time, Kunji Chek Musaliar and a party seceded from the Government kazi party.

"On 3rd June 1887, a riot took place in the Moidin Palli mosque; the fight arose out of the attempt on part of Kunji Chek Musaliar to celebrate Jama or Kutba in the Moidin Palli mosque. The parties were convicted on both sides and the decision of the lower court has been upheld on appeal. The evidence showed that a bench and lamps in the Moidin Palli mosque were broken in the fight.

"As it appeared to this Court that a dispute concerning the fight of Kunji Chek Musaliar to perform the Jama ceremony in the Moidin Palli mosque existed, and as both parties asked for an order, an enquiry under s. 147 has been instituted and both parties have been heard. The mosque was inspected by the Court in the presence of counsel on either side. The Jama mosque is a large tiled building in possession of the Government kazi. The Moidin Palli mosque is a small thatched building about 100 yards away from the Jama mosque. The following fact is admitted by both sides; that the Moidin Palli mosque is in actual possession of one Mussa Kutti Musaliar. It is claimed by the Government kazi that his appointment under the Kazi Act gives him constructive possession over this mosque.

"Mussa Kutti Musaliar, however, has given permission to Kunji Chek Musaliar to officiate in this mosque and Kunji Chek Musaliar at the time of the Court visiting the mosque was in actual possession of it. The questions raised are:—

"(1) Whether any one, besides the Government kazi, can perform the Jama ceremony. It appears to me that under the Kazi Act the Government kazi is not given any sole power to perform any of the functions of a kazi. I see no reason to find that no one but the Government kazi can perform the Jama.

"(2) Whether two Jamas can take place in the same neighbourhood. It is no doubt contrary to Muhammadan

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custom to allow two Jamas to exist in the same place; but Government have recognized the fact that where there is a dispute the Jamas may be performed, and, in several places, two kazis have been recognized by Government. I decide this in the affirmative as there is no question of a dispute existing at Quilandi.

"(3) Whether Moidin Palli mosque is in exclusive possession of Kunji Chek Musaliar.

"There is no doubt that the Moidin Palli mosque is in the charge of Mussakutti Musaliar, and that he has given sanction to Kunji Chek to hold this Jama ceremony there. Mussakutti's possession is sufficient in my opinion to warrant his granting the permission to Kunji Chek.

"(4) Whether the Government kazi has general control over all the mosques in his jurisdiction.

"The Kazi Act does not, in my opinion, grant the Government kazi administrative powers over the mosques in his division.

"Lastly, the question is raised, whether Kunji Chek Musaliar has exercised the right within three months.

"The previous Friday to the riot (26th May) he applied to the police for protection, and police were sent to the mosque and he swears that he performed Jama in this mosque on that day. He likewise swears that ever since he gave up the keys of the Jama mosque he has been celebrating the Jama in this mosque. He says the reason of the present objection was the approaching enlargement of the Moidin Palli mosque. I find (1) that the Government kazi, with reference to his functions as Government kazi, has no right to prevent Kunji Chek Musaliar from performing Jama and (2) that he has no right to interfere with the management of the ceremonies in Moidin Palli mosque, which is in possession of Mussakutti Musaliar, and that, therefore, Kunji Chek Musaliar has, with the consent of Mussakutti Musaliar, a right to perform the Jama in this Moidin Palli mosque and I find that he has exercised this right within three months from institution of the enquiry. Under s. 147, I issue an order permitting Kunji Chek Musaliar to perform Jama ceremony in the Moidin Palli mosque till the party objecting obtain a decree of the Civil Court entitling them to prevent the celebration."

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Muhammad Musaliar objected to this order on the following grounds:—

- (1) Section 147 of the Code of Criminal Procedure is not applicable, because there was no dispute concerning the right to do or prevent the doing of anything in or upon any tangible immovable property.
- (2) The right was not exercised during the season next before the institution of this enquiry, and therefore the Magistrate erred in passing the order.
- (3) The Magistrate failed to receive all the evidence adduced before him.

Sankaran Nayar for petitioner.

Desikacharyar for Kunji Chek Musaliar.

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

JUDGMENT:—We are not able to hold that s. 147, Criminal Procedure Code, is inapplicable to this case.

A dispute likely to cause a breach of the peace is shown to exist concerning the right to perform a religious service in the Moidin Palli mosque, i.e., upon tangible immovable property and the Magistrate finds that (in his opinion) the right exists and that it has been exercised within three months next before the institution of the enquiry.

The Moidin Palli mosque is found to be in the possession of Mussa Kutti Musaliar, and it is further found that Kunji Chek Musaliar has, with his consent, performed the religious services therein.

The claim of the petitioner, who is the kazi appointed by Government, is that he alone is authorized to perform this religious service within a given area; but we find nothing in Act XII of 1880 declaratory of such a right, and it should, if it exists, be established by a regular suit brought for that purpose in due course of law.

The Magistrate's order appears to be legal, and there is nothing before us to show that any further evidence was tendered before him.

We decline to interfere and dismiss this petition.
Ordered accordingly.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

KUNHI (PLAINTIFF), APPELLANT,

and

MOIDIN (DEFENDANT), RESPONDENT.*

1888.
March 2, 18.

Muhammadian law—Marriage—Suit by husband for restitution of conjugal rights—Duty of wife to cohabit with husband—Plea of non-payment of dower bad.

Suit by a Muhammadan to recover possession of his wife, the defendant. Defendant pleaded that she was not bound to return to plaintiff until plaintiff paid Rs. 42, prompt for dower, which plaintiff promised to pay by the marriage contract and had not paid.

The lower Courts following *Eidan v. Mazhar Husain* (I.L.R., 1 All., 483) dismissed the suit:

Held, on appeal that defendant could not refuse cohabitation on the plea that her dower had not been paid—*Abdul Kadir v. Salima* (I.L.R., 8 All., 149) followed.

APPEAL from the decree of F. H. Wilkinson, District Judge of South Malabar, confirming the decree of V. Kelu Eradi, District Munsif of Shernad, in suit 366 of 1886.

The facts appear from the judgment of the Court (Kernan and Parker, JJ.).

Rajaratna Mudaliar for appellant.

Respondent was not represented.

JUDGMENT.—The original suit No. 366 of 1886 in the Shernad Munsif's court was brought by the plaintiff to obtain possession of his wife, the defendant. The Munsif in the court of first instance and the District Court on appeal dismissed the suit. The facts found are—the plaintiff and defendant entered into a contract of marriage and the plaintiff agreed to pay 12 miscals equal to Rs. 42, prompt for dower to the defendant, but did not pay it. After the marriage the parties lived together and the defendant withdrew from his house, but in her defence she says she is willing to return if dower was paid. Both the lower courts followed the decision in *Eidan v. Mazhar Husain* (1) to the effect that when prompt-dower was not paid the wife might refuse cohabitation

* Second Appeal No. 434 of 1887.

(1) I.L.R., 1 All., 483.

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to her husband. The opinion of Haneefa, though opposed to the views of his two disciples as recorded in the Hedaya, pages 150 to 152, was in that case followed. However, a Full Bench of that court have since reversed that decision and followed the views of the two disciples, *Abdul Kadir v. Salima* (1). There is no case on the subject reported in the Madras Supreme or High Courts. The reasons given by the Allahabad Full Bench for their decision seem to us sound and we agree therein. The Muhammadan matrimonial contract involves separate and independent contract by the husband and wife. The wife is by contract bound to submit herself to her husband and he is bound to pay the prompt or other dower according to the contract, or if no sum agreed on, according to the provision of the law. Each has a separate remedy against the other for non-performance of the contract. We reverse the decree of both the lower Courts and direct the defendant to return to cohabitation with the plaintiff within three months from this date.

Another suit No. 410 of 1886 in the Munsif's Court for payment of dower was brought by the wife against the husband. Both suits were heard together and were heard in appeal together and dismissed. We cannot interfere as to suit No. 410, as there has been no appeal. The parties will bear their own costs respectively of this suit No. 434 throughout including this appeal, as the appellant set up an untrue case in respect of the payment of the dower and the respondent without legal excuse left her husband's house.

(1) I.L.R., 8 All., 149.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

against

MUTTIRULANDI.*

1887.
October 20.

Stamp Act, 1879, s. 61—Acknowledgment of receipt of cheque by letter, not stamped, an offence.

M. acknowledged receipt of a cheque for Rs. 100 by letter. The letter was not stamped :

Held, that M. was properly convicted under s. 61 of the Indian Stamp Act, 1879.

APPLICATION under s. 439 of the Code of Criminal Procedure.

The accused was convicted by C. H. Mounsey, Acting Joint Magistrate of Madura, under s. 61 of the Indian Stamp Act, 1879, and fined Rs. 25 for acknowledging by letter without affixing a receipt stamp thereto, the receipt of a cheque for Rs. 100.

The grounds on which this petition was based were as follows :

- (1) Because the lower Court is wrong in treating the letter written by the accused as receipt.
- (2) Because the accused did give a stamped receipt to the complainant after the demand was made.
- (3) Because the accused was not bound to give a stamped receipt before any demand was made.

Balaji Rau and Rajaram Rau for the accused.

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

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

JUDGMENT:—We are of opinion that the conviction is right. Section 3, clause (17) of the Stamp Act I of 1879 defines a receipt to be a note or memorandum in writing, whereby . . . any cheque or promissory note is acknowledged to have been received.

By art. 52 of sch. I a receipt for any money or other property, the amount or value of which exceeds Rs. 20, requires a one-anna stamp (except it be especially exempted) and a cheque is

* Criminal Revision Case 365 of 1887.

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clearly property. Section 58 requires that a receipt for a cheque exceeding Rs. 20 in amount shall be acknowledged by a receipt duly stamped, if demanded. In the case before us, a cheque for Rs. 100 was sent to the accused and by him acknowledged in the following terms: "Your cheque for Rs. 100 to hand." We entertain no doubt but that it is an instrument chargeable with the stamp duty of one anna within the meaning of s. 61 of the Stamp Act, Act I of 1879, and the petition is dismissed.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

KELAN (PLAINTIFF), APPELLANT,

and

MANIKAM (DEFENDANT No. 2), RESPONDENT.*

Revenue Recovery Act, ss. 41, 42—Sale for arrears of revenue—Land subject to kanam—Purchaser's title not subject to kanam holder's rights.

Where land subject to a kanam was sold for arrears of revenue due by the pattadar and owner and the kanam holder claimed to retain possession as against the purchaser on the ground that his rights were not affected by the sale:

Held, that reading ss. 41 and 42 of Madras Act II of 1864 together, the purchaser's title was not subject to the kanam.

The contracts referred to in s. 41 of the Act are those which do not create a charge on the proprietary right in the land sold.

APPEAL from the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, reversing the decree of K. Imbichunni Nayar, District Munsif of Tellicherry, in suit 463 of 1885.

Plaintiff having purchased certain land sold for arrears of revenue under Act II of 1864 (Madras), sued to recover the same. Defendant No. 1 was the original owner and pattadar. Defendants 3 and 4 were tenants under defendant No. 2 who claimed, under a kanam for Rs. 350 (granted by defendant No. 1 prior to the sale to plaintiff), to retain possession until his kanam was redeemed.

The Munsif found that no encumbrances had been reserved at the revenue sale and citing *Zamorin of Calicut v. Sitarama*(1) decreed for plaintiff.

* Second Appeal No. 603 of 1887.

(1) I.L.R., 7 Mad., 405.

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Defendant No. 2 appealed.

The Subordinate Judge held that, though the land was bought free of encumbrances, the contract between defendant No. 1 and his tenant, defendant No. 2, would still be binding on the purchaser by virtue of s. 41 of Act II of 1864.

He also held that *Zamorin of Calicut v. Sitarama*(1) was not applicable to this case and that *Lakshmaya v. Appadu*(2) was more in point.

Plaintiff appealed.

Sankaran Nayar for appellant.

Sankara Menon for respondent.

The Court (Muttusami Ayyar and Shephard, JJ.) delivered the following

JUDGMENT:—The land in dispute belonged to the 1st defendant and he demised it on kanam to the respondent under (exhibit I). It was since sold for arrears of revenue due thereon and the appellant bought it at the revenue sale held under Act II of 1864. The Subordinate Judge considered that the appellant took the land subject to the kanam and it is urged in appeal that the decision is wrong in law. The Subordinate Judge observes that s. 42 is controlled by s. 41 and must be construed so as to validate all contracts between the defaulter and his tenants. We are unable to adopt the construction suggested by him. It is provided by s. 42 that all the lands brought to sale on account of arrears of revenue shall be sold free of all encumbrances. Reading ss. 41 and 42 together, the only conclusion that can be arrived at is that the contracts contemplated by s. 41 are such as do not create a charge on the proprietary right in the land in suit or an under-tenure and thereby impair its value. Though ordinarily some rent is payable under a kanam document and it constitutes a tenancy on that ground for 12 years or more, yet the tenancy is created on the basis of a subsisting mortgage; and if the mortgage becomes inoperative under s. 42, the tenancy which rests on it must also fail. We may add that, in the case before us, the kanam document contains a stipulation that the whole income derived from the land shall be taken in liquidation of the interest due on the amount of the loan, and there is therefore no founda-

(1) I.L.R., 7 Mad., 405.

(2) I.L.R., 7 Mad., 111.

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tion for the contention that it created any tenancy at all. The cases cited by the Subordinate Judge are not in point.

We reverse the decree of the Subordinate Judge and restore that of the District Munsif. The respondent will pay the appellant's costs throughout.

APPELLATE CRIMINAL.

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

1887.
Dec. 15.

IN THE MATTER OF KITTU AND OTHERS.*

Act XIII of 1859, s. 2.—Limitation Act no bar to a claim to recover an advance.

Act XIII of 1859 being a penal enactment, the Limitation Act is no bar to a claim under s. 2 to recover an advance made to a labourer.

CASE referred under s. 439 of the Code of Criminal Procedure by S. H. Wynne, Acting District Magistrate of South Canara.

The facts were stated as follows:—

"A complaint was brought under Act XIII of 1859 to recover a sum advanced in respect of work, which work was not done. The Magistrate has rejected the complaint under s. 203 of the Code of Criminal Procedure, because a suit to recover the sum would be barred by limitation. As it is expressly stated in the preamble to Act XIII of 1859 that the reason for the enactment is that the remedy by suit is wholly insufficient, I do not think the order was legal. There is no law limiting the time within which complaints under Act XIII of 1859 may be brought. The Act is penal, its object being to make 'persons guilty of fraudulent breach of contract subject to punishment,' and therefore proceedings taken under it are not suits and are not governed by art. 120 of sch. II of the Limitation Act.

"I request that the case be submitted for the orders of the High Court."

The parties did not appear.

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

* Criminal Revision Case 448 of 1887.

JUDGMENT:—Act XIII of 1859 is a penal enactment, and the Act of Limitation is no bar to the enforcement of a penal provision. Though it was passed because the remedy by suit was insufficient, it is no ground for saying that the Act ceases to be applicable when the civil remedy is barred. The expression without lawful or reasonable excuse has reference to the circumstances in which the breach occurred. A plea of limitation which is available only in civil suits cannot be taken to bar punishment for what is an offence. The case before us is perhaps one not foreseen and provided for by the Legislature, but we must construe a penal enactment as it stands. We set aside the order made by the 2nd-class Magistrate and direct him to restore the complaint to his file and to deal with it in accordance with law.

KITTU,
in re.

APPELLATE CIVIL.

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

PASSANHA (PLAINTIFF),

and

THE MADRAS DEPOSIT AND BENEFIT SOCIETY (DEFENDANTS).*

1888.
February 3.

Limitation Act, sch. II, arts. 36, 49.

Plaintiff was the owner of a house mortgaged to defendants. On the 22nd August 1885 defendants sold the house by auction under a power of sale contained in the mortgage and gave possession to the purchaser. On the 2nd September 1887 plaintiff sued the defendants to recover the value of certain timber which was stored in the house and not mortgaged and which plaintiff alleged the defendants had taken possession of and converted to their own use. It was proved that the timber was in the house when defendants took possession from the plaintiff and defendants did not account for it:

Held, (1) that plaintiff was entitled to recover from the defendants the value of the timber and (2) that the suit was not barred by art. 36 of sch. II of Indian Limitation Act, 1879.

CASE referred under s. 69 of the Presidency Small Cause Courts Act, 1882, by J. W. Handley, Chief Judge of the Court of Small Causes at Madras.

* Special Case 83 of 1887.

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The case was stated as follows :—

"In this suit plaintiff sought to recover from the defendant Society the value of certain timber which it was alleged defendants seized, took possession of, and converted to their own use and wrongfully deprived the plaintiff of the use and possession thereof.

"The admitted facts were that plaintiff was the owner of a house in the Mount Road, Madras, which was mortgaged to defendants. On the 22nd August 1885 defendants sold the house by auction under a power of sale in the mortgage having obtained the key on that day from plaintiff's brother, plaintiff being then absent from Madras. Plaintiff's case was that certain timber, consisting of beams, joints, doors, windows and other similar articles, partly new and partly old, and intended for re-building a neighbouring house also belonging to plaintiff, was stored in the house sold by defendants. It was admitted that if there was any such timber in the house it was not subject to the mortgage; but defendants denied all knowledge of the existence of any such timber in the house. It was abundantly proved however that the timber was stored in the house, as alleged by plaintiff, and I found accordingly and that the value of the timber was as claimed in the plaint Rs. 1,500. The sale was conducted outside the house, which was in a partially dismantled condition, and nobody on behalf of defendants seems to have entered the house at the time of the sale or made any examination of its contents. Defendants did not profess to sell the timber, but they sold the house and handed over possession to the purchaser without taking the trouble to ascertain what was in the house. Upon plaintiff's return to Madras some informal communications appear to have taken place between him and one of the Directors of the Society; but it was not till 25th August 1887, shortly before the filing of this suit, that a formal demand in respect of the timber was made by plaintiff through his solicitors, Messrs. Grant and Laing.

"Two questions of law were raised in the course of the hearing, upon which, at the request of defendant's Attorney, I have to ask the opinion of the High Court.

"The first question was that of limitation. It was contended on behalf of defendants that the case was governed by art. 36 of sch. II of the Limitation Act. If this were the article applicable to the case, the suit would be barred, if the cause of action arose

on the day of sale, 22nd August 1885, as the period of limitation under that article is 2 years and the suit was filed on 2nd September 1887. But if the correct view is that the cause of action arose on the house being handed over to the purchaser, further evidence would be necessary as to that date. The only evidence on that point, was that of the auctioneer, who said he gave over the key to the purchaser on the balance of the purchase money being paid, which he said was about 8 days after the sale. I held that the case was governed by art. 49 of the schedule, the period of limitation under which is 3 years, and that the suit was therefore not barred.

"It was further contended on behalf of defendants that there was no evidence of wrongful conversion to entitle plaintiff to recover in this suit. Finding the facts to be, as stated above, I held that plaintiff was entitled to recover. I considered that defendants having taken possession of the house became responsible for it and its contents, and if they chose to sell it without taking proper measures for the security of any property in the house not covered by their mortgage they were liable to make good any loss to plaintiff occasioned by their so doing.

"I therefore gave judgment for plaintiff for Rs. 1,500 and costs contingent upon a reference to the High Court upon these two points of law.

"The questions therefore which I have the honor to refer for the opinion of the High Court are these :—

- (1) Is the suit barred by the Law of Limitation?
- (2) Is plaintiff entitled to recover upon the facts as stated above?"

Mr. Shaw for plaintiff.

Mr. Michell for defendants.

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

JUDGMENT :—Upon the facts stated, we are of opinion that the plaintiff is entitled to recover. The defendants took possession of the timber and have not accounted to plaintiff for it. On the question of limitation we think that art. 49 of the Limitation Act does apply. It is open to plaintiff under that article to bring his suit for the specific movable property or for compensation for wrongfully taking the same.

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In our opinion the learned Chief Judge has rightly decided both the questions referred. Defendants are to pay the costs of this reference.

Solicitors for plaintiff—*Grant & Laing*.

Solicitors for defendants—*Barclay & Morgan*.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

GOPILANDHU (PLAINTIFF).

and

DOMBURU (DEFENDANT No. 2).*

1888.
Jan. 12.

Limitation Act, sch. II, art. 179 (4)—Application for copy of decree not a step in aid of execution.

The application by a decree-holder for a copy of a decree with intent to apply for execution is not a step in aid of execution within the meaning of cl. 4 of art. 179 of sch. II of the Indian Limitation Act, 1879.

REFERENCE under s. 617 of the Code of Civil Procedure by M. Visvanatha Ayyar, District Munsif of Aska.

The case was stated as follows:—

“Gopilandhu Patnayak obtained a decree for Rs. 40-1-5 against Domburu Maharana, defendant No. 2, on 28th April 1884, in small cause suit No. 137 of 1884, on the file of this court. The decree-holder applied for execution of the said decree for the first time on 20th May 1887. It is alleged in the petition that it is not barred by limitation, firstly, inasmuch as the petitioner had applied for a copy of the decree on 17th September 1884; secondly, inasmuch as the judgment-debtor had made two payments out of court to him, viz., Rs. 9 in June 1884 and Rs. 10 in December 1884, and had got receipts for these payments.

“The decree-holder did not certify these payments to the court, nor did the judgment-debtor file the receipts and ask the court to call upon him to certify these payments. The adjustment out of court was specified for the first time in the present application for execution. The dates of these payments cannot give the decree-holder a fresh starting point of limitation.

* Referred Case No. 14 of 1887.

“The decree-holder, through his pleader, applied to this court on 17th September 1884 for a copy of the decree. The said application recites that the copy is required to enable him to execute the decree. GOPILANDHU
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“The decree-holder's pleader contends that the said application is an application ‘in accordance with law to the proper court to take some step in aid of execution of the decree,’ under cl. 4 of art. 179 of the Limitation Act. He relies upon a certain passage in the judgment of the Calcutta High Court in *Ganga Pershad Bhoomick v. Debi Sundari Dubea* (1) and upon the case in *Kunhi v. Seshagiri* (2) as favoring his contention.

“In the latter of the two cases cited above, an application by a judgment-creditor to the court which passed the decree for a certificate that a copy of a revenue register of the land is necessary to enable him to obtain such copy from the Collector's office and thereupon to execute the decree by attaching the land was declared to be a step in aid of execution within the meaning of cl. 4, art. 179, of the Act. This decision no doubt indicates a tendency to construe the clause in a more liberal spirit.

“Under s. 238, Civil Procedure Code, it is indispensable that an application for attachment of land registered in the Collector's office should be accompanied by an authenticated extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue. An application for a certificate that a copy of the revenue register is necessary is a legitimate and necessary step in aid of execution.

“But the Civil Procedure Code does not make it obligatory on the judgment-creditor to file a certified copy of the decree with his application for its execution. I doubt, therefore, whether the application for a copy of the decree can be regarded as a step in aid of execution within the meaning of cl. 4 of art. 179. As a matter of fact, applications for execution are accompanied by copies of decrees sought to be executed. When they are not accompanied by such copies, the courts generally call upon the applicants for execution to produce copies of the decrees so as to facilitate an examination by the officers of the court to see whether the contents of the applications, as required under s. 235, Civil Procedure

(1) I.L.R., 11 Cal., 227.

(2) I.L.R., 5 Mad., 141.

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Code, are correctly entered before they are filed, as the records of the suits are generally sent away to the District Court for safe custody.

"These particulars can no doubt be verified by reference to the entries in the suit registers; but it must be admitted that a copy of the decree is essential to a judgment-creditor to enable him to specify in his application for execution the particulars required by (g) and (h) of s. 235.

"On the other hand, if an application for a copy of the decree be regarded as a step in aid of execution, the starting date prescribed in every one of the cl. 1, 2, and 3 of art. 179 would virtually be a dead letter.

"The passage on which the judgment-creditor's pleader relies in the other case quoted by him is as follows:—'This was an application to get back the copy of the decree, for purposes of execution, made by a lady who had not then been substituted for the decree-holder on the record. We think that this application also cannot be considered as a step in aid of the execution of the decree.' The pleader lays stress on the words italicized in the above passage, and says that their Lordships would have regarded it as a step in aid of execution had it not been for the defect, viz., that she had not been substituted for the decree-holder on the record by the date of the application to get back the copy of the decree. It is doubtful whether their Lordships intended such a thing.

"As the question is one of importance as my order in execution of the small cause decree now sought to be executed is final, and, as I entertain reasonable doubt as to the soundness or otherwise of my views on the point, I have thought it fit to make this reference. I have, however, dismissed the application for execution as being barred by limitation, subject to the decision of the High Court on the following question:—'Whether, under the circumstances stated in this reference, the application of the decree-holder on 17th September 1884 to this court for a copy of the decree with intent to apply for execution is a step in aid of execution of the decree within the meaning of cl. 4 of art. 179 of the Limitation Act.'

The parties did not appear.

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

JUDGMENT:—Further information was called for after this

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petition was presented. It now appears that, when the decree-holder applied for a copy of the Munsif's decree, the original was in that Court. Therefore, it was not necessary then for the decree-holder to obtain the copy before he could obtain the execution. The Munsif says that it is the practice of the office to require a copy to be furnished before execution is issued, and that execution could not be obtained unless the copy was furnished to the office; but the Civil Procedure Code makes no provision for such practice, and the application for execution, without production of the copy, would be "according to law" as provided by art. 179, cl. 4. The practice of the office cannot affect the question of limitation. The principle of the decision in *Kunhi v. Seshagiri*(1) applies, and that is that the true meaning of "step in execution" under art. 179, cl. 4, is a step which is necessary to be taken before execution can be had.

The dates are—

Decree, 28th April 1884.

Application for execution, 20th May 1887. Therefore the application was more than three years after the decree.

We answer the reference by saying the application for copy of decree and obtaining it were not steps, nor was either of them a step in execution of the decree within art. 179 of the Limitation Act.

CROWN SIDE.

Before Mr. Justice Kernan.

QUEEN-EMPRESS

against

VENKATAPATHI AND FOUR OTHERS.*

Criminal Procedure Code, s. 289—Prosecutor's right to reply.

Where documentary evidence was put in by the accused during the case for the Crown and before examination of the accused:

Held, under s. 289 of the Code of Criminal Procedure, that the Crown had the right of reply—*Queen-Empress v. Grees Chunder Banerjee* (I.L.R., 10 Cal., 1024) dissented from.

(1) I.L.R., 5 Mad., 141.

* Calendar Nos. 3 and 1 of 1888 of the 2nd Madras Sessions.

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In this case the accused were tried on various charges with conspiring to defraud the Government by selling salt stored in a monopoly factory and misappropriating the sale-proceeds. During the examination of the witnesses for the Crown several entries in books relating to the factory were proved and marked as exhibits and put in evidence. In cross-examination some of the accused required that certain other entries in the same books should be marked to be used as evidence on their behalf, and those entries were marked and read to the Jury by the witnesses for the Crown. At the close of the case for the Crown the accused stated through their counsel that they did not intend to call any witnesses and claimed that the prosecutor should sum up the case.

The Public Prosecutor (Mr. Shaw) contended that he had the right of reply and referred to a ruling of Muttusami Ayyar, J., in *Queen-Empress v. Bhow Rau* at 3rd Madras Sessions on 16th August 1886, and to similar rulings by Collins, C.J., in *Queen-Empress v. Arunachala* and *Queen-Empress v. Jevan Lall* at the 3rd Madras Sessions, 1887.

Mr. Wedderburn, Mr. Ramasami Raju, Annandachari, Sadagopachari, Namaya Chetti for the accused.

It was urged contra that the prosecutor had heard all the evidence to be used for the accused, and, under s. 289 of the Code of Criminal Procedure, he had no right to reply—*Queen-Empress v. Grees Chunder Banerjee*(1) and *Empress of India v. Kaliprosanno Doss*(2).

KERNAN, J., following the rulings of Collins, C.J., and Muttusami Ayyar, J., held that, as the accused had adduced evidence, the prosecutor was entitled to reply.

(1) I.L.R., 10 Cal., 1024.

(2) I.L.R., 14 Cal., 247.

APPELLATE CIVIL.

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

THE MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS,
PLAINTIFFS,

and

PARTHASARADI AND ANOTHER, DEFENDANTS.*

*City of Madras Municipal Act, 1878, s. 318—President sole judge of necessity of
cleansing tank likely to prove injurious to health.*

By s. 317 of the City of Madras Municipal Act, 1878, the President of the Municipal Commissioners was invested with a discretion as to the necessity of cleansing and filling up tanks and wells and draining off stagnant water likely to prove injurious to the health of the neighbourhood; and by s. 318 was empowered on neglect of the owner to comply with a requisition to do the necessary work, to get the work done and to recover the costs in the manner provided for the collection of taxes. No appeal was allowed by the act against the President's decision:

Held, in a suit by the Municipal Commissioners to recover from the defendants the cost of draining and cleansing a tank, that it was not open to the defendants to prove that the tank was not likely to prove injurious to the health of the neighbourhood.

CASE referred under s. 617 of the Code of Civil Procedure, by J. W. Handley, Chief Judge of the Court of Small Causes, Madras, in suit No. 19381 of 1884.

The case was stated as follows:—

“This was a suit by the Municipal Commissioners to recover under s. 318 of the City of Madras Municipal Act, 1878, from defendants as trustees of a pagoda, the cost of draining and cleansing a tank alleged to be the property of the pagoda. Defendants at first appeared by the same wakil and pleaded, *inter alia*, that the tank was not the property of the pagoda. The case was adjourned from time to time at the request of the parties with a view to a compromise, it being proposed on behalf of plaintiffs that the suit should be withdrawn upon defendants executing on behalf of the pagoda a release of all claims to the tank in favour of the Municipality. Ultimately, however, the

* Special Case 84 of 1887.

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negotiation fell through and the case came on for final disposal on the 11th November 1887, defendant No. 1 being represented by another vakil, and defendant No. 2 not appearing either in person or by pleader. If the question, whether the tank, the subject of the suit, was in fact at the time when the Municipality took action in the matter injurious to health or offensive to the neighbourhood within the meaning of s. 317 of the Municipal Act of 1878 had been open in this suit, I should have found on the evidence that plaintiffs had not shewn that such was the state of the tank. But I was of opinion that the Act left this matter entirely to the discretion of the President, and that if he considered the state of a tank to be such as is described in s. 317 he was entitled to issue the notice and, in default of compliance with such notice, proceed under s. 318. I therefore held that plaintiffs were entitled to recover, and having found that defendants as dharmakartas of the pagoda were the persons liable to pay and that Rs. 1,000 was the proper amount recoverable, I gave judgment for that amount and costs to be recovered from the property of the pagoda. The vakil of defendant No. 1 requested me to state a case for the opinion of the High Court as to the construction of 317 of the Act. Accordingly I made my judgment contingent upon the opinion of the High Court.

"The following is the question which I have to refer for the opinion of the High Court:—

"Is it open to the Court in this case to decide whether the tank, the subject of the suit, was at the time when the Municipality took action in the matter injurious to health or offensive to the neighbourhood within the meaning of s. 317 of the City of Madras Municipal Act, 1878?"

Mr. *Michell* for plaintiffs.

Sundram Sastryar for defendant No. 1. Defendant No. 2 did not appear.

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

JUDGMENT:—We agree with the learned Chief Judge that the Legislature in s. 317 of Madras Act V of 1878 has invested the President with the discretion to require the owner of the tank to drain off or remove the stagnant water from the tank, and in the event of the owner neglecting to comply with such requisition the President may execute the work and recover the expenses in the

manner prescribed in s. 318. No appeal is given and the President is constituted the sole judge of the necessity.

The defendants must pay the costs of this reference.

Solicitors for plaintiffs—*Barclay & Morgan*.

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APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Parker.

QUEEN-EMPRESS

against

BOLAPPA.*

1888.
Feb. 29.

District Municipalities Act, 1884 (Madras), s. 173—Obstruction of public street.

Section 173 of the District Municipalities Act, 1884 (Madras), provides that no person shall deposit anything so as to cause obstruction to the public in any street without the written permission of the Municipal Council:

Held, that the depositing by any person of an article in the street without the permission of the Municipal Council amounted to an obstruction.

CASE referred by H. Goodrich, District Magistrate of Bellary, under s. 438 of the Code of Criminal Procedure.

The facts were stated as follows:

"The accused in this case, a merchant of Bellary town, was charged by the Municipality under Bye-law 61, s. 255 of the District Municipalities Act IV of 1884 with having stored jaggery bags on the bazaar road within the Municipality. It was proved by the witnesses for the prosecution that the accused stored about 50 bags of jaggery on the public road in front of his shop, occupying a portion of the road surface measuring 5 yards long and 4 yards broad and causing obstruction to passengers. The accused admitted having stored 20 bags occupying about 2 yards in width of the road surface, but pleaded that he had a right to do so, as no obstruction was hereby caused to the public. In spite of this admission the accused was acquitted under s. 245 of the Code of Criminal Procedure, the Bench of Magistrates having held by a majority that the act of the accused did not constitute an offence.

"In their order, No. 559, dated 23rd March 1887, Government have sanctioned the levy of a fee of Rs. 12 a year from each grain

* Criminal Revision Case 579 of 1887.

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merchant by the Bellary Municipality, who might desire to acquire the privilege of utilizing a space of 2 yards of the road in front of his shop for unloading, measuring, and storing his consignments of grain for two hours on the weekly market day and on the day preceding it, provided room was left for traffic. No permission of any sort was obtained by the accused in the present case, nor any fee paid by him.

"The Municipal Council moved Government to direct the Public Prosecutor under s. 417 of the Code of Criminal Procedure to present an appeal to the High Court from the order of acquittal passed in this and three other similar cases.

"Government have in their order, No. 2681, Judicial, dated 24th November 1887, observed that the point involved was one of law and instructed me to refer the plainest case to the High Court under s. 438 of the Code of Criminal Procedure and to ask that the law on the point may be authoritatively declared and a new trial directed.

"The act of the accused in the present case falls under s. 173 of the District Municipalities Act and Bye-laws 57, 61, and 62 of the Municipality sanctioned in G.O., No. 1010, dated 7th June 1878. In s. 173 and Bye-law 61 the words, "So as to cause obstruction to the public," occur, and these words do not seem to have been defined anywhere. It is doubtful whether these words throw on the prosecution the burden of proving that the public could not pass at all by reason of the obstruction or whether, the public having the right to pass freely over all portions of the street, an obstacle in any part of the roadway is an obstruction within the meaning of the section.

"I am of opinion that the act of the accused amounts also to a public nuisance as defined in s. 268 and punishable under s. 290 of the Indian Penal Code. The case of *Umesh Chandrakar*, in *re*(1), is analogous to the present one.

"I have therefore the honor to request that the Honorable Judges may be pleased to issue orders declaring the law on the point authoritatively and to direct the retrial of the case."

The Public Prosecutor (Mr. Powell) for District Magistrate.

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

(1) I.L.R., 14 Cal., 656.

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JUDGMENT :—The depositing by any one of any article on the high road except with the license of the Municipality under s. 173 is an obstruction. The public are entitled to the whole width of the road unimpeded by any article deposited thereon. The Bench having found that articles were deposited on the road without license, should have found that such deposit caused obstruction. The deposit might not be very great, but in law it was an obstruction.

We set aside the acquittal and direct the accused to be retried before the Bench.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

RUPABAI AND OTHERS (PLAINTIFFS, NOS. 1, 2, AND 3), APPELLANTS,
and

AUDIMULAM AND OTHERS (DEFENDANTS), RESPONDENTS.*

1887.
Nov. 4.
1888.
Jan. 17.

Presumption that person paying off a mortgage intends to keep the security alive—Power of court to order refund of money wrongly paid out of court in another suit—Limitation Act, sch. II, art. 29.

In 1861 B granted a lease of his zamindari to A for 30 years, A undertaking to pay off all debts then due by B. B died in 1882 and his successor sued A and obtained a decree that on payment of Rs. 1,20,000 A should give up possession of the zamindari. This sum having been paid into Court, A lost possession of the zamindari. On January 5th, 1875, A had mortgaged the whole zamindari, which consisted of 22 villages, to M to secure a loan of Rs. 1,00,000 borrowed by A to pay off the debts of B which A undertook to pay in 1861. On June 27th, 1879, A being indebted to M in the sum of Rs. 1,78,000 paid M Rs. 1,00,000 and undertook to pay the balance out of the income of the estate, M releasing the 22 villages from the mortgage of January 5th, 1875. On June 28th, 1879, A executed a mortgage of the 22 villages to L to secure repayment of Rs. 1,30,000. Of this sum, Rs. 1,00,000 was borrowed to pay M and Rs. 30,000 was a prior debt due by A to L. Of the Rs. 1,00,000 paid to M, Rs. 27,000 was specially applied to discharge so much of the charge created by the mortgage of January 5th, 1875. On January 30th, 1875, A borrowed from S Rs. 43,000 and mortgaged to her 10 of the 22 villages of the zamindari. In 1885 S sued L to have her debt declared a first charge on the money paid into court by the zamindar. The Subordinate Judge held that L had a prior claim on the fund and dismissed the suit:

Held on appeal, following the principle of decision in *Gokaldas v. Parammal* (L.R., 11 I.A., 126) that L was entitled to a first charge on the fund to the extent

* Appeal No. 84 of 1886.

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of Rs. 27,000 which had been applied to pay off the mortgage of January 5th, 1875. In the suit brought by B's successor against A to recover the zamindari L was a party, but S was not. In that suit L obtained an order for payment of Rs. 1,00,000 of the sum paid into Court by the zamindar. It was contended by L that S could have no decree for repayment of this sum and (2) that if the money was wrongly paid under the order of the Court to L it was wrongfully seized within the meaning of art. 29 of sch. II of the Indian Limitation Act:

Held, that the Court had power to order a refund and that art. 29 of sch. II of the Limitation Act was not applicable.

APPEAL from the decree of A. J. Mangalam Pillai, Subordinate Judge of Madura (West), in suit No. 7 of 1885.

The facts are set out in the judgment of the Court (Kernan and Parker, JJ.)

Bhashyam Ayyangar and Kalianaramayyar for appellants.

Subramanya Ayyar for respondents.

JUDGMENT.—This case was argued at much length, and many documents, records of suits and many legal authorities were referred to. We do not think it necessary to follow the arguments (except on the points that appear material) in detail.

Bangaru Appu Nayak, zamindar of Kannivadi, was in the year 1861 greatly in debt and had consented to decrees in many suits brought by creditors and thereby gave those creditors hypothecation for their debts on different villages.

Those debts were created—some by the ancestors of the zamindar, but mostly by himself—and they amounted to about Rs. 3,19,500.

The zamindar granted to Adimulam Pillai, defendant No. 1, a lease, dated the 20th of July 1861, of the zamin for 30 years, for the purpose, as stated therein, of clearing the debts slowly as therein specified. That lease recited the debts due to the various creditors by names, and the intention of the zamindar to liquidate the debts as thereby provided. It provides that Adimulam Pillai should take possession of 22 of the villages, and manage the same (3 villages being retained by the zamindar) and that Adimulam Pillai should pay the peshkash to Government and certain maintenance to the zamindar and to others and interest on the debts, and the principal of the debts also as therein provided. Provisions are made for securing Adimulam Pillai the debts paid by him. Adimulam Pillai entered into possession of the 22 villages and so continued in possession, until he was put out of possession in 1882 as after stated. By means of money, partly his own, but

principally by money borrowed by himself from other persons, he paid off and got the zamindari released from the original debts set out in the lease of 1861.

Many of the sums of money borrowed by Adimulam Pillai he repaid from the income of the 22 villages. But two large debts contracted by him remained unpaid, when his possession of the villages ceased in 1882. These debts are—one to Sukya Bhai (represented by the plaintiffs in this suit) under exhibit A, and a debt due to defendant No. 4 under exhibit C. By exhibit A, 30th January 1875, Adimulam Pillai mortgaged to Sukya Bhai 10 of the villages to pay a sum of Rs. 43,000, which sum, with interest, is the claim of the plaintiff in this suit. By exhibit C, Adimulam Pillai mortgaged the whole 22 villages for payment of Rs. 1,30,000, to defendant No. 4. Bungaru Appu Nayak, the lessor, in the lease of 20th July 1861, died on the 6th February 1881, without issue. The zamindari was impartible, and his brother, Appasami Nayak, having succeeded as zamindar filed suit No. 4 of 1881 in the Court of the District Judge of Madura to establish his title to the zamindari free from the lease of 20th July 1861 and for possession of the zamindari with mesne profits from 9th February 1881. The defendants to that suit were Adimulam Pillai, the lessee, and Kusturi Reddi, Kuppu Reddi and Gurusami Reddi, who were sub-lessees of portions of the zamin from Adimulam, defendant, and who alleged they advanced money to him, No. 1, to pay debts due by the late zamindar, the lessor. Defendant No. 4 in this suit applied to be, and was made party (defendant No. 5) to that suit to protect his interest in the debt due to him by Adimulam (defendant No. 1) secured by exhibit C, on foot of which and collateral securities he claimed Rs. 1,74,445. In that suit, it was decided by the District Judge that the document of the 20th July 1861 was not binding on the plaintiff, the zamindar, as a lease, but that it was binding on him as a mortgage to the extent of Rs. 1,87,885 paid by defendant No. 1, to release the estate from debts which as against the plaintiff were proper charges on the estate, and by decree, dated the 18th of April 1882, the Court ordered that the defendants (in that suit) should give up possession of the zamindari of Kannivadi to the plaintiff on his paying into Court for defendants No. 1 and No. 5 the sum of Rs. 1,87,735 with interest at 9 per cent. from the 9th of February 1881 till payment less profit of the estate.

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The zamindar deposited on the 3rd of June 1882 Rs. 2,00,000 in Court in that suit. On the 7th of June 1882, the District Court made an order for payment to defendant No. 5 in that suit (fourth defendant here) of Rs. 1,00,000 (stated to be admitted to be due to him) out of the sum so deposited and recited that the claims of creditors Nos. 2, 3, 4, and the representatives of Tekaram Sukya Bhai could not exceed Rs. 1,00,000, and it was ordered that Rs. 1,00,000 should be retained for a limited time for other creditors to put forward claims. Notices (exhibit S) were issued to defendants Nos. 2, 3, 4, and to Sukya Bhai to file a petition on or before the 21st July 1882, stating if anything was due to them, respectively, out of this money in Court.

The plaintiff in that suit (4 of 1881) appealed to the High Court and by decree, dated the 2nd of May 1885, the sum of Rs. 1,87,335 was reduced to Rs. 1,20,000. The difference between the latter sum and 2,00,000 rupees was paid out of Court to the zamindar leaving 20,000, in Court which sum was by order, dated the 18th of January 1887, paid to defendant No. 4 in this suit on an undertaking by him to repay the sum, if so ordered by the Court.

On the 1st May 1885 this suit was filed by the four plaintiffs, the first two of whom are daughter and grand-daughter of Sukya Bhai and the third is husband of the 2nd and the 4th is transferee, by way of security, of the claim of the other plaintiffs.

The defendants are No. 1, Adimulam Pillai, No. 2 and No. 3 are his sons, No. 4 the Rev. Laberthere (defendant No. 5 in the former suit).

In the first instance Kusturi Reddi and Gurusami Reddi were made parties to this suit, but their names were afterwards struck out and they are not now parties. In the plaint, the deed of hypothecation of the 30th of January 1875 from defendant No. 1 to Sukya Bhai for Rs. 43,000 payable by instalments beginning 30th January 1878 the last of which was due on the 30th January 1884 is stated and the plaint claims that after crediting a payment (admitted) the sum of Rs. 69,284-3-0 is due thereon. The plaint also states the decree directing the money to be paid into Court and the payment out of Rs. 1,00,000 to defendant No. 4 and that Rs. 1,00,000 still was in Court (when the plaint was filed the appeal had not been disposed of). The relief prayed is payment

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by the defendants, Nos. 1, 2, 3 of the Rs. 69,284 and that same should be declared to be a first charge on the amount deposited by the zamindar. Defendant No. 1 in his written statement admits the rights of plaintiffs Nos. 1 and 2. Defendants Nos. 2 and 3, sons of defendant No. 1, deny that they are liable. Defendant No. 4 does not appear to have filed any written statement, but alleged, as appears by the Judge's judgment, that he is not liable to the plaint claims, having got the money from the Court and denies plaintiffs' debt and says plaintiffs are not the legal heirs of Sukya Bhai.

The Subordinate Judge decided that plaintiffs, Nos. 1, 2, and 3 were the representatives of Sukya Bhai and made a decree for payment of the plaintiffs' claim by defendants Nos. 1, 2, 3, but dismissed the suit as against defendant No. 4, on the ground that the claim of defendant No. 4 on the Rs. 1,20,000 is prior to the claim of the plaintiffs. The question of priority between the plaintiffs and defendant No. 4 is to be determined.

One ground of priority relied on by the defendant No. 4 and to which the Judge referred is this. He is assignee of a judgment against the zamindar—the lessor in suit 5 of 1868 for Rs. 1,27,000 and also assignee of a judgment against the same zamindar in suit No. 19 of 1870 for Rs. 20,000 or thereabouts. It is contended for defendant No. 4 that these judgments were obtained for moneys borrowed by defendant No. 1 or paid by him to discharge debts due by the zamindar before 1861 and for which razinama decree had been obtained. This is no doubt true. It is also probably true that in the debts for which the decree in 5 of 1868 was given, some of these debts were incurred for moneys borrowed to pay off portions of the debts, which were included as charges in the Rs. 1,20,000. But defendant No. 1 borrowed and borrowed again to pay the prior borrowing and it would be impossible to trace any equity in defendant No. 4 or in the assignors of the decrees of 1870 and 1868 to have the benefit of money lent to defendant No. 1 to pay off such ancestral or family debts. Moreover, the zamindari has been released on record from *all* debts in suits before 1861 and those suits included all debts, ancestral and other debts, which would be chargeable against the zamindari.

The zamindar by the lease of 1861 bound himself, when proof was given to him of payment of the debt mentioned in that document, to give a bond for the amount of such debt and the

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bonds on which the decrees of 19 of 1870 and 5 of 1868 were obtained were so given.

These bonds and decrees were securities binding on the zamindar and might be used against him, but they did not bind the estate in the hands of the present zamindar.

The money paid into Court was not paid for the purpose of discharging either of those decrees. But it was paid in, in discharge of ancestral and family debts binding the estate, and which had been paid by defendant No. 1 under the conditions in the lease of 1861. The decree for payment of Rs. 1,20,000 was made not because of any liability on the estate then existing by virtue of decrees, but because the estate was relieved by defendant No. 1 from ancestral and family debts to the extent of Rs. 1,20,000 and because it would be inequitable to take from defendant No. 1 the benefit of the lease without paying him the amount which the present zamindar would have been obliged to pay, if defendant No. 1 had not paid those debts. Defendant No. 4 was not entitled to take any proceedings against the estate, or against the present zamindar in respect of either of the decrees.

We do not think defendant No. 4 is entitled to be considered to have a charge on the Rs. 1,20,000 by reason only of being assignee of the decrees. The plaintiffs in the appeal before us contended that the Rs. 1,20,000 was compensation for the loss of the lease, and in lieu of the lease, and that plaintiffs, as the mortgagees of the lease, have a first charge on the money.

It is clear the money was not awarded by the Court in lieu of the lease, as the lease was declared invalid as a lease, but good as a mortgage to the extent of Rs. 1,20,000.

The money paid into Court was not a substitute for the interest in the lease. The Court treated the lease as a mortgage on the zamindari for the amount which the plaintiff in the suit of 1881 ought to pay. That mortgage was created by the decree and was not contemplated by any of the parties when the instruments, under which the plaintiffs and defendant No. 4 claim, were executed. The mortgage, though not a substitute for the lease in the zamindari, was an interest, which had arisen in consequence of the payment by defendant No. 1, in respect of his interest in the lease, which interest was mortgaged to the plaintiffs and defendant No. 4.

The interest in the lease has failed, but defendant No. 1 had a

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right under the decree of January 1882 to remain in possession until the amount awarded was paid. We think, therefore, the mortgagees of the lease were entitled to have the amount due to them on the mortgage of the lease thrown on the Rs. 1,20,000. As between defendant No. 1 and defendant No. 4 this view has been adopted in suit 4 of 1881 and as between the plaintiffs and defendant No. 1 the latter has in his written statement admitted plaintiffs' right to be paid out of the mortgage amount. Moreover, from the order of the 7th June 1882, it appears that the District Judge contemplated that other parties than defendant No. 4 claiming against defendant No. 1 would be entitled to participate in the fund.

A question is made by the plaintiffs in the 4th ground of appeal whether the Rs. 1,20,000 should be divided rateably between them and defendant No. 4, but it was not urged or argued by either party.

It is therefore now to be seen what are the priorities of the plaintiffs and defendant No. 4 to the sum of Rs. 1,20,000. No doubt the decree of the 18th April 1882 directed that the Rs. 1,87,000 was to be paid to the defendants Nos. 1 and 5 in that suit, but the plaintiffs in this suit were not parties to, and are not bound by, that decree. Defendant No. 4, however, contends that, if the plaintiffs adopt the decree in respect of the declaration that the Rs. 1,20,000 should be paid into Court, they must adopt all the directions in the decree, including the direction for payment to defendant No. 4. This contention is not well founded.

Defendant No. 4 sets up that decree as defining his rights. The plaintiffs not being bound thereby may, and do submit, to be bound by the declaration that the lease is not valid as a lease, but good as a mortgage. They cannot set up any matter inconsistent with that declaration. But the direction as to payment of the amount of the mortgage money is entirely separate from the prior declaration. A direction for the payment of the mortgage money to plaintiff would not be inconsistent with the prior declaration.

Here the plaintiffs only dispute the direction for payment to defendant No. 5 in that suit of the Rs. 1,20,000 and this is consistent with the adoption of the rest of the decree. The appellants rely on the deed of the 30th of January 1875, whereby security was given on 10 villages and claim the priority of that date. If defendant No. 4 does not establish priority over that

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deed, plaintiffs will have priority over so much of the Rs. 1,20,000, as will represent the proportionate value of the 10 villages to the 12 other villages. Defendant No. 4 relies on the deed of the 28th of June 1879, whereby all the 22 villages were hypothecated. As regards the 12 villages not hypothecated to the plaintiffs, they cannot claim any portion of their proportionate value. Defendant No. 4, however, seeks to establish his priority over the plaintiffs in respect of the 10 villages thus:—

By deed of the 5th of January 1875, exhibit XII, defendant No. 1 hypothecated to Minakshi Nayak the 12 villages [and also property belonging to defendant No. 1 in his own right] to secure a sum of Rs. 1,00,000, therein recited as being due by defendant No. 1 for moneys advanced to pay debts mentioned in the deed of 1861.

This deed created the hypothecation first in date by defendant No. 1 on all the villages.

By an agreement in writing, dated the 27th of June 1879, (allowed to be given in evidence by the plaintiffs on the appeal) between Minakshi Nayak and defendant No. 1, the exhibit, No. XII of the 5th January 1875, is recited and also the fact that defendant No. 1 became further indebted to Minakshi making his whole indebtedness after credit and deduction Rs. 1,78,317—and that Minakshi received from defendant No. 4, by name, Rs. 1,00,000—and that, after crediting of that sum 21,683 and 6,030 rupees to the bond of the 5th January 1875, there remained a balance of Rs. 78,317 due by that defendant to Minakshi. The agreement provided that Minakshi released the 22 villages from the hypothecation liability created by the deed of 5th January 1875, and that the Rs. 78,317 should be paid by defendant No. 1 out of the income of the zamin, by instalments as thereby provided.

The exhibit C was executed bearing date the next day, viz., the 28th of June 1879. It recited that Rs. 30,000 was theretofore and then due by defendant No. 1 to defendant No. 4, and that the latter at request of the former paid to Minakshi Rs. 1,00,000. It then provided that, for the purpose of paying that sum of Rs. 1,30,000 and interest, from the income of the zamin, the peshkash and maintenance and interest should be paid and that defendant No. 1 should pay Rs. 78,317 and interest to Minakshi by Rs. 16,000 per annum and should pay the Rs. 1,30,000 by

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instalments, commencing 30th July 1885 and ending 30th July 1889,—that after the debt to Minakshi should be paid off the estates which defendant No. 1 mortgaged to Minakshi should be made equivalent to the amount of the debt of Rs. 1,30,000 and interest until it was cleared. The properties set out in C comprise the 22 villages and property of defendant not No. 9 belonging to the zamindari.

Thus it appears that $21,683 + 6,030 = 27,713$ of the Rs. 1,00,000 lent by defendant No. 4 was specially applied to discharge so much of the hypothecation charges created by the exhibit XII, dated the 5th of January 1875. The principle of the decision in *Gokaldas v. Paranmal* (1) is that when in India there are successive mortgages on an estate a purchaser or mortgagee of the equity of redemption who pays off a first incumbrance, is entitled as against intermediate incumbrances to stand in the place of the incumbrancers paid off, even though he did not express any intention to keep alive the first incumbrance. In the judgment, it is said: "The doctrine of *Toulmin v. Steere* is not applicable to Indian transactions, except as a law of justice, equity and good conscience. The obvious question to ask in the interest of justice, equity and good conscience is what was the intention of the party paying off the charge. He had a right to extinguish it or to keep it alive. What was his intention? If there is no express evidence of it what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest. In each case, it may be for the advantage of the owner of the partial interest to keep on foot a charge upon the corpus which he has paid off?" If therefore the Rs. 1,00,000 lent defendant No. 4 had been applied to pay off the whole hypothecation charges under the exhibit XII, 5th January 1875, no doubt defendant No. 4 would have had the priority of that charge to the full amount. But only Rs. 27,713 was so applied, and the question is does that fact prevent the application of the rule above stated. We do not think it does, inasmuch as the hypothecation under that agreement of 5th January 1875 is by the terms of the agreement of the 27th of June 1879 released and Minakshi after that had no hypothecation on the villages. The position there-

(1) I.L.R., 11 I.A., 126; s.c. I.L.R., 10 Cal., 1035.

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fore of defendant No. 4 is in principle the same as regards Rs. 27,713 as if he had paid off the whole amount of the hypothecation of 5th January 1875. The whole charge was released as it was in the case the subject of the decision in the Privy Council. But as defendant No. 4 has only paid a part of the amount of the first charge, he can only rank to that extent and interest in the priority of that first charge. The result is that defendant No. 4 must be declared to be entitled to have a first charge to the extent of Rs. 27,713 and interest on the sum of Rs. 1,20,000.

It is alleged by the plaintiffs that the 10 villages are more valuable villages than the 12 villages. If this is so, the value of each village should be ascertained. If the amount of the value of the 10 villages exceeded the value of the debt due to the plaintiff, then the balance would be applicable to the debt of defendant No. 4, who has a 2nd charge thereon.

Defendant No. 4 contends that having been awarded payment of the sum of Rs. 1,00,000 under the order of the 7th of June 1882, the plaintiffs are not entitled to obtain any decree that defendant No. 4 should refund that sum, or any part of it. We do not doubt that a court of equity has power to make such order, if it is necessary to effectuate justice between the parties. The plaintiffs were not parties to the suit of 1881 and the decree and order for payment were made by the Court in the absence and in ignorance of the claim of the plaintiffs. The order was made in mistake of the facts. Moreover, the order was plainly not intended by the Court to be a final disposition of the fund. It contemplated that further claims might come in, but apparently the Court thought it was not likely that the payment to defendant No. 4 could be disputed. The payment was merely provisional. Moreover, a court of equity exercises the jurisdiction to order a refund of payment made under its order when justice requires it. In cases when legatees have been paid by order of Court in the distribution of assets and when an unpaid creditor or legatee sues to recover his debt or legacy, the Court makes decree against the paid legatee to refund. See *March v. Russell*(1), *Gillespie v. Alexander*(2).

Defendant No. 4 contended that the money paid to him under the order of the 7th of June 1882, if it was wrongfully paid, was wrongfully seized within the meaning of art. 29 of the Limit-

ation Act, and therefore the plaintiff is barred from recovering the amount wrongly paid. We do not think the order for payment was a legal process within the meaning of that section.

The process meant by that article refers to process under which seizure takes place. Here there was no seizure. The fund was Court and was subject to the order of the Court. Article 29 does not apply.

Though the plaintiffs stated their cause of action arose in 1878, they were mistaken. Their cause of action arose when the decree of the February 1882 was passed and art. 120, Limitation Act, applies. Therefore the suit is in time. The first two plaintiffs are the representatives of Sukya Bhai to whom the bond of the 30th of May 1875 was executed and apparently are the parties entitled to maintain this suit along with plaintiff No. 4. The sub-lessees, the Reddies, who were parties to suit 4 of 1881, had not any hypothecation on the lease of 1861 and have no claim in the fund and it was not necessary to make them parties to the suit. They did not appeal from the decree of 1881. The sum due to the plaintiffs and defendant No. 4 exceeds the Rs. 1,20,000 and interest. We modify the decree of the Subordinate Judge as follows:—We declare that the funds applicable to the payment of the plaintiffs and defendant No. 4 in this cause are as follows:—Rs. 1,20,000 with interest thereon, Rs. 1,00,000 from 7th June 1882, also interest on Rs. 20,000 from the 18th day of January 1887 and with such further interest as mentioned in the decree of the High Court, and that all such sums and interest, after making deduction allowed by the Court amounted on the 18th January 1887 to Rs. 1,38,639 as appears by an order of the Court of that date. Declare defendant No. 4 entitled to a first charge on the Rs. 1,20,000 and interest thereon for Rs. 27,713 from the 28th June 1879 to 7th of June 1882 at 9 per cent. per annum and that he is entitled to retain the same out of Rs. 1,00,000 paid to him under the order of the 7th of June 1882 and that the 22 villages shall be valued separately and that the plaintiffs and defendant No. 4 are entitled to the residue of the fund after payment to defendant No. 4 as aforesaid in the proportion of the value which the 10 villages and 12 villages bear to each other. It is ordered that defendant No. 4 do bring in and deposit in Court to the credit of this cause the sum of Rs. 38,639 drawn out of Court under the order of the 18th January 1887 with

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(1) 3 My. & Cr., 41.

(2) Russell—130.

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interest thereon at 4 per cent. per annum until payment into Court. It is ordered that in case the said sum of Rs. 38,639 and interest is not sufficient to pay to the plaintiffs the sum they shall be entitled to receive according to the above directions, that defendant No. 4 shall pay into Court to the credit of the cause a sum sufficient along with the said sum and interest to make up the sum payable to the plaintiffs.

The claim of the plaintiffs and of defendant No. 4 to costs are nearly equally balanced. The plaintiffs have succeeded in the appeal, but not to the full extent for which they sued. Unless the plaintiffs had chosen to go in and claim under the order of the 7th of June 1882 a suit was unavoidable to finally dispose of the fund in No. 4 of 1881. As between the plaintiffs and the defendant No. 4, each party—plaintiffs and defendant No. 4—should abide their own costs. Confirm the decree of the Sub-Judge in other respects with the above directions. The case is remitted to the Court of first instance to be carried out.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

MADDEN (DECREE-HOLDER),

and

CHAPPANI (DECREE-HOLDER).*

Civil Procedure Code, ss. 294, 295.

M and C each obtained a decree against the same judgment-debtor and applied for execution. C, in execution of his decree, attached certain immovable property, and, with the permission of the Court, purchased the same under s. 294 of the Code of Civil Procedure and set off his purchase money against the decree. M claimed that the proceeds of the sale to C should be rateably distributed under s. 295 of the Code and that C should either elect to have the property resold or pay into Court the rateable proportion due to M. C objected to a resale or to pay:

Held, that C might be compelled to refund the rateable amount due to M by summary process in execution.

CASE referred, under s. 617 of the Code of Civil Procedure, by W. E. Clarke, Subordinate Judge of the Nilgiris.

* Referred Case No. 10 of 1887.

MADDEN
v.
CHAPPANI.

The case was stated as follows:—

"Mrs. Madden, plaintiff in original suit No. 62 of 1885, is a decree-holder against three persons. Peria Chappani Pillai, plaintiff in original suit No. 38 of 1885, is a decree-holder against one of Mrs. Madden's judgment-debtors. In execution of her decree, Mrs. Madden has taken out various execution proceedings, one of which is still pending. In execution of his decree, Chappani Pillai attached certain immovable property of his judgment-debtor, and, with permission of the Court, purchased a portion of it at a court-sale, setting off his purchase money against his decree-amount—s. 294. On this purchase and set-off becoming known to Mrs. Madden, she, through her solicitor, Mr. Smith, protested against this course being allowed, and urged that the proceeds of the sale of the property attached by Chappani Pillai should be rateably divided amongst the decree-holders under s. 295. On hearing Mr. Smith for Mrs. Madden in support of this contention and Mr. Orr for Chappani Pillai against it, the Court was of opinion, on the authority of *Shrinivas v. Radhabai*(1), that, although it had given Chappani Pillai leave to bid and set off, this could not deprive Mrs. Madden of her right as a decree-holder to a rateable distribution of the purchase money under s. 295; but it had a doubt as to whether it could order such purchase money to be paid into Court, as, however, the case already cited seemed to show that, under circumstances very similar to the ones which exist in this case, the Bombay High Court allowed a judgment-creditor to elect a resale, and s. 294, cl. 3, provides for a resale, the Court ordered that Chappani Pillai should exercise such election, or show cause why he should not pay the purchase money into Court. Notice to this effect was served on the said Chappani Pillai. On the day appointed for the said Chappani Pillai to show cause, he appeared by Mr. Winterton, who argued that his client was not bound by the Court's order to elect or show cause, and maintained that the last proviso of s. 295 operated to secure him from being compelled to pay his purchase money into Court, and that Mrs. Madden could only get her share of such money by filing a suit for it.

"OPINION.—I am of opinion that the case of *Shrinivas v. Radhabai* is clear authority for the position that s. 294 only applies

(1) I.L.R., 6 Bom., 570.

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as between a purchasing decree-holder and his judgment-debtor and cannot avail to deprive a competing decree-holder under s. 295 of his rights under the latter section; as to Mr. Winterton's argument founded on the wording of the last proviso to s. 295, I am of opinion that it is not at all in point, for this proviso seems to me only to apply in respect of assets which have been realized and paid into Court and then paid out of Court to a person not entitled to receive them.

"In this case, however, no assets at all have been received by the Court or paid out to any one, and, therefore, I think this proviso inapplicable to the present case. I am, however, doubtful whether, since this Court allowed Chappani Pillai permission to bid and set off under s. 294, it can order him to pay his purchase money into Court, there being no provision of the Code to this effect. I would, therefore, respectfully solicit the decision of the Honorable the Judges of the High Court as to whether, under the circumstances narrated, this Court has power to order his purchase money to be paid into Court by Chappani Pillai, or whether its power is restricted to ordering a resale under cl. 3 of s. 294."

Mr. Shaw for Mrs. Madden.

Chappani did not appear.

The Court (Muttusami Ayyar and Brandt, J.J.) delivered the following

JUDGMENT:—The permission granted under s. 294, Civil Procedure Code, to a judgment-creditor to set off the amount of the purchase money payable for the property sold against the debt due to him under his decree must be taken to be granted subject to the provisions of s. 295—*Viraragava v. Varada*(1).

The set-off so allowed in effect represents the payment, into and out of Court, of the purchase money due by the purchaser, and we agree with the view expressed in *Taponidi Hordanund Bharati v. Mathura Lall Bhagat*(2) that the substantial nature of the transaction is not altered and that the set-off is allowed as a substitute for payment into and out of Court as a matter of convenience.

It is clear then that Chappani Pillai would not be bound to pay into Court the purchase money if he considered it to his interest to elect for a resale, and that if he wishes the sale to

(1) I.L.R., 5 Mad., 123.

(2) I.L.R., 12 Cal., 499.

stand he must pay in so much of the purchase money as may be rateably due to other creditors under s. 295 on account of their money decrees. MADDEN v. CHAPPANI.

If he will neither elect a resale nor pay the money into Court as above limited, such refund may be enforced either by suit or by an order in execution proceedings by way of restitution. Clause 3, s. 294, of the Code of Civil Procedure is applicable only to cases in which the purchaser buys without the permission of the Court, and there is no other provision in the Code which authorizes the Court executing the decree of its own motion to order a resale by reason of non-compliance with a direction to refund.

We, therefore, answer the question referred to us as follows:—The Court executing the decree has no power to order the purchaser to pay the whole of the purchase money into Court, but it is competent to the Court to give him the option of electing a resale, and if he does not avail himself of that option, it is open to the Court to order him to pay into Court so much of the price as is due to the other decree-creditors entitled to share rateably in the distribution of the assets, and to enforce that order by summary process in execution. The Court is also at liberty, where it sees fit, to refer the execution-creditor or creditors to a regular suit when the circumstances of the case appear to render such a course desirable. There will be no order as to costs in the matter of this reference.

APPELLATE CRIMINAL.

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

KHADAR KHAN, IN RE.*

1887.
Dec. 15.

Cattle Trespass Act I of 1871, s. 22—Compensation.

No appeal lies against an order made under s. 22 of Act I of 1871.

CASE referred under s. 438 of the Code of Criminal Procedure, by A. F. Cox, Acting Sessions Judge of Cuddapah.

The facts of the case as stated by the Judge were as follows:—

One Khadar Khan was ordered by a Second-class Magistrate to pay Rs. 35 as compensation under s. 22 of the Cattle Trespass

* Criminal Revision Case 467 of 1887.

KHADAR
KHAN,
in re.

Act. Khadar Khan appealed, and the Joint Magistrate admitted the appeal and reversed the order treating it as a conviction. The Sessions Judge was of opinion that no appeal lay (Weir, p. 676, ed. 3).

Khadar Khan in person.

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

JUDGMENT:—We are of opinion that no appeal lay against the order of the Second-class Magistrate made under s. 22 of Act I of 1871. We set aside the order made by the Joint Magistrate in appeal, and restore the order of the Second-class Magistrate.

ORIGINAL CIVIL.

Before Mr. Justice Kernan.

1888.
April 20.

OUCHTERLONY AND OUCHTERLONY AND OTHERS,

BY REVIVOR

ADMINISTRATOR-GENERAL OF MADRAS AND WAPSHARE
AND OTHERS.*

*Trust—Improvements of estate—Rights of tenant for life and remainder man
as to sums expended.*

A testator conveyed his property which consisted of extensive coffee estates to trustees upon trust as to part thereof for certain persons for life and then upon trust for their children absolutely. A suit having been filed for the administration of the trusts of the will a receiver was appointed. On the application of the receiver, and with the consent of all parties, the Court sanctioned the extension of the estate. This was done by raising a loan on pledge of the profits of the estate, out of which, when realised, the loan was paid off. By the will, the trustees were empowered to raise money for the purpose of managing the estate at their absolute discretion, either by using the profits, or by pledging or selling the corpus. The tenants for life claimed that the loan might be declared a charge on the estate:

Held, that the extension was within the powers of the trustees, but that as between the life-tenants and the remainder men, the former were entitled to have the sums expended on the improvements charged on the corpus, they keeping down the interest.

This suit was filed in 1878 for the administration of the trusts under the will of James Ouchterlony. The plaintiff and defendant No. 1 were the surviving sons of the testator, and the other defendants were his two daughters and his daughter-in-law and

* Civil Suit No. 298 of 1878.

their children, most of whom were minors. The suit was revived OUCHTERLONY AND OUCHTERLONY on the death of the plaintiff by Michael Gould, Administrator-General of Madras, his executor, and the estate of defendant No. 1 was on his death represented by H. C. F. Wapshare, the husband of one of the testator's daughters, and one of the executors of the will of defendant No. 1. On the 8th of September 1879 an order was made that an account should be taken by a Judge sitting in Chambers of the estate of the testator, &c. On the 10th April 1888 the case came on for hearing for confirmation of the certificate of the Judge in Chambers.

The Acting Advocate-General (Mr. Spring Branson) for plaintiff.

Mr. Wedderburn for defendant No. 1 and the trustees of the will.

Mr. Grant and Mr. Brown for the tenants for life.

Mr. Shaw and Mr. Kernan for the reversioners.

Mr. Grant moved that certain sums of money which had been expended out of the income of the estate by the receiver on extensions and improvements of the estate should be declared to be a charge on the reversion in favor of the tenants for life who would otherwise have received 30,000 rupees each.

These sums had been raised under orders of the Court on the application of the receiver with the consent of all parties to the suit by pledging the annual coffee crop with a Bank, the loan being repaid out of the sale-proceeds of the crop.

Mr. Kernan, contra, referred to *Jones v. Jones*(1), *Floyer v. Banks*(2).

Mr. Brown referred to Lewin on Trusts (Ed. 8), p. 576—*Marker v. Kekewich*(3), *Marquis of Bute v. Ryder*(4).

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

KERNAN, J.—The question before the Court now is as to the relative obligation of the tenants for life, and those in remainder in respect of the money spent in extending the estate of the testator. This depends on whether it appears from the will of Ouchterlony that intended advances made by the trustees for the benefit both of the tenants for life and those in remainder are to be borne exclusively by the tenants for life or should be borne in the ordinary way by the whole estate, the tenants for life keeping

(1) 5 Hare, 440.
(3) 8 Hare, 291.

(2) L.R., 8 Eq., 115.
(4) L.R., 27 Ch. D., 196.

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down the interest and those in remainder paying the corpus of the debt. There is no doubt as to the general principle that if an estate is given by will to a tenant for life and to a remainder man subject to debts already existing or subject to debts created by the testator by charges under his will, without any special directions as to how the debts or charges are to be paid, the tenant for life of the estate is only bound to pay the interest, and the corpus of the estate must bear the principal.

If the testator expressed himself in clear terms that the tenant for life should bear the burden, he must bear the burden. The estate belonged to the testator to devise it as he pleased.

Now the will enables the trustees of their own absolute and uncontrolled discretion to sell any portion of the estate, he directs that after-payments of debts all the residue of his estate should form a trust fund, as he devised—five-sixteenth part thereof to James William Ouchterlony for his own absolute use and benefit, also five-sixteenth thereof to his other son, G. A. Ouchterlony, for his own absolute use and benefit. As regards those five-sixteenths no question arises. As to two-sixteenth other parts of the trust funds, the testator directs his trustees to pay the annual income arising therefrom to his daughter, Helen Harriett Johnson, during her life, and, after her decease, as to the capital as well of the said two-sixteenth and the securities on which they are invested in trust for her child or children absolutely. Then, in the same way, and in the same terms, there is a trust created for Fanny Ouchterlony, his daughter-in-law for life, in two-sixteenth of the estate, with remainder to her children. The other two-sixteenth is given to Mrs. Wapshare for life, with remainder to her children, in the same terms. The will provides it should be lawful for the trustees for the time being, so long as they should think fit to carry on and continue the business of a coffee planter carried on by him, by means of the capital employed therein, and any further capital which the trustees may think requisite for that purpose, such additional capital to be obtained either on loan or out of his general estate. It then declares that his trustees for the time being should, while they carry on the said business, have the fullest discretionary power in all matters relating thereto, as if they were absolute proprietors or owners, but the actual management thereof may be delegated to managers; and that the trustees should, out of the profits, pay all rents, rates, taxes, insurance,

salaries, wages and other expenses of, and incidental to, the said business, and also remuneration to such as they shall think fit. Then it declares that the net profits arising from the said business shall be applied in the same manner in all respects hereinbefore declared, as if the same were income arising from investment of the trust funds. Such net profits are to go to the tenants for life during their lives. Then there is a declaration that while the said business should be carried on by the said trustees, no person interested under his will, nor any other person, except such trustees, shall have any right of control or management over, or in relation to, the management or carrying on of the said business or the mode or time of ascertaining and applying the profits thereof, but the same shall be wholly in the discretion of the trustees.

Upon the will it is perfectly plain that the testator intended that the different tenants for life should each have their own share of the net profits. The proviso against interference with the trustees as to the time or mode of application of profits shows that complete control was given them over the management of the profits. The trustees might have applied the whole of these profits for the extension of the estate; they might have realised by sale or mortgage. If they had realised by sale or mortgage, it is plain that the corpus of the estate would have to pay the principal of the mortgage, and the tenants for life would only have to pay the interest. After this suit was filed, a receiver was appointed, and the receiver was also the manager of the property. After he was some time in possession, the parties, including the trustees, agreed that as there was a large estate belonging to the deceased adjoining the estate on which he carried on the business of coffee planter, it would be to their benefit and to the benefit of all parties that the estate should be extended, and that for that purpose, additional capital should be raised. A question arises whether apart from the consent of the parties, the trustees were justified in raising money for the purpose of those extensions. Looking at the circumstances of the testator and of his estate at his death, I think, they were. The proviso authorises them as long as they carried on the business of coffee planter. Coffee-planting might, perhaps, include in it planting of cinchona or planting of tea according to circumstances. When we come to look at the circumstances of the testator at his death, from which time the will speaks, we find the circumstances are these. He had spent 18,000 rupees or there-

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abouts in planting tea, he had planted some hundred trees of cinchona and, therefore, he was a tea-planter and cinchona-planter. The words used are "absolute proprietors or owners." Taking these circumstances, I think, the trustees were perfectly justified in raising the additional capital not only for the purpose of coffee-planting but also for tea-planting and cinchona-planting. They, therefore, made an application to the Court on more than one occasion, and notice was given to all parties, all parties appeared and consented that the receiver should be at liberty to raise by loan from a Bank money sufficient for the purpose of making the extensions on the pledge of the growing crops. The extensions were carried out, and were intended to be, and, in fact, as it turned out, were to the benefit not only of those in remainder but the tenants for life. It is unnecessary to refer to the particular sums, the decree will state the same limiting the sums and separate accounts made for these extensions. The money expended on the extensions were raised out of the net profits of the estate to which profits the tenants for life were entitled. The trustees had power so to raise money as they had power if they thought fit to raise money on sale or mortgage. Their power could not be interfered with by the beneficiaries; but the selection by the trustees to raise the money out of the growing crops, or net profits, did not affect the question between the beneficiaries how the burden should be borne between them. The decision in the case of the *Marquis of Bute v. Ryder* (1) was based on facts not unlike the facts of this case. The trustees under the will of the plaintiff's father finding that there was a large annual surplus of income applied that surplus to the payment of the improvements which are said to have amounted to a million. They paid the whole of the surplus to these improvements. What was done here was the whole of these extensions were paid for out of the income. It was there contended that the trustees having spent the income of the property towards improvements, that it was not open to the Marquis of Bute, the plaintiff, to obtain a charge on the estate for the amount. It was argued that as the trustees had power to apply any portion of the produce of estate or the income of the estate inasmuch as the trustees applied the income for payment of the improvements, the plaintiff,

(1) L.R., 27 Ch. D., 196.

as tenant for life, could not dispose such application or it was contended that if the trustees had honestly applied the income of the estate in discharge of the improvements it was not open to the tenant for life to question that. No doubt, if the trustees honestly applied the income, then as between those trustees and the tenants for life the accounts were right; but that was not the point in that case, nor is it in this case. The point in this case is what are the rights as between the tenant for life and the tenant in remainder. The question is not whether the trustees were right in doing what they did. The point decided in that case is to be found at the end of the judgment when it is said "if they, the trustees, had raised the money by sale or by mortgage, they would have charged the corpus of the estate; that they were at liberty to charge the estate cannot be disputed, but there is clear authority for holding that in no case can the exercise by the trustees of their discretion affect the rights of the parties *inter se*." Applying the principle of that answer to the provisoes in this will giving them the absolute power of disposal, the exercise of the power by applying the moneys to the extension does not affect the rights of the parties *inter se*. In Story's Equity Jurisprudence, s. 558, he refers to the marshalling of estates, securities and liens and says: "In the next place as to marshalling assets (strictly so-called) in the course of the administration. In the sense of the lexicographers to marshal is to arrange or rank in order, and in this sense the marshalling of assets would be to arrange or rank assets in the due order of administration. This primary sense of the language has been transferred into the vocabulary of Courts of Equity, and has there received a somewhat peculiar and technical sense, although still germane to its original signification. In the sense of the Courts of Equity, the marshalling of assets is such an arrangement of the different funds under administration as shall enable all the parties having equities thereon, to receive their due proportions notwithstanding any intervening interests, liens or other claims of particular persons to prior satisfaction out of a portion of these funds. Thus where there exist two or more funds and there are several claimants against them and at law one of the parties may resort to either fund for satisfaction, but the others can come upon one only; there, Courts of Equity exercise the authority to marshal the funds and by this means enable the parties whose remedy at law is confined to one fund only, to

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(1) 5 Hare, 440.

There must, therefore, be a declaration that as between the parties the several tenants for life and their children, the tenants for life are each entitled to a charge on the remainder of the two-sixteenth limited to their children, but that the tenants for life must each bear during their respective lives the interest that accrues upon the sum charged on the two-sixteenth remainder. As regards the shape of the decree, the decree will therefore confirm the certificate and set out the terms of the certificate, converting the certificate into a decree in its several branches and with its several schedules. There will then be a recital in the decree that a sum of Rs. 3,000 mentioned in the certificate as due to the administrator of James William Ouchterlony has been paid to the administrator. Then the decree is to direct the receiver over five-sixteenths of the estate belonging to J. W. Ouchterlony and vesting in the plaintiff as executor shall continue until further orders. The decree will declare all parties to the suit entitled to their costs in the following manner. The trustees shall pay out of the funds the costs of the plaintiff when taxed and ascertained, and the costs of the trustees when taxed and ascertained, and also the costs of the several tenants for life and of the infants, after deducting from all such costs all sums of money due or paid heretofore on account thereof under the orders of this Court, dated 21st April 1886. Costs as between attorney and client. Liberty to all parties to apply.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

APPAYYA (PLAINTIFF), APPELLANT,
and

RAMIREDDI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 146—Failure of plaintiff to prove unnecessary averments—Decree on admission of defendant—Unnecessary issues raised by Court.

In a suit brought by an undivided member of a Hindu family to set aside a sale made by the managing member and to recover a moiety of the land sold, the plaintiff alleged that he had been adopted by his deceased uncle and claimed as adopted son. The purchaser denied the adoption, alleged that plaintiff was the natural brother of the vendor, and justified the sale under Hindu law.

* Second Appeal No. 1044 of 1887.

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Apl. 20, 24.

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The lower Courts found that the adoption was not proved, and, on the plaintiff urging that if the adoption was not proved yet he was entitled to recover by virtue of the admission that he was the natural brother of the vendor, held that the latter claim was inconsistent with the claim as adopted son.

The suit was therefore dismissed:

Held, on appeal, that the suit was improperly dismissed, and that if the purchaser could not justify the sale the plaintiff was entitled to succeed.

The rule that the decree should be in accordance with what is alleged and proved, is intended to prevent surprise and is not applicable to a case in which the defendant's own admission is adopted as the ground of decision against him.

APPEAL from the decree of C. S. Crole, District Judge of North Arcot, confirming the decree of M. Jayaram Rau, District Munsif of Chittoor, in Suit 501 of 1885.

The facts are set out in the judgment of the Court (Muttusami Ayyar and Parker, JJ.).

Mr. Ramasami Raju for appellant.

Narayana Rau for respondents.

JUDGMENT.—The plaintiff (appellant) is a minor, and, as his next friend, his uncle, instituted the present suit to set aside a sale of joint family property and to recover for the minor the moiety to which he would be entitled as a coparcener on partition. The plaint stated that the minor's father Surayya and one Appayya were cousins; that the property in dispute was joint; that Appayya adopted the minor; that defendant No. 2 (respondent) was his natural brother, and that he alienated the joint property without adequate necessity or justification in favor of defendant No. 1 (respondent). Defendant No. 2 admitted the claim and alleged that defendant No. 1 took advantage of his youth and improperly obtained a sale-deed from him. Defendant No. 1, who is the purchaser, resisted the claim. He denied that Appayya adopted the minor plaintiff, and that the property in suit was common both to Appayya and Surayya. He stated however that the plaintiff and defendant No. 2 were Surayya's sons as alleged; that the property in question belonged to Surayya, and that defendant No. 2 sold it to him in payment of a debt contracted by Surayya's widow for the benefit of the joint family. Upon the pleadings the coparcenary relation in regard to the property in suit and the minor's title to a half share were admitted, subject to the special case set up by defendant No. 1, viz., that there was a sale in his favor which bound the minor's interest. The District Munsif recorded three issues with reference to the question of title, viz., (1) whether

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the property in litigation was common to Appayya and Surayya, (2) whether Appayya adopted the appellant, and (3) whether the sale was for family benefit. He recorded, however, no issue as to whether if the sale were not valid, the plaintiff was entitled to the relief claimed by him on the admissions made by defendant No. 1. He decided the first two issues against the minor, and the third issue against the purchaser, and dismissed the suit with costs. In his judgment he referred to the plaintiff's contention that he was entitled to the relief prayed for on his natural admitted birthright, but overruled it on the ground that it was inconsistent with his alleged right as an adopted son. On appeal, the District Judge concurred with the District Munsif that the case set up in the plaint was not proved and confirmed the original decree. It is urged in second appeal that the plaintiff was entitled to a decree on the ground that the special case set up by defendant No. 1 was not proved, and that the plaintiff's title as a coparcener in respect of the property in question was admitted.

It seems to us that the contention is well founded. The plaintiff was entitled at the first hearing to adopt the admissions of defendant No. 1 as proof of his *prima facie* title to the relief claimed and to put him to the proof of the special case set up by him. In dealing with questions of alleged variance between the ground of claim and the ground of decision, regard should be had more to the substance of the issue than to the form in which it is raised. The substantial issue in the case was whether the plaintiff was a coparcener at the time of sale with respect to the property in dispute, and, if so, whether the sale set up by defendant No. 1 was made for family benefit. Whether coparcenary was deduced from his *status* as the son of Surayya or as the adopted son of Surayya's cousin was not a matter necessary for the decision of this case. If the District Munsif had said that the plaintiff had a good *prima facie* title in either view of his *status* and recorded an issue only with reference to the special case set up by defendant No. 1, it could not be contended in appeal that there were false averments in the plaint, and that though they were immaterial for the purpose of determining the claim to the relief prayed for, distinct issues ought to have been raised in order that the plaintiff may be punished in some way for making untrue statements. The fact of the District Munsif having recorded issues which were not necessary to see if the plaintiff had a *prima facie* title, could make no

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difference. It is, on this view, that when the plaintiff asserts one kanam and the defendant relies on a different kanam and the former claims a decree on the admitted kanam, a decree has been passed in his favor by this Court. Again, a decree has been passed in plaintiff's favor when the plaint avers a lease and jenm title and the former is not, and the latter is, alone established. If the plaint in this case stated that the plaintiff claimed either by reason of his *status* as Surayya's son by birth, or as Appayya's son by adoption, it could not be said as supposed by the District Munsif, that the plaintiff was not entitled to rely on such alternative ground of claim. Having regard to s. 146 of the Code of Civil Procedure, the absence of an express allusion to alternative averments in the plaint should not be permitted to prove fatal to the plaintiff's claim when the alternative is raised by the pleadings as a ground of decision. The rule that the decree should be in accordance with what is alleged and proved has for its object to prevent surprise and preclude the adoption, as a ground of decision, of what is not suggested by the pleadings and other materials on which issues may be framed and presumably not in the contemplation of the parties when they proceed to trial. There can be no surprise upon a party when his own admissions are adopted as the basis of a decision against him. If the course adopted by the District Munsif in this case misled defendant No. 1, and he thereby failed to prove his special case, an opportunity should be given him to prove it; but we do not think that the suit should be dismissed because the District Munsif raised issues which were unnecessary for the purpose of determining whether the plaintiff had a *prima facie* title, and then refused to recognise the plaintiff's right to claim a decree on the admissions made by the defendant and on the finding that the latter failed to prove his special case.

We set aside the decree appealed against and direct that the appeal be re-heard with reference to the foregoing observations, and that leave be given to both parties to produce fresh evidence with reference to the third issue. We further direct that, under the circumstances, each party do bear his own costs of this appeal. The other costs will be provided for in the revised judgment.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

SITARAMAYYA (DEFENDANT), APPELLANT,

and

VENKATRAMANNA (PLAINTIFF), RESPONDENT.*

1888.
April 6.

Transfer of Property Act, ss. 67, 83, 84—Suit by mortgagee instituted before payment into Court—Right of mortgagee to a decree and to full costs.

In a suit to recover money due on a mortgage, defendant paid the money into Court and a notice was issued to the mortgagee under s. 83 of the Transfer of Property Act. The mortgagee filed his suit before notice was served on him, and it was not proved that the mortgagee was aware of the fact of the payment into Court when he filed his suit:

Held that the plaintiff was not debarred by s. 67 of the Transfer of Property Act from obtaining a decree, and that under the rules of Court the pleader's fee was properly assessed as in a contested suit and not as in a case where there is a confession of judgment.

APPEAL from the decree of Venkata Rangayyar, Subordinate Judge at Ellore (Godavari), confirming the decree of O. S. R. H. Krishnamma, District Munsif of Ellore, in suit No. 185 of 1886.

Plaintiff sued to recover Rupees 1,172-7-6 due under a bond, whereby certain property was hypothecated as security for a loan.

Defendant pleaded tender on 5th September 1886 and alleged that the sum due had been deposited in Court on 6th September, and that on 7th September a notice had been issued to plaintiff under s. 83 of the Transfer of Property Act, 1882.

On the same day, but before service of notice, which took place at 4 P.M., the plaint was filed.

The Munsif found no tender had been made on 5th September and decreed for plaintiff.

On appeal this decree was confirmed.

Defendant appealed on the following grounds, *inter alia*,

- (1) The admitted fact that defendant deposited the amount in Court under the provisions of the Transfer of Property Act on 6th September 1886 being a day previous to the

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institution of the suit disentitles the plaintiff to any costs.

- (2) The observations of the Court of first instance not questioned by the lower appellate Court virtually show that plaintiff had knowledge of the money raised to pay his debt and the deposit made.
- (3) At any rate the vakil's fee ought not to have been calculated upon the full amount of the debt which was not questioned, but only upon the amount of costs which was only the point of dispute.
- (4) The lower appellate Court failed to record its finding on the material point, namely, whether or not plaintiff had knowledge of the fact of the deposit made before he actually instituted the suit.
- (5) Under the circumstances of the case the defendant is entitled to his costs in both the courts below.

Ramachandra Rau Sahib for appellant.

Bhashyam Ayyangar for respondent.

The Court (Muttusami Ayyar and Shephard, JJ.) delivered the following

JUDGMENT:—The first objection taken in appeal is that the deposit of what was due to the plaintiff in Court precluded him from instituting the suit whether he was aware of such deposit or not, and reliance is placed on s. 67 of the Transfer of Property Act. We are of opinion that this objection cannot be supported. Reading s. 67 together with ss. 83 and 84, we do not consider that it was intended to take away the plaintiff's right of suit before there was a notice to him or knowledge on his part of the deposit. Another contention is that no issue was recorded with reference to the plea that the plaintiff had knowledge of the deposit. The second issue was sufficient to enable the appellant to prove the knowledge, if any, which he imputed to the respondent. It is next urged that, inasmuch as the liability to pay costs was the only matter in contest, the case must be treated, for the purpose of assessing the vakil's fee, as one in which there was confession of judgment. This is clearly not a case in which the appellant confessed judgment, and we are not prepared to hold that it is governed by the rule framed with reference to such cases.

We dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

SITARAMAYYA (DEFENDANT NO. 3), APPELLANT,

and

VENKATRAMANNA (PLAINTIFF), RESPONDENT.*

Hindu law—Son's estate liable for debt of deceased father contracted as surety—Contract Act, s. 131, not applicable to case.

In a suit brought to recover money from the estate of a deceased Hindu in the hands of his son on a surety bond executed by the father:

Held that the estate of the son was liable according to the principles of Hindu law, and that the question was not affected by the provisions of the Contract Act.

APPEAL from the decree of Venkata Rangayyar, Subordinate Judge at Ellore (Godāvāri), modifying the decree of O. S. R. Krishnamma, District Munsif of Ellore, in suit No. 187 of 1886.

Plaintiff sued the defendants to recover Rupees 1,161-11-4, principal and interest due under a registered deed, whereby certain land was hypothecated as security for repayment of a loan made to defendants Nos. 1 and 2. D. Narasimhulu (deceased) also executed the bond as surety for defendants Nos. 1 and 2. Defendant No. 3 was the minor son of D. Narasimhulu and was represented by his mother as guardian *ad litem*. The Munsif decreed the claim as against defendants Nos. 1 and 2, and, in default of payment by them, against the estate of D. Narasimhulu, inherited by defendant No. 3, to the extent of Rupees 369 only.

Plaintiff appealed on the ground that the estate of defendant No. 3 was liable for the whole debt, and defendant No. 3 also appealed.

The Subordinate Judge held that the estate of defendant No. 3 was liable for the whole debt and decreed accordingly.

Defendant No. 3 appealed.

Ramachandra Rau Sahib for appellant.

Bhashyam Ayyangar for respondent.

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

* Second Appeal No. 756 of 1887.

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JUDGMENT:—It is conceded by the appellant's pleader that it would be the pious obligation of the son under Hindu law to pay the debt incurred by the father as a surety for the repayment of a loan. It is also admitted that the appellant inherited ancestral property sufficient to cover the amount decreed against him, but it is contended that the question ought to be decided by the Contract Act and not by Hindu law; and that under the former the debt incurred by the father could not be treated as a family debt.

The decision of the Subordinate Judge rests on the ground that ancestral property inherited by a son from his father ought to be treated as assets available for the payment of the father's debts neither vicious nor immoral, and that the debt incurred by him as surety for the repayment of a loan is within the scope of that obligation.

The Smritis of Manu, Yagnavalkya, Brahaspatti, and the Mitakshara support the decision, nor is the Subordinate Judge in error in applying Hindu law for the purpose of determining whether ancestral property in the hands of the son ought to be treated as assets for the payment of the debt incurred by the father as a surety.

Another objection taken in appeal is that the decree is not in accordance with the terms of the contract set out in the District Munsif's judgment. No objection on this ground is taken in the petition of second appeal, nor was it raised in either of the courts below.

We decline to entertain it for the first time in second appeal and dismiss the second appeal with costs.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

against

VENKAYYA.*

1888.
Feb. 22.
March 13.

Regulation IV, 1816—Power of Village Munsif to administer oath to witness—Criminal Procedure Code, s. 195—Sanction for prosecution of witness for perjury by Village Munsif.

V was tried and convicted under s. 193 of the Penal Code for giving false evidence before the court of a village munsif in a suit in which V was defendant. The village munsif sanctioned the prosecution of V under s. 195 of the Code of Criminal Procedure. On appeal the Sessions Judge acquitted V on the grounds that a village munsif had no power to administer an oath to V (the case not being one in which either party was willing to allow the cause to be settled by the oath of the other) and because s. 195 of the Code of Criminal Procedure did not apply:

Held that both objections to the conviction were bad in law.

IN calendar case 49 of 1887 Raman Venkayya was convicted by the Joint Magistrate of Godavari (G. Hamnett) and sentenced under s. 193 of the Penal Code to three months' rigorous imprisonment.

On appeal, the Sessions Judge (A. L. Lister) acquitted the accused on the 12th December 1887.

On the 20th January 1888 the records were called for by the High Court.

The facts are set in the judgment of the Court.

The Public Prosecutor (Mr. Powell) in support of the conviction.

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

JUDGMENT:—The accused in this case was sued by the complainant before a village munsif for the rent of a house. He persisted in denying the execution of the rent bond, and the village munsif after warning him of the consequence of committing perjury, put him on solemn affirmation and examined him. In

* Criminal Revision Case No. 21 of 1888.

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the result the village munsif found that he had executed the rent bond and gave sanction for a criminal prosecution.

The Acting Joint Magistrate convicted the accused under s. 193, Indian Penal Code, and sentenced him to three months' rigorous imprisonment. On appeal the Sessions Judge reversed the conviction on the grounds:—

- (1) That a village munsif acting under Regulation IV of 1816 is not empowered to administer an oath to a party unless either party is willing to let the cause be settled by the oath of the other, hence that the defendant was not legally bound to make a declaration upon any subject (s. 191, Indian Penal Code).
- (2) That as nothing in the Criminal Procedure Code applies to heads of villages such functionaries cannot give the sanction required by s. 195, Criminal Procedure Code.

The case was called up by the High Court on revision. The accused did not appear, but the Public Prosecutor contended that the accused had been properly convicted. Section 15, Regulation IV of 1816 empowers a village munsif to require the attendance of any person in his village who may be named as a witness by a party and cl. 4 of the same section gives a village munsif authority at his discretion to cause an oath to be administered to a witness.

In the case under consideration the defendant was present at the inquiry and it is not shown that he objected to be called as a witness or to be examined. We apprehend there is nothing in the Regulation to prevent a village munsif examining as a witness any person who is present and who may not have been summoned—nor is there anything to prevent one party naming another party as a witness if he so pleases. The case referred to by the Sessions Judge in paragraph 4 of his judgment is altogether different and relates to the settlement of the cause by the oath of either party, and without trial by the village munsif on the merits (s. 14, cl. 3). We are of opinion that it was competent to the village munsif under the circumstances to examine the defendant as a witness, and that once sworn the defendant was legally bound to speak the truth (see also s. 118, Evidence Act).

A village munsif trying a cause is a Court, and though nothing in the Code of Criminal Procedure applies to heads of villages the limitation in s. 195, cl. (b) is on the powers of the Courts which are governed by the Procedure Code in the entertainment

of complaints. The section merely prohibits the entertainment of a complaint in a Court governed by the Procedure Code without a sanction.

We set aside the acquittal and direct the Sessions Judge to rehear the appeal.

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APPELLATE CIVIL—FULL BENCH.

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

REFERENCE UNDER THE STAMP ACT, s. 46.*

1888.
March 23.

Stamp Act, ss. 3 (10), 55, 57—Duly stamped—Document issued without endorsement required by rules passed and published under ss. 55 and 57.

The omission of a stamp vendor to endorse on a stamped paper the particulars required by rule (9) of the revised rules published under ss. 55 and 57 of the Indian Stamp Act, 1879, by the Government of Madras, with the approval of the Governor-General in Council, does not render a document "not duly stamped" within the meaning of s. 3 (10) of the Indian Stamp Act, 1879.

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

The case was stated by the Secretary to the Board of Revenue as follows:—

"The enclosed agreement was executed by the toddy farmer of Sidhout on a stamp paper supplied to him by the Tahsildar. By an oversight the usual endorsement required by rule 9 (a) of the Madras Government Notification, No. 129, dated 24th July 1883, was not made on the document. The question for decision is—Whether the omission of the endorsement renders the document not duly stamped.

"On the one hand it may be urged that 'duly stamped' means 'stamped in accordance with the law,' s. 3 (10) of the Act. The rules framed under s. 55 have the force of law (s. 57), and one of those rules is that above referred to which prescribes that the stamp vendor 'shall write on the back of every stamp paper which he sells' a certain endorsement. It may be argued that this is a

* Referred Case 5 of 1888.

REFERENCE legal obligation and that its breach renders the documents 'not
UNDER STAMP duly stamped.'
Act, s. 46.

"On the other hand it may be argued that these rules issued by the Local Government, subject to the control of the Governor-General in Council under s. 55, concern the executive duties of the stamp vendors, and are to be broadly distinguished from the rules framed by the Government of India Notification, No. 1288, dated 3rd March 1882, which concern the proper stamps to be issued in certain cases. It may be also contended that if an instrument was not 'duly stamped,' because the stamp vendor violated rule (9) above referred to, as regards the endorsement, it would be equally 'not duly stamped' if he failed to make the entries in his register required by the same rule. The Board are not agreed on the point and therefore deem it desirable to obtain an authoritative decision of the High Court."

The Government Pleader (Mr. *Powell*) appeared on behalf of the Board of Revenue.

The Full Bench (Collins, C.J., Kernan, Muttusami Ayyar and Parker, JJ.) delivered the following

JUDGMENT:—We are of opinion that the document in question is duly stamped.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

CHANDU (DEFENDANT No. 2), APPELLANT,

and

RAMAN (PLAINTIFF), RESPONDENT.*

Malabar law—Decree for maintenance against karnavan—Execution against tarwad property.

A member of a Malabar tarwad having obtained a decree for maintenance against her karnavan, assigned the decree to the plaintiff, who proceeded to execute it against the tarwad property. The then karnavan objected and his claim was allowed. In a suit by plaintiff to have it declared that he was entitled to execute the decree against tarwad property:

Held that the plaintiff was entitled to execute the decree against the tarwad property.

* Second Appeal No. 689 of 1887.

APPEAL from the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, confirming the decree of J. F. Pereira, District Munsif of Kaval, in suit No. 100 of 1886.

The facts of the case, so far as they are necessary for the purpose of this report, appear from the judgment of the Court (Muttusami Ayyar and Shephard, JJ.).

Ramachandra Rau Saheb for appellant.

Sankara Menon for respondent.

JUDGMENT.—Defendant No. 8 obtained a decree for maintenance against defendant No. 1, the karnavan of the defendant's tarwad. The decree was assigned by defendant No. 8 to the plaintiff, and he proceeded to execute the decree against tarwad property. Defendant No. 2, who was then managing the tarwad affairs, objected to the execution and the objection was allowed. Thereupon, the present suit was brought to obtain a declaration that tarwad property was liable for the decree debt. Both the Courts below decreed the claim, and it is urged in appeal that there was no decree against defendant No. 1 in his capacity of karnavan, that the decree for maintenance in favor of a member of a Malabar tarwad created only an obligation personal to the karnavan, and that the decree is incapable of being executed against tarwad property. As to the objection that there was no decree against defendant No. 1 in his capacity of karnavan, we observe that it was not taken in the petition of appeal to the lower appellate Court. It must also be remembered that the suit was one brought for maintenance, which from its nature would ordinarily be brought against the karnavan. As to the contention that the decree created an obligation personal to the karnavan, we are of opinion that if the contention were to prevail, there would be no adequate means of enforcing decrees for maintenance which might be passed in favor of members of a Malabar tarwad. Our attention was called to *K. Manoki Koran Nayar v. P. Manoki Chanda Nayar*(1), but that case appears to show that a decree for maintenance is one for the satisfaction of which a karnavan may encumber tarwad property. We may also refer to the judgment of this court in S.A. 340 of 1885, in which it was held that the maintenance of members of a Malabar tarwad is a charge on the tarwad property. It is urged that the mainte-

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(1) 3 M.H.C.R., 295.

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nance would be a charge only when there was no tarwad income out of which it might be paid, but neither of the cases cited was decided on that ground.

The second appeal fails and we dismiss it with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

JAGANATHA AND ANOTHER (DEFENDANTS), APPELLANTS,

and

RAMABHADRA AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Zamindari—Partition—Limitation Act, 1877, sch. II, art. 127—Limitation Act, 1859, 1(13).

In 1803 G being in possession of the zamindari of M, the permanent settlement was made with him and a sanad was granted to him as prescribed by Regulation XXV of 1802. In 1827 C, the only son of G, being in possession of the zamindari, got into debt and the zamindari was sold in execution of a decree and bought by Government. In 1835 the zamindari was granted to J, the son of C, by Government and a sanad issued in the usual terms as prescribed by Regulation XXV of 1802. J died in 1864 leaving four sons, the three plaintiffs and C, his eldest son. C died in 1869 leaving an only son, J, the defendant. In 1869 the Court of Wards took charge of the estate on behalf of the infant defendant and allowed his uncle, plaintiff No. 1, to receive the rents of the zamindari as renter. J and his three uncles lived in the same house and participated in the joint family property until 1872, when the plaintiffs claimed to have the zamindari divided.

By an agreement between the plaintiffs and the Court of Wards all the movable and immovable property, except the zamindari taluk, was divided into four shares and distributed in 1874 between the plaintiffs and defendants. In 1884 the plaintiffs sued for partition of the zamindari, alleging that their cause of action arose in 1872, when the Court of Wards denied their right to a partition of the zamindari taluk.

The defendant pleaded

(1) that the estate was not partible;

(2) that the suit was barred by limitation;

Held (1) distinguishing the *Hunsapore* case (12 M.I.A., 1) and the *Sivaganga* case (I.L.R., 3 Mad., 290), and following the principle laid down in the *Nuzvid* case (I.L.R., 2 Mad., 428) that the zamindari was partible;

(2) that the suit was not barred by limitation.

APPEAL from the decree of J. R. Daniel, District Judge of Ganjam, in original suit No. 27 of 1884.

* Appeal No. 48 of 1886.

The facts of this case appear sufficiently for the purpose of this report from the following judgment.

The Acting Government Pleader (Mr. Powell) and Mr. Norton for appellants.

The Acting Advocate-General (Mr. Spring Branson) and Subba Rao for respondents.

KERNAN, J.—This is an appeal from a decree dated the 14th December 1885 of the District Judge of Ganjam, declaring that the zamindari of Merangi is partible, and decreeing partition to be made between the three plaintiffs and the infant defendant, their nephew.

The appellant's grounds of appeal are—

- (1) that the zamindari is impartible;
- (2) that the plaintiff's claim is barred by limitation;
- (3) that the plaintiffs are precluded from suing during the minority of the infant defendant by agreement between them and the Court of Wards made in 1872.

The Judge has given, what appears to me, a correct judgment on all the above points. I would be satisfied to rest my judgment on that of the District Judge, except that the appellant's arguments present some views not presented to the District Judge.

On the question whether the zamindari was partible there is no evidence that it was at any time a raj or sovereign principality. But the defendants contend

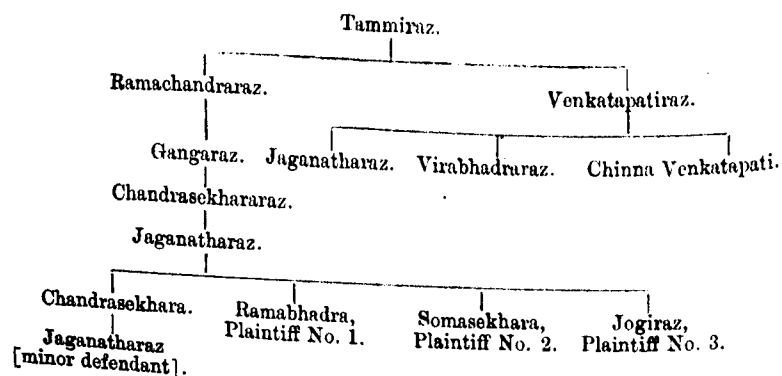
- (1) that, as it was found by the Judge (referring to Carmichael's *Vizagapatam Manual*, pp. 284, 303) to have been held on military service, he should have held it was impartible;
- (2) that there was evidence to prove that by custom the zamindari had always descended as impartible, and there was no evidence to the contrary, and, therefore, should have been held to be impartible;
- (3) that under the circumstances there was a strong presumption in favor of the alleged custom.

The only evidence on record as to the zamindari is that to be found in Carmichael's *Vizagapatam Manual*, pp. 301–3, in which it is stated: that this hunda came into the possession of the present family in the time of Visvambhara Deo of Jeypore—that Dharmaraz Dora, zamindar of Merangi, endeavoured to make himself independent, and Jeypore having advanced with a large force

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RAMABHADRA. against him, he was given up and put to death and his estate was given over to Jaganatharaz, a principal Jeyporean, who was installed zamindar, with the title of Satrucherla (destroyer of the enemy); that about the time the French were expelled (1758 to 1760) Merangi zamindari was incorporated in the neighbouring zamindari of Kurupam by Sivaramaraz; that the latter was overthrown by Sitaramaraz, and both zamindaris were under Vijayanagaram until its dismemberment in 1795 when they were restored to the old families, Satrucherla Gangaraz getting Merangi.

Paragraph 22 of exhibit C shows that at that date, 10th June 1802, Gangaraz was in possession of the Merangi zamindari. Paragraph 18 of exhibit D, 22nd September 1803, explains that in 1795 Mr. Webb recommended C. Gangaraz being appointed zamindar as well on account of his better claim than that of Venkataraz, a representative of a younger branch, as that he was descended from the elder branch of the family. Exhibit E (Government Order, dated the 22nd of October 1803) states that Government approved of the permanent settlement being made with C. Gangaraz. A family tree agreed on between the parties shows the following, viz. :—



The defendant alleges that Chandrasekhara, son of Gangaraz, had three sons, but the plaintiffs deny this.

It is not shown what relation, if any, there was between Tammiraz, the propositus in the family tree, and Jaganatharaz, the principal Jeyporean; but apparently Tammiraz or his son Ramachandraraz were never in possession of the zamindari. Apparently also C. Gangaraz, the grandson of Tammiraz, was put into possession of the zamindari in 1795 without any grant being made to him by the Government, and that he held at a rent

which (paragraph 24 in exhibit C) shows he had a difficulty in paying, and which it is recommended in that paragraph should be reduced from Rs. 19,697-0-10 to Rs. 18,500. JAGANATHA v. RAMABHADRA.

No sanad to C. Gangaraz was produced, but a kabuliat or instrument of assent (exhibit B) was produced, dated the 25th April 1804, which refers to a sanad-i-milkiat-i-istimirar to him by the Government. Clause 6 provides that he had the right, without assent of Government, to transfer all or any part of his estate, provided such transfer should be according to Hindu law.

No doubt there was a sanad in the ordinary terms executed by Government to C. Gangaraz as prescribed by the Regulation XXV of 1802.

Exhibit D, paragraphs 18, 19, and 20 show that Jaganatharaz, or a cousin of C. Gangaraz, had claimed a share of the zamindari from Gangaraz and had got possession of certain part of the estate, but the Government declined to recognize the arrangements and left it to Gangaraz to arrange as he pleased with Jaganatha. Gangaraz died, but the date is not proved. Jaganatha then filed a suit against Chandrasekhara, son of Gangaraz, alleging he was illegitimate; but the plaintiff died and the suit was revived by Virabhadraraz, and was ultimately dismissed.

Chandrasekhara, the only son of Gangaraz, got into debt, and, being sued by a creditor, the zamindari was set up for sale in suit No. 23 of 1827, and was bought by Government and thus the rights acquired under the sanad of 1803 became extinguished.

Exhibit G is a sanad-i-milkiat-i-istimirar, dated the 22nd September 1835, by the Governor in Council to Jaganatha, son of Chandrasekhara, therein called ex-zamindar of Merangi. It recites the sale by court process to pay debts of the ex-zamindar, and that the zamindari was bought on account of Government, and that the Government, impressed with the services rendered by the dewan and others of the zamindari during the late disturbance in the Vizagapatam district, in compliance with their request, and to notify their approbation of their meritorious conduct and attachment to the family of their ancient zamindars, resolved that the zamindari should be granted to Jaganatha, son of Chandrasekhara.

The sanad provides that the zamindari shall not be liable for any debt contracted before the sanad, except the balance due to Government. Paragraph 6 contains the power to the zamindar to

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Exhibit H, dated 25th November 1835, is a kabuliat executed by the guardian of the infant Jaganatharaz corresponding with the terms of sanad.

Jaganatha died in 1864 leaving four sons, the three plaintiffs, who were then infants under 18 years, and Chandrasekhara, his eldest son. The latter died in 1869 leaving the plaintiffs, his brothers, and an only son, Jaganatha, the infant defendant, and a widow.

The appellant contends that the zamindari was held by military tenure. The Judge assumes this was so before Jeypore took possession from Dharmaraz and afterwards when he gave the zamindari to C. Gangaraz: probably it was so, though I do not see the evidence of it.

There is no evidence how or by whom it was held from Kurupam or Vijayanagaram, or that it was held on military tenure. There is nothing to prove that it was held by any of the family of C. Jaganatharaz after he was dispossessed by Kurupam. There was thus a break in the possession of the zamindari by any of the former family from about 1760 up to 1795. After the zamindari was taken possession of by the English in 1795 from Vijayanagaram it certainly was not held on military tenure. In 1795 Gangaraz received possession from Mr. Webb, but nothing was then settled as to the terms on which he was to hold the zamindari as he was not then restored absolutely to the possession of the zamindari or for seven years afterwards. In the meantime he was in possession on sufferance. It was properly taken from one family and given to a member of the family of a former owner without any special circumstances to prove that the intention of the grant was to create an impartible estate which is an exception from the ordinary Hindu law. Though Gangaraz as representing the elder branch was preferred, there seems no reason why, in addition to this grant of an ordinary estate, the incident of impartibility should have been intended to be granted. Gangaraz does not appear to have been a man of influence or a leader of people. He was fortunate to get the zamindari as a zamindar on the ordinary terms of Hindu law, and I am unable to see any reasonable ground for presuming that the intention of the Government as

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The terms of the kabuliat of the 25th April 1804 to which the sanad no doubt corresponded do not lead to the conclusion that the Government intended to grant or did grant the zamindari as impartible. On the contrary the terms of paragraph 6 show that the zamindar was at liberty to transfer all or any part of the zamindari without the consent of Government so as the transfer was not contrary to Hindu law. This is inconsistent with the idea that the zamindari was impartible and was to remain so.

It was argued, however, that a clause, the same as No. 6, has been introduced into all grants of permanent settlement made as directed by Regulation XXV of 1802. In the *Nuzvid case*(1) it appeared that the jagir was in the nature of a principality before it was taken possession of by Government in 1783 when Narayya rebelled, and it was granted to Venkata Narasimha, his eldest son, in 1784. The Privy Council assumed it was restored in 1783 in its entirety, and that the rule of impartibility and descent continued as before. But when the ancient zamindari was resumed for arrears of revenue in 1793, the zamindari had ceased to be held on military tenure. There was then no reason on the 8th of December 1802, the date of the grant to Ramachandra, son of Venkata Narasimha, why the rule of impartibility or descent to a single heir according to the rule of primogeniture should be extended to the newly-created estates.

The Privy Council observed that there was no State policy which required that the new estate should be indivisible; otherwise cl. 7 (the same as cl. 6 in this case) would not have been inserted in the sanad, and that if the grantee had transferred by gift, sale, or otherwise any portion of his zamindari, such portion would not have been impartible descending according to the rule of primogeniture to the single heir of the transferee of a Hindu or Muhammadan. Their Lordships further observed that it was expressly stipulated in the sanad that transfers in whole or in part should be valid provided they should not be repugnant to the Hindu or Muhammadan laws which they would have been if they were limited to the eldest son or other single heir of Hindu or Muhammadan transferee. That was no reason why the new

(1) L.R., 7 I.A., 38; s.c. I.L.R., 2 Mad., 128.

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Their Lordships then decided that the limitation to the heirs of the grantee in the sanad was a limitation according to the ordinary rule of Hindu law, and not a limitation to a single heir according to the rule of primogeniture, as the grantor at the date of the grant did not hold an estate descendible to a single heir according to the rule of primogeniture, and that if the Government intended to make the estate impartible and to limit the succession to a single heir according to the rule of primogeniture instead of to the heirs of the grantee according to Hindu law there was no doubt that they would have expressed their intention in unambiguous language. Their Lordships referred to the *Hunsapore case*(1), which was confiscated in 1767 and kept by Government in their possession until 1790 and then granted in that year to a younger member of the family, on whom the title of raja was afterwards conferred. Their Lordships observed that there was no fresh sanad granted, and the question was whether it was a fresh grant of the family raj with its customary rule of descent, or merely a grant of the lands formerly included in the raj to be held as an ordinary zamindari, that in that case the zamindari had not been broken up, and it was held that it was the intention of the Government to restore the zamindari as it existed before the confiscation, and that the transaction was not so much the creation of a new zamindari as the change of the tenant by a *vis major*. That in the case before them (*Nuzvid case*) the estate was divided into two zamindaris, and a new sanad granted allowing the same to be alienated in part or in whole and making it inheritable by a person and his heirs and assigns for ever, that person being one who had never held an estate (in the lands) descendible to his eldest male heir.

No doubt the fact that the old Nuzvid estate, which was granted in 1784 and was then presumed to be impartible, had been broken up and divided on the 8th December 1802 into two zamindaris, was of much importance. But the decision did not turn on that ground alone. That fact was only one of several

circumstances which led their Lordships to the decision they made. There was in that case the fact as here that the grantee had never held an impartible estate in the zamindari, and that he was a member of the hold family, and the fact that the grant of 8th December 1802 was made after the Regulation XXV of 1802, and contained a clause like cl. 6 in this case. The observation of their Lordships as to the intention manifested by that clause and as to the absence of any policy leading to any desirability to confer an impartible estate apply equally to this case as it seems to me.

The Hunsapore estate and the Sivaganga had been principalities held by chiefs as impartible estate. The Hunsapore estate was confiscated in 1767, and in 1790 a junior member of the family was put in possession as of the old tenure. In the *Sivaganga case*(1), the estate was granted by proclamation in 1801. There was a sanad granted in 1803 with a clause the same as No. 6 in the case. Their Lordships observe everything points to the installation of the istimidar zamindar not merely as proprietor but as ruler of the district, and that the policy of the Government clearly was to appoint a new ruler whom the rebellious inhabitants would obey: that the policy of the permanent settlement was applied to the Sivaganga as well as to other estates, but that if there were any general intention of introducing the principle of partibility it was certainly not followed in that instance.

Observing the principles laid down by the Privy Council in the *Nuzvid case*, it appears to me that the zamindari of Merangi was intended by Government to be held by Gangaraz and was granted to Chandrasekhara's son, Jaganatha, by the sanad of 22nd September 1835, and was held by him as an ordinary zamindari estate subject to the ordinary rule of descent according to the rule of Hindu law. Chandrasekhara's estate was sold at the instance of a creditor and was purchased by the Government on the 22nd September 1833. At that time three leaders of the Palkonda rebellion were lurking, with their retainers, in the jungles, and the late dewan of Chandrasekhara, with hill peons assembled by him, attacked and killed those leaders. For this service the dewan and the peons were entitled to a reward offered by Government; but on their request through the Collector, the Governor in Council, in lieu of the reward, and to notify approval of the assistance

(1) 12 M.I.A., 1.

(1) I.L.R., 3 Mad., 290.

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given against the rebels, agreed to grant, and did grant, the sanad already stated on the 22nd of September 1835 to Jaganatha, son of Chandrasekhara, a boy five years old with special provision that no debts prior to the grant except the balance due to the Government should be a charge on the estate. I do not see that the circumstance under which the grant of 1835 was made, or the terms of the grant, lead to the conclusion that Government intended to grant, or that they did grant in 1835, this zamindari as an impartible estate. The estate was granted to the son, five years old, of Chandrasekhara who was then alive. It appears to me, therefore, that the grant of 1835 only conferred on the grantee an estate in the zamindari of the like nature that his father held in it, that is, as an ordinary zamindar subject to the ordinary incidents of Hindu law. It was contended that Gangaraz had, besides his son Chandrasekhara, two other sons, Ramabhadra and Somasekhara, and that they did not set up any claim to have the zamindari divided, inasmuch as it was the custom of the family that it should not be divided. But there is no legal evidence that Gangaraz had any son except Chandrasekhara. In June 1859 a petition (exhibit No. 7) was filed in the office of the Agent of the Governor in Vizagapatam district by Somasekhara stating that the fathers of the zamindar and petitioner were brothers, and that he was entitled to a share in the zamin. The Agent referred the petitioner to a civil suit. There is no evidence that any suit was brought.

The next question is whether the claim of plaintiff is barred by limitation. Jaganatha died in 1864 leaving four sons, namely, the three plaintiffs, all then infants under 18 years of age, and Chandrasekhara, his eldest son. The four sons had lived with their father up to his death, and continued to live after his death in the same house as their brother, Chandrasekhara, up to his death in 9th September 1869, and were maintained in common with their brother Chandrasekhara. Plaintiff No. 1 was then 20, No. 2, 18, and No. 3, 15 years old. Chandrasekhara left at his death an only son, the infant defendant Jaganatha, then of the age of 7 years. On the 10th September 1869 the widow of Chandrasekhara sent notice (exhibit III) to the Collector stating the death of her husband, and also stating that before his death he gave direction to her that the estate should be registered in her son's name, and that she and plaintiff No. 1, and the dewan should manage the

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affairs of the taluk, as well as other affairs, and that they would be brought to the Collector's notice. This notice purports to be signed by plaintiff No. 1 and by the dewan and initialled by the widow. Plaintiff No. 1 says the signature of his name is like his, but he does not recollect that he signed it. However this may be, it appears that the Court of Wards took charge of the infant defendant's estate and appointed the dewan guardian, and allowed plaintiff No. 1 as renter to receive the rents of the taluk, and also of some inam and other immovable and movable properties acquired up to the death of the father of the infant defendant. There was a considerable amount of Government promissory notes and cash and monies due. There were also immovable properties other than the taluk left by Chandrasekhara, the infant's father. But it is not stated whether such Government notes, cash, debts, or immovable properties other than the taluk were acquired by the infant's father or by his grandfather: most probably it was by both. It is to be gathered from the award (exhibit M) 30th December 1873, after stated that plaintiff No. 1 acted with the apparent assent of the Court of Wards as receiver of the rents of the taluk and of the other immovable properties from the death of the infant's father until the end of fashi 1022, i.e., about July 1873, and lodged in the treasury of the Court of Wards or of the Collector large receipts, and that plaintiff No. 1 also received large sums in Government promissory notes and cash. It further appears that the three plaintiffs and the infant defendant (when the latter was not at school) all lived together in the house of the infant's father (see paragraph 20, exhibit M), and were maintained out of the part of the produce so received by plaintiff No. 1. No question as to the rights of any of the parties, either to the zamindari or as to the other properties received by plaintiff No. 1 was made until April 1872.

Exhibit J is a copy of the Proceedings of the Court of Wards, 13th May 1872, acknowledging a letter from Mr. Melville, the Collector of Vizagapatam, dated 15th April 1872, forwarding an arzi from the two first plaintiffs, soliciting the division of the Merangi zamindari and movable and immovable property. The Court sanctioned the division of the personal estate and approved of the Collector's proposition to appoint a panchayat to carry out details.

Exhibit II, dated the 24th of August 1872, is addressed to the

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By exhibit No. 1 the Court of Wards approved of the karar, provided there was a clause that nothing in it should be deemed to imply the slightest admission of any claim by the plaintiffs to demand a division of the zamindari.

Exhibit M is the panchayat decision. It recites an agreement of the 20th of September 1873 by the plaintiffs, and by the guardian of the infant defendant binding themselves to exclude the zamindari and the royal insignia, and to divide and take the whole of the remaining movable and immovable property as might be passed by the panchayatdars. It also recited that the accounts and other papers were in a separate list attached thereto. The list referred to is taken as part of M and precedes the decision. It is divided into numbers from No. 1 to No. 28.

In No. 1, amongst other monies, a sum of Rs. 1,74,485-13-10 is set down as paid into the Vizagapatam Collector's office, being the amount of the income for faslies 1280 to 1282 after the taluk passed into the minor's possession, deducting Rs. 1,20,659-15-9 Sircar peshkash and other expenses, and strikes a balance of Rs. 53,825-14-1. This balance, with Rs. 91,957-5-1, being Government bond and monies which should be in the treasury, amounted to Rs. 1,45,783-3-2. The sum actually in the treasury was Rs. 92,783-3-2, to which was to be added "concealed and kept by renter for his own purpose, Rs. 53,000." These two sums make Rs. 1,45,783-3-2.

The fifth paragraph of exhibit M directs that the sums of Rs. 92,783-3-2 and Rs. 53,000 should be divided into four equal shares between the three plaintiffs and the infant defendant. JAGANATHA
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It is not necessary to go through any further details of the decision. It is enough to say all the items of immovable and movable property except the zamindari and the insignia were divided into four shares and one-fourth given to each of the plaintiffs and the infant defendant. It is clear that the profits of the zamindari taluk down to June 1873, after payment of peshkush to Government, was divided amongst other property between the plaintiffs and the infant defendant.

It was contended that personal property only was agreed by the Court of Wards to be divided. But it is clear that what was considered personal property included rents received from the taluk zamindari up to June 1873 as well as all other movable and immovable property except the zamindari and insignia. That decision was acted on by the Collector, who directed further inquiry to ascertain the exact sum to be paid to each of the four shares in the sum of Rs. 92,783-3-2, and the panchayatdars on the 7th of October 1874 ascertained and reported the sums so payable to each of them, the plaintiffs and the infant defendant, and directed them to be distributed by the Collector, which presumably was done.

The plaintiffs allege their cause of action commenced on the 13th May 1872, when the Court of Wards denied their title to a division of the zamindari and relied on art. 127 of sch. II of the Limitation Act, 1877. The defendants relied, in the Court below, on the Act of 1859 in which limitation begins from the death of the deceased owner, but were met by the decision in *Govindan Pillai v. Chidambara Pillai*(1), that unless the claimant was entirely out of, and excluded from, possession, limitation did not run. Before this Court in appeal the defendants relied on the prior ground of limitation, and also on the ground that the plaintiffs were excluded from the joint family property in 1864 and up to and after the death of the infant's father in 1869. I am not able to see that the plaintiffs were excluded from the joint family property consisting of the zamindari until the 13th of May 1872 when the Court of Wards denied their title to a division of the

(1) 3 M.H.C.R., 99.

JAGANATHA zamindari. The plaintiffs lived with their father in his house down to his death in 1864, and continued to live with their brother without any objection raised to their right to do so down to his death in 1869. From that time until the plaintiffs asked for division of the zamindari in April and were refused in 1872 the plaintiffs also lived in the house with their nephew, the infant defendant, and no objection was made to their participation in the joint family property. The letter of the defendant's mother (exhibit No. III) was relied on as excluding the plaintiffs from the zamindari, but it did not amount to exclusion of the plaintiffs, on the contrary it proposed that plaintiff No. 1 should be manager. She must have been then well aware there was a large amount of other joint property. The infant defendant and the plaintiff lived after that for upwards of two years in the same house. Finally the plaintiffs were actually paid in 1873 in cash one-fourth share of the income of the zamindari from 1280 to 1282, and got one-fourth share each of the other undivided family property, movable and immovable.

When a party is not in possession of any joint property and does not receive any of the proceeds of the property he may be said to be excluded from joint property, but not if he is living on the property with the other joint owners and is supported in the family by the proceeds of the family property. The principle of the decision in *Govindan Pillai v. Chidambara Pillai* applies. I think the plaintiff's claim is not barred by limitation. The defendant's counsel alleged that there was a custom in the family that the zamindari should be impartible. But there was no family of any possessor before the father of the plaintiffs. The allegation of such custom is entirely unsupported. The allegation of presumption that the zamindari was impartible is, I think, also unfounded. The next question is whether the suit is premature until the infant defendant attains 21 years. I am unable to see that there was any contract of agreement between the plaintiffs and the guardian of the infant defendant or the Court of Wards that the plaintiffs would not bring a civil suit until the infant defendant attained 21 years. What took place amounted to no more than this, that the division agreed on was not to prejudice the question whether the zamindari was or was not impartible and there was no admission on either side of the claim of the opposite party. The plaintiffs added that they would be

quiet during the minority of the zamindar and would bring this suit afterwards. This addition it seems to me was no part of this agreement. The parties could not by such agreement stay the operation of the Statute of Limitation and if the plaintiffs had waited to bring suit until the minor attained 21 years they might find that their claim was barred by limitation, which certainly never was intended. If such alleged agreement was made, as it would limit the time within which the plaintiffs could enforce their rights, it would be void under s. 28 of the Contract Act. As to costs, I think, the Judge should have awarded the plaintiffs their costs of the suit. We modify the decree of the District Judge by awarding the costs of suit and of this appeal to the plaintiffs, and confirm the decree in other respects.

MUTTUSAMI AYYAR, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

VENKU (DEFENDANT), APPELLANT,

and

MAHALINGA (PLAINTIFF), RESPONDENT.*

1888.
Apl. 9, 10, 27.

Hindu law—Adoption by Naikin or dancing girl—Adoption of more than one daughter at a time—Rights of adopted daughter—Custom of adopting more than one girl at a time not proved.

Ammu, a Naikin, or dancing girl, in South Canara, affiliated prior to 1849 three girls and a boy. These four persons lived together as a joint family till 1849, when a partition of their joint property was decreed between them in equal shares. T., one of the girls, died in 1880, leaving certain property. V. claiming to be the sister by adoption of T., sued to recover T.'s estate from M., T.'s uterine brother:

Held, (1) that an adoption of a daughter by a Naikin or dancing girl can be recognized by the Civil Courts and does confer rights on the girl adopted—*Mathura Naikin v. Esu Naikin* (I.L.R., 4 Bom., 545) dissented from;

(2) that there being no warrant for a plurality of adoptions in the analogies of Hindu law, and no special custom having been proved, V. could not claim T.'s estate.

APPEAL from the decree of C. Gopalan Nayar, Subordinate Judge of South Canara, confirming the decree of A. Venkatramana Pai, District Munsif of Mangalore, in suit 1888 of 1887.

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The facts appear from the judgment of the Court (Muttusami Ayyar and Parker, JJ.).

Bhashyam Ayyangar and Narayana Rau for appellant.

The decision in 1849 cannot operate as *res judicata*—*Parthasaradi v. Chinna Krishna* (I.L.R., 5 Mad., 304). Even if, since the date of the Penal Code, no rights pass by adoption by a dancing girl, rights created prior to 1860 cannot be affected. In all the Presidencies prior to 1860, dancing girls could lawfully adopt. It is doubtful if such adoption is illegal under the Penal Code. Reference was made to S.A. 579 of 1876—*Mathura Naikin v. Esu Naikin* (I.L.R., 4 Bom., 545), *Chalakonda Alasani v. Chalakonda Ratnachalam* (2 M.H.C.R., 56, 75), *Mayna Bai v. Uttaram* (2 M.H.C.R., 202), and *Strange's Manual*, s. 351. The adoption of a girl by a dancing girl need not necessarily be for prostitution. The minor commits no offence and should not suffer. No issue was raised as to the validity of plurality of adoption.

Ramachandra Rau Sahab for respondent.

Respondent is in possession. Appellant must show she has a better title. He relied on *Chinna Ummayi v. Tegarai Chetti* (I.L.R., 1 Mad., 168) and *Mathura Naikin v. Esu Naikin* (I.L.R., 4 Bom., 563).

MUTTUSAMI AYYAR, J.—The contest in this Second Appeal is as to the right of succession to the property of one Timmu, deceased, who was of the Naikin, or of what is ordinarily called the dancing girl caste. The deceased and the appellant Venku, together with another girl and a boy, were affiliated sometime prior to 1849 by a woman of the same caste named Ammu, who had emigrated from Goa and settled in South Canara. They had lived together as one joint family until 1849, when a disagreement arose between them and resulted in litigation. In Original Suit 217 of 1849, a partition was decreed among four persons who then survived in the family, including the deceased and the appellant, and a quarter share of their joint property was allotted to each. By virtue of that partition, the garden in suit became the separate property of Timmu, and she died in December 1880, leaving her surviving the appellant (defendant) her sister by adoption, and the respondent (plaintiff) her natural brother, and each of the survivors contended that he or she was entitled to the garden in preference to the other. As it was land paying revenue to Government, the Collector of South Canara altered its registry in

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his books from the name of the deceased to that of the appellant. Thereupon the respondent brought the present suit to have it declared that he was entitled to have his name registered in the revenue accounts in preference to the appellant. Two issues were recorded for decision, viz., (1) whether the natural brother was entitled to succeed to the property in dispute in preference to the adoptive sister, and (2) whether he was entitled to have the kuditale or registry altered to his name. The Collector was not made a party to the suit, and both the Lower Courts treated it therefore substantially as one for a declaration of title. They held that as between the natural brother and the sister by adoption of a dancing girl, the former was the preferable heir, and accordingly decreed the claim. It is urged in Second Appeal (1) that according to Hindu law the sister is the preferable heir, (2) that at all events the respondent is not the heir-at-law, and (3) that the decision in the suit of 1849 is conclusive as between the parties to this appeal on the question of title. On the other hand it is contended for the respondent (1) that assuming that the adoption of a daughter by a dancing girl is valid, no second adoption can be lawfully made during the lifetime of the daughter first adopted, and (2) that the respondent being the party in possession, the appeal must fail unless it is shown that the appellant is the preferable heir.

I do not consider that the question of title is *res judicata*. The ground of claim in the case before us is that the natural brother of a dancing girl excludes her adoptive sister, and it was not adjudicated upon in the suit of 1849. Further it was necessary in the former suit to consider whether the property then in litigation was joint, whereas the sole question for decision in the present suit is whether the natural brother or the adoptive sister is the better heir. Though it was decided in 1849 that the appellant and the deceased were sisters by adoption and their relationship as such was the source of a right to demand a share of joint property, that decision is conclusive only as to the *factum* of the relationship. As to the contention that if it is the source of a right to insist on partition, it must likewise be a valid ground of succession to a collateral relation, I may observe that it was held by a Divisional Bench of this Court in *Parthasaradhi Ayyangar v. Chinna Krishna Ayyangar* (1) that the doctrine of *res judicata*

(1) I.L.R., 5 Mad., 304.

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Turning then to the merits, the relationship of the rival claimants to the deceased woman is found to be a fact. I see also no reason to doubt that prior to the introduction of the Indian Penal Code, a dancing girl without a daughter was, by the custom of her caste, entitled to adopt a daughter so as to constitute between them the legal relation of mother and daughter. That a valid adoption could be made as mentioned above according to custom is clear from the decision in the suit of 1849 and the decision in *Mathura Naikin v. Esu Naikin*(1) relied on by the Lower Courts. In this connection we may refer to *Venkatachalam v. Venkatasami*(2) wherein it was held in accordance with the opinion of the Law Officers attached to the Court that such adoption constituted the relation of mother and daughter for purposes of inheritance. I take it then that the adoption of a daughter by a dancing woman was valid by custom prior to the date on which the Indian Penal Code came into force, viz., May 1861.

I observe, further, that the Courts did not omit to consider the ethical aspect of the question suggested by the professional prostitution practised by this class of women. In *Chalakonda Alasani v. Chalakonda Ratnachalam*(3) it was decided by the High Court that a dancing girl and her adopted daughter constituted together a joint Hindu family in which the right of managing the joint property was vested in the eldest member by Hindu law. In delivering the judgment of the Court, Mr. Justice Holloway said "it would not be possible for us to decline adjudicating upon the matter, viz., that the rule of Hindu law applicable to ordinary gains of science is also applicable in suits between dancing girls on account of the immoral source from which the gains have been derived. Precedents, not indeed numerous but uniform, have recognized rights of property and of inheritance." Referring to the status of the defendant in that suit as an adopted daughter, he said that for the purpose of this cause the mother and the adopted daughter must be treated as the mother and daughter of

an undivided family. The answer to the ethical objection was that the trade of prostitution was recognized and regulated by Hindu law. VENKU
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Again, this Court decided in *Kamakshi v. Nagarathnum*(1) in January 1870 that the law of coparcenary obtaining in respect of right of survivorship among male coparceners of an ordinary Hindu family was applicable as between a dancing girl and her sister's adopted daughter. That case was decided by the Chief Justice Sir Colley Scotland and Mr. Justice Collett, who said: "There appears to be no doubt that the daughters of dancing women like the parties to this suit take the place of sons, and our decision founded upon this view of law is that in the absence of any further positive rule, daughters must be regarded as sons and held to take estates of inheritance from their mother similarly to sons under the general law of inheritance."

Another case to which we were referred at the hearing is *Mayna Bai v. Uttaram*(2). Though it is not an authority for the position that a dancing woman may adopt, it is a clear authority in support of the view that even when the rival claimants are the adulterous issue of a Brahman woman living with an Englishman, they may be considered to be Hindus, and their rights of inheritance and their rights, *inter se*, may be determined with reference to some local custom or usage or the analogies of Hindu law. Mr. Justice Holloway referred to the opinion of the Privy Council that the adulterous issues were properly considered to be Hindus, and that further inquiry ought to be made in order to ascertain whether the opinion of the law officers is not well founded with reference to some local custom or usage—*Mayna Bai v. Uttaram*, adding that in the absence of such custom the Courts are bound to reason analogically and to apply to them the rules observable by classes of Hindus to whom the adulterous issue bears the greatest resemblance, and that the rule so deduced was the rule of equity and good conscience which by the Charter they were bound to apply. It was not then considered to be legal to treat them as persons without any status and to put them beyond the pale of Hindu law because their mother lived in adultery. The answer given there to the ethical objection is this: "All the analogies of Hindu law are against the view of a bastard taken by the law of England."

(1) I.L.R., 4 Bom., 545.

(2) M.S.D., 1856, p. 65.

(3) 2 M.H.C.R., 56.

(1) 5 M.H.C.R., 161.

(2) 2 M.H.C.R., 196.

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There is an element in that law, the doctrine of Christianity which would render any argument drawn from its provisions merely deluding. There is, and there can be, no analogy." It was therefore held in that case that there was heritable blood between the illegitimate sons of Hughes by the Hindu mother. Another case mentioned during the hearing was cited from a publication called the Law Reporter. It appears that a partition suit brought by the adopted daughter of a dancing woman was dismissed by the High Court. According to the report the learned Judges who decided that case (Sir Walter Morgan, C.J., and Mr. Justice Holloway) observed "that adoption by a dancing woman amounted to the decoying of a minor for the purpose of prostitution." There is no written judgment on the record. Nor does the decision appear in the regular reports. The opinion imputed to Mr. Justice Holloway is at variance with the opinion expressed by the same learned Judge in previous decisions. That decision therefore appears to me to be of questionable authority.

The next two cases cited during the argument are *Chinna Ummayi v. Tegarai Chetti*(1) and *Kamalam v. Sadagopa Sami*(2). In the first case, which was decided in 1876, the right set up by dancing women attached to a Hindu temple against the dharma-kartas was a right to have by custom a veto upon the introduction of new dancing girls into the service of the temple. The Court, consisting of Mr. Justice Innes and Mr. Justice Kernan, held that the right asserted was that of an association of dancing women to enjoy a monopoly of the gains of prostitution, and that such a right no Court of justice could countenance. In the second case, which was decided in 1878, a similar right was asserted and recognized, the Court observing that in the first case there was no allegation of any endowment attached to the office, whilst in the other there were various honors and more or less valuable sources of income alleged to be appurtenant to the hereditary office, and that it was necessary to inquire into the existence of such an hereditary office with endowments or emoluments attached to it, as it would materially affect the question of whether the plaintiff had sustained injury by the interference of the defendant. It is not however clear how, if the custom which is the source of the hereditary right to the office is an immoral custom and one to

(1) I.L.R., 1 Mad., 168.

(2) I.L.R., 1 Mad., 356.

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monopolize the gains of prostitution, the existence of an endowment or emolument makes a difference and removes the legal taint in the source of the right. Even assuming that the second case did not overrule the first, the latter is only an authority to this extent, viz., where the right asserted has for its direct and immediate object a monopoly of gains of prostitution, such right cannot form the basis of a judicial decision.

The last case cited is that of *Boologam v. Swornam*(1). The only point decided in that case was that property acquired with income derived from prostitution by a Hindu dancing girl who has received the ordinary education in music and dancing is not partible. It is only an authority for the position that the rule of Hindu law as to the ordinary and extraordinary gains of science is applicable in suits between dancing women. It is clear then, if we are to be guided by the course of decisions in this Presidency as a whole both prior and subsequent to 1861, that a dancing woman may make an adoption, that such adoption may be the source of a civil right for purposes of inheritance and collateral succession, and that such right is to be adjudicated upon in the absence of a positive rule of law to the contrary with reference to the custom of the caste and the analogies of Hindu law as indicated in 5 Madras High Court Reports, 161.

The case, however, relied on by the lower Courts is that of *Mathura Naikin v. Esu Naikin and others*(2), decided in June 1880. That was a suit by the adopted daughter of a Naikin or professional prostitute like a dancing woman to recover a share of the property in the hands of her adoptive mother which was alleged to be family property. In a very learned judgment, Mr. Justice West came to the conclusion that the suit must be dismissed. Apart from the professional prostitution referred to as tainting the custom of the caste, there are several special grounds on which the decision can be supported. Among those, it is stated, first, that, according to the very custom set up, a daughter cannot call for a partition during her adoptive mother's life. It is observed further that there were natural-born daughters and that they excluded the adopted daughter. The remarks then made in regard to the usage, though very instructive, were not necessary for the decision of that case. It is there observed that usage is law because it is

(1) I.L.R., 4 Mad., 330.

(2) I.L.R., 4 Bom., 545.

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followed from a conviction that it is law. Though reference is made to Austin's opinion that the tacit sanction of the sovereign is necessary to the binding force of custom, yet the cases decided in this Presidency wherein adoption by a dancing woman was recognized as the source of a civil right are also mentioned. In advertence to the practice of an abandoned class of women like dancing girls, it is admitted that it was recognized by Hindu law. It is also admitted that it is only according to the standards of Hindu law that a usage has coercive force among Hindus. But it is remarked that the usage which the Courts are bound to follow according to the Charter is not to be understood in the sense that it shuts out all amelioration. The learned Judge then observes that the practices of an abandoned class are no doubt a usage in the sense of a tolerably uniform series of acts, but they do not therefore spring from a consciousness of compulsion but rather from habit, imitation, and ignorance, and that such usage is not a law, for, over it presides the higher usage of the community at large from whose approval it must have derived any conceivable original validity and in opposition to which it cannot subsist; and as the community comes to recognize certain principles as essential to the common welfare, it will no longer lend its sanction to sectional practices at variance with the principles thus recognized. This seems to be the jural theory suggested in regard to sectional usage, and from it a power is deduced by the learned Judge for Courts of justice to decline to recognize adoption by a dancing girl when the popular sentiment would no longer give validity to such adoption. In *Abraham v. Abraham*(1), the Privy Council say that customs and usages as to dealing with property unless their continuance is enjoined by law, as they are adopted voluntarily, may be changed or lost by desuetude. Would not they, the class of dancing women, cease to exist as a distinct class when there is such a complete change in the sentiment of the general mass of the Hindu community as to render the adoption of the jural theory feasible and just for the amelioration or abrogation of what was once recognized as a valid special custom? Is not therefore the cessation of the usage indicated by the Privy Council the sound basis for judiciary action especially when there is a standing Legislative Council and when only very imperfect material is

(1) 9 M.L.A., 195.

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available to a Judge who is bound to decide according to evidence for ascertaining whether to any and what extent there has been a substantial change in the sentiments of the large mass of the Hindu community in regard to a particular usage of a section of the Hindus? How would this theory work as the basis of judiciary action if a Judge in Malabar or South Canara were to hold that according to a very considerable body of Hindus the non-recognition of marriage as a legal institution is pernicious and that he would therefore decree tarwad or Aliyasantanam property to the sons and daughters of those who now follow the special law of the nephews? Is it not also a sound rule of legislative policy that judiciary legislation of the earlier period should gradually retire within the narrow limits of judicial interpretation in proportion to the increased activity of direct legislation through organized bodies? I may observe that whatever may be the change in the sentiments of the general mass of Hindus in regard to dancing women in Bombay and Poona I am unable to say that there is a considerable change in this Presidency in the opinion of the general mass of the Hindu community as contra-distinguished from a comparatively small section that has come under the influence of Western culture. With all deference to the learned Judge who decided the Bombay case, I do not see my way to follow his decision or adopt the jural theory as propounded by him as the basis of judiciary action.

It is then urged that whatever might have been at one time accepted as custom in regard to the adoption, it could not be recognized as valid since the introduction of the Penal Code. That enactment, however, contains no provision which expressly prohibits adoption by dancing girls or others. It only enacts (s. 372) that whoever sells, lets to hire, or otherwise disposes of any minor under the age of sixteen years with intent that such minor shall be employed or used for the purposes of prostitution, or knowing it likely that such minor will be employed or used for such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to a fine. The act prohibited is the disposition of a minor for the purpose of prostitution, and the reason of the prohibition is the protection of the chastity of girls under sixteen years of age. Taking it then that the rule of public law embodied in s. 372 controls the private law and is an index of public policy

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the further question arises whether it operates to prevent a dancing girl from adopting a daughter altogether, or to prevent her only either from prostituting or from entering into a contract for prostituting the adopted daughter so long as she is under sixteen years of age. Adoption as recognized in Hindu law is allowed partly for continuing the family and partly for securing a person competent according to the custom of the caste to perform the funeral obsequies of the adoptive parents and to take their property. It should not therefore in the case of dancing girls be confounded with prostitution which is neither its essential condition nor *necessary* consequence, but an incident due to social influences. The extent to which the rule of public policy has been given effect to in this Presidency appears to me to indicate the legitimate limits within which we can recognize it as a rule of private law. We may set aside or decline to enforce a contract or disposition which has for its immediate object the prostitution of a minor during her minority so as to leave her no choice of married life when she is over sixteen years. The policy of the Penal Code, as it seems to me, is not to obliterate altogether the line of distinction between the province of ethics and that of law, but to protect the chastity of minors and to assure to them the freedom of choosing married life when they attain their age, whether they are the natural or adopted daughters of dancing women, and to leave otherwise the incidents of their legal *status* as daughters untouched, whether the parties concerned are dancing women or ordinary Hindus. Moreover I may observe that the adoption in question in the case before us was made prior to 1849 long before the Indian Penal Code became law, and it can have no retrospective effect and operate to take away a *status* which was validly created prior to 1861. According to the course of decisions in the Presidency both before and after 1861, the conclusion I come to is that Ammu was competent to adopt a daughter though she was a dancing woman.

This view is not however sufficient for the disposal of this second appeal. The appellant's case is that the woman Ammu made more adoptions than one, and that all those adoptions are valid. There is no warrant for a plurality of adoptions in the analogies of Hindu law, but it is contended by the appellant's pleader that there is a custom to that effect, and that there was no specific issue on the point. Not only is the alleged custom

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inconsistent with the analogies of Hindu law, but there is also no authority as far as we are aware in its support. It appears further that evidence of custom was adduced by the appellant in this case under the second issue and the Subordinate Judge did not consider it satisfactory. I agree with him in the opinion that both the appellant and Timmu could not have been validly adopted and that the relation of sisters could not have been lawfully constituted on the analogy of Hindu law. On this ground I do not consider that the appeal can be supported, and dismiss it with costs.

PARKER, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

SAMI (PLAINTIFF), APPELLANT,

and

KRISHNASAMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, ss. 268, 269, 274—Attachment and purchase of creditor's interest in a mortgage bond.

S got a decree against V for money and having attached a bond hypothecating certain land as security for a debt, executed in favor of V, under s. 269 of the Code of Civil Procedure, 1877, purchased the same. S then sued on the bond. The suit was dismissed on the ground that the attachment had not been made by obtaining an order under s. 268. S then attached the bond as immovable property under s. 274 and purchased it and the mortgagee's interest therein. S again sued to recover the amount due by sale of the land hypothecated. The defendants contended that S had no title because there had been no attachment under s. 268:

Held that the objection was bad and that S was entitled to the relief claimed.

APPEAL against the decree of T. Ganapathi Ayyar, Subordinate Judge at Kumbakonam, dismissing suit No. 8 of 1884 on the ground that plaintiff had derived no title by his purchase of the bond in suit.

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

Bhashyam Ayyangar and Desikacharyar for appellant.

* Appeal No. 145 of 1885.

1886.
Dec. 16.

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KERNAN, J.—The appellant is the plaintiff in original suit No. 8 of 1884 on the file of the Subordinate Court of Kumbakonam. 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 foot of a hypothecation deed, dated the 12th of March 1869, executed by Muttuvayyan, the father of defendant No. 1, for Rs. 5,000 to Kuppusami Ayyar, payable on the 11th of March 1872.

The defendants claim the lands specified in the hypothecation deed under different titles and in different shares.

The first question is whether the appellant has acquired the right and interest of Kuppusami, 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 appellant's claim is founded on a purchase in execution of a decree of the right of Kuppusami. The respondents contend that the proper proceedings were not adopted to attach the debt due on the hypothecation bond, and that therefore appellant is not entitled to maintain this suit.

There are various other defences afterwards referred to, but the main question is whether appellant has title to maintain the suit. The facts on this question are as follows, viz.:—The appellant obtained a decree in suit No. 15 of 1875 in the Court of the Subordinate Judge of Kumbakonam against Venkataramayyan and others, sons of the same Kuppusami, 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 appellant 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 appellant 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 appellant 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. Appellant 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 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 Muttuvayyan in favour of the defendants' father, Kuppusami Ayyar, for Rs. 5,000, hypothecating the two houses bearing Municipal Door Nos. 4-61 in Patchayappa Mudaliyar Agraharam, in Kusba Kumbakonam, attached to the Sub-Registration District of Kumbakonam, in Tanjore district, veli 1 and, kulis 93 $\frac{2}{3}$ of nanja punja, and other lands in Pudukappu Kattalai village in Kumbakonam taluk in the aforesaid district; 1 ma and 43 $\frac{1}{16}$ kulis of nanja land in Somanadhan Kattalai in the aforesaid taluk, and 5 velis, 13 mas and 90 $\frac{5}{16}$ kulis of nanja, punja, and other lands in Puttur village, Malayur Maganam, attached to Mathyarjanam Sub-Registration district, in the aforesaid district, total for the three villages being 6 velis, 16 mas, and 26 $\frac{2}{3}$ kulis, 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.”

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 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, *Appasami v. Scott*(1) that the interest of a defendant in a debt 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.

(1) I.L.R., 9 Mad., 6.

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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 the defendants 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 the defendants 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 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.—*Naoroji Beramji v. Rogers*(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.

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(1) 4 Bom. H.C.R., 64.

(2) I.L.R., 1 All., 349.

BRANDT, J.—I only wish to add a few observations regarding the first question, viz., whether this suit is not maintainable by reason of the appellant 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 appellant against the sons of Kuppusami Ayyan, the interest of the latter under the mortgage instrument A was attached and sold as movable property.

A suit brought by the appellant 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, *Appasami 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), *Srinath Dutt v. Gopal Chundra Mittra*(4).

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

(1) I.L.R., 9 Mad., 5.

(3) I.L.R., 7 All., 40.

(2) I.L.R., 5 All., 91.

(4) I.L.R., 9 Cal., 512.

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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 *quod* 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 there 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 A.

I also am therefore of opinion that the sale of such interest as

the respondent No. 1 had in the property mortgaged was, in the circumstances of this case, a valid sale.

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* * * *

Upon other questions arising in the suit issues were sent down for trial, and on 7th January 1888 the decree of the lower Court was reversed by Kernan and Parker, JJ.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

PERAYYA (DEFENDANT), APPELLANT,

and

VENKATA (PLAINTIFF), RESPONDENT.*

Transfer of Property, Act 1882, s. 60.

The breach of a condition in a mortgage deed to the effect that on default of payment on a certain date, the mortgage shall be deemed an absolute sale, does not amount to an extinguishment of the right of redemption by act of the parties within the meaning of the proviso to s. 60 of the Transfer of Property Act, 1882.

APPEAL from the decree of J. Kelsall, District Judge of Vizagapatam, reversing the decree of K. Murtirazu, District Munsif of Yellamanchili, in Suit 317 of 1886.

Plaintiff alleged that on 24th October 1885 he borrowed Rs. 200 from defendant and executed a deed mortgaging certain land to defendant: that he retained possession thereof under a lease from defendant (which had expired) and that he tendered the amount due on the 14th April 1886, but that defendant refused to receive the amount or to return the mortgage bond. The deed contained a condition that if the amount due was not paid on the 4th April the mortgage deed was to be considered as a deed of absolute sale.

The defendant pleaded that the condition "was intentionally inserted for enforcement, and not for the purpose of fear," as alleged in the plaint.

The Munsif framed an issue as to whether it was the intention of the parties that the condition for sale should take effect absolutely on the expiry of the term fixed for payment. No evidence

* Second Appeal 594 of 1887.

1888.
April 5, 27.

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was led, and the Munsif decided in favor of the defendant, on the ground that plaintiff adduced no evidence to show that it was not the intention of the parties that the condition should take effect.

On appeal, the District Judge decreed for plaintiff, holding that s. 60 of the Transfer of Property Act was enacted to carry out the recommendations of the Privy Council in *Thumbusaamy Moodelly v. Hossain Rowthen*(1), and that the provision in the mortgage deed was not an extinguishment by act of parties.

Subba Rau and Venkata Subba Rau for appellant.

Mr. Powell for the respondent.

The Court (Muttusami Ayyar and Shephard, JJ.) delivered the following

JUDGMENT:—The defendant appeals against a decree for redemption of a mortgage, dated the 24th October 1885, and his contention is that the Lower Appellate Court was wrong in having granted such a decree, inasmuch as the plaintiff possessed no right of redemption, the mortgage being by way of conditional sale. It was necessarily admitted that the case was governed by the Transfer of Property Act, but the point taken was that the proviso to s. 60 was applicable to the circumstances. It was said that, if there was otherwise a right of redemption, that right was extinguished by act of the parties within the meaning of the proviso to s. 60. According to this argument the stipulation in the mortgage instrument, that if the money is not paid within the date fixed, the instrument shall itself be considered as an absolute sale-deed, coupled with the fact of failure to pay within the time fixed, must be deemed to be an act of the parties extinguishing the right of redemption. In our judgment this is not a tenable position, and the act of parties, a phrase used here and elsewhere in the Act in contradiction to "operation of law," must denote a release or other such transaction standing apart from the mortgage transaction under which the right of redemption comes into existence. There is no extinguishment of the right by act of parties when, by virtue of a stipulation contained in the very contract under which the right is created, that right ceases to exist. It was further argued that, notwithstanding the provisions of the Act, effect must be given to the decisions with regard to mortgages by conditional sale delivered before the Act came into force, *Pattabhiramier v. Vencatarow Naicken*(2), *Thumbu-*

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

(2) 13 M.I.A., 580.

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sawmy Moodelly v. Hossain Rowthen(1), and reference was made to cases in which the Judicial Committee held that in this Presidency there was no right of redemption remaining after the sale had once become absolute by reason of default in payment of the amount due within the appointed time. In our judgment, it is to the Act, and not to these decisions with reference to the law as it stood independently of legislation, that regard must now be had. According to the Act, an instrument such as that here in question is a mortgage, and there is nothing in s. 60 to show that any distinction was to be made between one class of mortgage and another. The words "in the absence of a contract to the contrary," which are to be found in the section declaring the rights of the mortgagee (s. 67), are not to be found in this section.

Although the law with regard to conditional sale has, by the operation of this Act, been altered as far as this Presidency is concerned, by conferring on the mortgagor a right which he did not possess before, it is otherwise in the territories to which the Bengal Regulations, I of 1798 and XVII of 1806 applied. Under those Regulations, the mortgagor enjoyed a right of redemption, which the common law did not allow him; and those Regulations are repealed by the Act. The result, according to the appellant's contention, would be that in Bengal a mortgagor under an instrument of conditional sale would be deprived of the right of redemption which under the above-mentioned Regulations he has hitherto enjoyed. It would be difficult to accept a view, which led to such a result, and this view of the operation of the Act has not even been suggested in the cases in which the question has been discussed whether the plaintiff-mortgagee should obtain a decree in the manner provided in the Regulations or in the terms of s. 86 of the Transfer of Property Act, a section which prescribes a form of decree wholly inappropriate to a case where the right of redemption is not recognized, *Bay Nath Pershad Narain Singh v. Moheswari Pershad Narain Singh*(2) and cases there cited. For these reasons, we hold that the Lower Appellate Court was right in granting the plaintiff a decree for redemption, and we dismiss the appeal with costs.

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

(2) I.L.R., 14 Cal., 451.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

PEDDAYYA (DEFENDANT), APPELLANT,

and

RAMALINGAM (PLAINTIFF), RESPONDENT.*

Hindu law—Release by a coparcener of his rights in favor of another coparcener.

In a joint Hindu family, consisting of four brothers, A, B, C, D, A and B obtained their shares by a partition suit. In the plaint they stated that they relinquished their shares of the movable property in favor of C. In a suit by C against D to recover his share C claimed three-fourths of the movable property. D contended that the release by A and B in favor of C could not, according to Hindu law, add to the share of C as a coparcener:

Held, that C was entitled to the share claimed.

APPEAL from the decree of John Kelsall, District Judge of Vizagapatam, confirming the decree of C. Rangayyar, District Munsif of Vizagapatam, in suit 370 of 1885.

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

Mr. *Mitchell* for appellant.

Ramachendra Rau Saheb for respondent.

JUDGMENT.—There were originally five brothers, who, together with their father, Viranna, formed a joint Hindu family governed by the Mitakshara law. Viranna, died in December 1870, and one of the brothers, Bhimalingam, died since. A dispute arose among the survivors regarding the right of succession to the movable property left by Viranna, and it was secured in a room which was locked and sealed by each of the rival claimants. The plaintiff claimed the whole of the movable property under an arrangement said to have been made by Viranna prior to his death. Two of the brothers, Bogalingam and Gangayya, since obtained partition in Original Suit No. 127 of 1882, and by their plaint in that suit they relinquished their half share in the movable property stating that it was their father's wish that it should go to the present plaintiff. The defendant repudiated throughout the arrangement which was alleged to have been made by Viranna. In the present

* Second Appeal No. 669 of 1887.

inconsistent with the analogies of Hindu law, but there is also no authority as far as we are aware in its support. It appears further that evidence of custom was adduced by the appellant in this case under the second issue and the Subordinate Judge did not consider it satisfactory. I agree with him in the opinion that both the appellant and Timmu could not have been validly adopted and that the relation of sisters could not have been lawfully constituted on the analogy of Hindu law. On this ground I do not consider that the appeal can be supported, and dismiss it with costs.

PARKER, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

PERAYYA (DEFENDANT), APPELLANT,

and

VENKATA (PLAINTIFF), RESPONDENT.*

Transfer of Property Act, 1882, s. 60.

The breach of a condition in a mortgage deed to the effect that on default of payment on a certain date, the mortgage shall be deemed an absolute sale, does not amount to an extinguishment of the right of redemption by act of the parties within the meaning of the proviso to s. 60 of the Transfer of Property Act, 1882.

APPEAL from the decree of J. Kelsall, District Judge of Vizagapatam, reversing the decree of K. Murtirazu, District Munsif of Yellamanchili, in suit No. 317 of 1886.

Plaintiff alleged that on 24th October 1885 he borrowed Rs. 200 from defendant and executed a deed mortgaging certain land to defendant: that he retained possession thereof under a lease from defendant (which had expired) and that he tendered the amount due on the 14th April 1886, but that defendant refused to receive the amount or to return the mortgage bond. The deed contained a condition that if the amount due was not paid on the 4th April the mortgage deed was to be considered as a deed of absolute sale.

The defendant pleaded that the condition "was intentionally inserted for enforcement, and not for the purpose of fear," as alleged in the plaint.

* Second Appeal No. 594 of 1887.

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The Munsif framed an issue as to whether it was the intention of the parties that the condition for sale should take effect absolutely on the expiry of the term fixed for payment. No evidence was led, and the Munsif decided in favor of the defendant, on the ground that plaintiff adduced no evidence to show that it was not the intention of the parties that the condition should take effect.

On appeal, the District Judge decreed for plaintiff, holding that s. 60 of the Transfer of Property Act was enacted to carry out the recommendations of the Privy Council in *Thumbusawmy Moodelly v. Hossain Rowthen*(1), and that the provision in the mortgage deed was not an extinguishment by act of parties.

Subba Rau and Venkata Subba Rau for appellant.

Mr. Powell for the respondent.

The Court (Muttusami Ayyar and Shephard, JJ.) delivered the following

JUDGMENT:—The defendant appeals against a decree for redemption of a mortgage, dated the 24th October 1885, and his contention is that the Lower Appellate Court was wrong in having granted such a decree, inasmuch as the plaintiff possessed no right of redemption, the mortgage being by way of conditional sale. It was necessarily admitted that the case was governed by the Transfer of Property Act, but the point taken was that the proviso to s. 60 was applicable to the circumstances. It was said that, if there was otherwise a right of redemption, that right was extinguished by act of the parties within the meaning of the proviso to s. 60. According to this argument the stipulation in the mortgage instrument, that if the money is not paid within the date fixed, the instrument shall itself be considered as an absolute sale-deed, coupled with the fact of failure to pay within the time fixed, must be deemed to be an act of the parties extinguishing the right of redemption. In our judgment this is not a tenable position, and the act of parties, a phrase used here and elsewhere in the Act in contradiction to "operation of law," must denote a release or other such transaction standing apart from the mortgage transaction under which the right of redemption comes into existence. There is no extinguishment of the right by act of parties when, by virtue of a stipulation contained in the very contract under which the right is created, that right ceases to exist. It was further argued that, notwithstanding the provisions of the Act, effect must be given to the decisions with

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

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regard to mortgages by conditional sale delivered before the Act came into force, *Pattabhiramier v. Vencatarow Naicken*(1), *Thumbusawmy Moodelly v. Hossain Rowthen*(2), and reference was made to cases in which the Judicial Committee held that in this Presidency there was no right of redemption remaining after the sale had once become absolute by reason of default in payment of the amount due within the appointed time. In our judgment, it is to the Act, and not to these decisions with reference to the law as it stood independently of legislation, that regard must now be had. According to the Act, an instrument such as that here in question is a mortgage, and there is nothing in s. 60 to show that any distinction was to be made between one class of mortgage and another. The words "in the absence of a contract to the contrary," which are to be found in the section declaring the rights of the mortgagee (s. 67), are not to be found in this section.

Although the law with regard to conditional sale has, by the operation of this Act, been altered as far as this Presidency is concerned, by conferring on the mortgager a right which he did not possess before, it is otherwise in the territories to which the Bengal Regulations I of 1798 and XVII of 1806 applied. Under those Regulations, the mortgagor enjoyed a right of redemption, which the common law did not allow him; and those Regulations are repealed by the Act. The result, according to the appellant's contention, would be that in Bengal a mortgagor under an instrument of conditional sale would be deprived of the right of redemption, which under the above-mentioned Regulations he has hitherto enjoyed. It would be difficult to accept a view which led to such a result, and this view of the operation of the Act has not even been suggested in the cases in which the question has been discussed whether the plaintiff-mortgagee should obtain a decree in the manner provided in the Regulations or in the terms of s. 86 of the Transfer of Property Act, a section which prescribes a form of decree wholly inappropriate to a case where the right of redemption is not recognized, *Bay Nath Pershad Narain Singh v. Moheswari Pershad Narain Singh*(3) and cases there cited. For these reasons, we hold that the Lower Appellate Court was right in granting the plaintiff a decree for redemption, and we dismiss the appeal with costs.

(1) 13 M.I.A., 560.

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

(3) I.L.R., 14 Cal., 451.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

PEDDAYYA (DEFENDANT), APPELLANT,

and

RAMALINGAM (PLAINTIFF), RESPONDENT.*

1888.
April 6
July 2.

Hindu law—Release by a coparcener of his rights in favor of another coparcener.

In a joint Hindu family, consisting of four brothers—A, B, C, D—A and B obtained their shares by a partition suit. In the plaint they stated that they relinquished their shares of the movable property in favor of C. In a suit by C against D to recover his share C claimed three-fourths of the movable property. D contended that the release by A and B in favor of C could not, according to Hindu law, add to the share of C as a coparcener:

Held, that C was entitled to the share claimed.

APPEAL from the decree of John Kelsall, District Judge of Vizagapatam, confirming the decree of C. Rangayyar, District Munsif of Vizagapatam, in suit No. 370 of 1885.

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

Mr. *Michell* for appellant.

Ramachandra Rau Saheb for respondent.

JUDGMENT.—There were originally five brothers, who, together with their father, Viranna, formed a joint Hindu family governed by the Mitakshara law. Viranna died in December 1870, and one of the brothers, Bhimalingam, died since. A dispute arose among the survivors regarding the right of succession to the movable property left by Viranna, and it was secured in a room which was locked and sealed by each of the rival claimants. The plaintiff claimed the whole of the movable property under an arrangement said to have been made by Viranna prior to his death. Two of the brothers, Bogalingam and Gangayya, since obtained partition in original suit No. 127 of 1882, and by their plaint in that suit they relinquished their half share in the movable property, stating that it was their father's wish that it should go to the present plaintiff. The defendant repudiated throughout the arrangement which was alleged to have been made by Viranna. In the present

suit the plaintiff claimed a quarter share in two houses and three-quarter shares in the movable property, on the ground that Bogalingam and Gangayya had relinquished their interest in his favor. PEDDAYYA.
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Both the Courts below decreed the claim, and this second appeal is restricted to the movable property, of which partition has been decreed. Two questions were argued before us. As to limitation the decision of the Judge is clearly right. Having regard to the mode in which the movable property has been secured, its possession must be taken to have been joint, neither party having exclusive control over it. The main contention for the defendant is that the relinquishment by Bogalingam and Gangayya could not under Hindu law add to the plaintiff's share as a coparcener, even though Bogalingam and Gangayya desired that he should take their shares. On referring to the plaint in original suit No. 127 of 1882, we entertain no doubt that such was their intention, the renunciation being expressly made in plaintiff's favor, or in part execution of the alleged suggestion of Viranna, which they accepted so far as their undivided interest in the movable property was concerned. That a coparcener is competent under Hindu law to renounce his share, there can be no doubt. *Manu* says: "If any one of the brethren has a competence from his own occupation and desires not the property, he may be debarred from his share, giving him a trifle in lieu of maintenance"—*Manu*, Chapter ix, p. 207. *Yagnavalkya* says: "The separation of one who is able to support himself, and is not desirous of participation, may be completed by giving him some trifle"—*Yagnavalkya*, 2-117.

According to the *Smritis*, then, the renunciation operates as alienation of one coparcener's interest in favor of the others. If he can alienate in favor of the other coparceners as a body, there is no reason why he should not do so in favor of one of them, who alone may need such help. No question of survivorship can arise because Bogalingam and Gangayya are admittedly alive. In regular appeal No. 58 of 1884 this Court upheld an arrangement made by an undivided son with reference to his share, observing that, "having regard to the circumstances, although exhibit A is in form a gift, the whole transaction was in fulfilment of a natural obligation founded upon the consent of the father to the severance of the alienator's interest in the coparcenary." In this case Bogalingam and Gangayya, in fulfilment of their natural obli-

* Second Appeal No. 669 of 1887.

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tion to give effect to what they believed to be the wish of their father, gave up their interest in plaintiff's favor, and their act may be regarded as the severance of their interest coupled with a direction to make over their shares to the respondents when he should separate.

It has been held that when some of the coparceners only obtain partition, it must be taken that the partition was general and that there was a reunion among those who live afterwards in coparcenary. This view also supports the conclusion that there was a severance of interest on the lines indicated by Bogalingam and Gangayya.

We do not consider that this second appeal can be supported, and we dismiss it with costs.

APPELLATE CIVIL.

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

1888.
March 20, 27.

SUBBANNA (DEFENDANT), APPELLANT,
and

VENKATAKRISHNAN (PLAINTIFF), RESPONDENT.*

Hindu law—Representation of estate by mother—Decree against mother when adopted son in existence, null.

Plaintiff obtained a decree on a bond executed by S against the mother of S, whom he believed to be the heiress of S. In attempting to execute this decree against the estate of S, plaintiff was obstructed by the defendant, who was the adopted son of S. Plaintiff sued the defendant for a declaration that he was entitled to execute his decree against the estate of S in the hands of the defendant:

Held, that the suit must fail, inasmuch as the estate of S was not properly represented in the former suit. *S. C. Lahiry v. N. C. Lahiry* (I.L.R., 11 Cal., 45) distinguished.

APPEAL from the decree of C. Venkoba Rau, Subordinate Judge of South Canara, confirming the decree of K. Krishna Rau, District Munsif of Udipi, in suit No. 406 of 1884.

The facts stated in the plaint were as follows:—

- (1) That plaintiff obtained a decree in suit No. 315 of 1878 against Santharamma, mother of Subbaraya, adoptive father of defendant, on a bond executed by Subbaraya.

* Second Appeals Nos. 899 of 1885 and 216 of 1887.

- (2) That it was held in suit No. 443 of 1883 that, as defendant was not a party to the decree aforesaid, all the proceedings taken in execution thereof against the estate of Subbaraya were invalid.
- (3) That plaintiff was not aware of the adoption of defendant when he sued Santharamma, whom he believed to be the heiress of Subbaraya.
- (4) That as defendant had taken the estate of Subbaraya as adopted son, he was bound to pay the decree-debt aforesaid.
- (5) Plaintiff, therefore, prayed for a decree declaring that defendant was bound to pay the decree-debt aforesaid, and that plaintiff was entitled to execute the same against defendant and the estate of Subbaraya.

Defendant, *inter alia*, pleaded that plaintiff was not entitled to sue for a declaratory decree after having obtained the decree in suit No. 315 of 1878.

The second issue was whether the suit as framed was maintainable.

The Munsif held—

- (1) that, as Subbaraya was addicted to drinking and adultery, the debt was only binding on the share of Subbaraya mortgaged to plaintiff as security for the bond:
- (2) that the fact that the judgment-debtor was the mother and not the widow of Subbaraya did not take the case out of the principle of *S. C. Lahiry v. N. C. Lahiry*, and that the half share of Subbaraya in the property mortgaged to plaintiff was liable to be sold in execution of the decree in suit No. 315 of 1878 after making defendant a party to the proceedings.

Both parties appealed from this decree and both appeals were dismissed.

Defendant appealed in No. 899 of 1885; plaintiff in No. 216 of 1887.

Ramachandra Rau Saheb for plaintiff.

Narayana Rau for defendant.

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

JUDGMENT:—The only question in these second appeals is whether the suit was maintainable.

- The plaintiff obtained a decree against Subbaraya's widow in

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original suit No. 315 of 1878 as representing her late husband's estate in ignorance of the adoption of the defendant. It is found that the decree-debt is a family debt, such as would bind the son, but it is contended that Subbaraya's estate was never really represented in original suit No. 315.

The Courts below have decreed in the plaintiff's favor, on the strength of *S. C. Lahiry v. N. C. Lahiry*(1), holding that the decree in original suit No. 315 was in fact against the husband's estate and obtained against the widow as representing that estate, and that it will therefore bind the estate whether the widow or adopted son is the representative.

It is contended that the decision in that case is not applicable and is opposed to that in *Siva Bhagiam v. Palani Padiachi*(2), with which the Bombay Court agreed in *Akoba Dada v. Sakharan*(3).

It appears to us that the decisions clearly establish that a widow does not represent the estate so as to bind the son when the existence of the son is from whatever cause ignored, and when there is nothing on the face of the proceedings to show that the widow is sued as representing a minor son.

On reviewing the cases that were quoted at the bar we find that in the *Raj Durbhunga case*(4) the minor as well as the widow were made parties to the suit. In I.L.R., 4 Mad., 401, it was held that the decree and sale did not bind the estate when by mistake the widow of the father had been made defendant instead of the minor widow of the son, who was the last full owner; and in I.L.R., 9 Bom., 429, which was a case somewhat similar in its facts to the present, except that the parties were marshalled differently (that being a suit for redemption), it was held that, the son having been ignored, the inheritance had not been substantially represented in a suit against the mother alone.

The decision relied upon by the Courts below (I.L.R., 11 Cal., 45) is, when examined, in no way in conflict with these authorities. The suit was brought in 1862 against the widow and two minor sons as representing the estate of one Romanath Lahiry deceased. The inheritance was therefore fully represented at the institution of the proceedings. During the progress of the suit the two minor sons died and the widow then adopted another son just before the

(1) I.L.R., 11 Cal., 45.
(3) I.L.R., 9 Bom., 429.

(2) I.L.R., 4 Mad., 401.
(4) 14 M.L.A., 605.

decree was passed. It was held that the proceedings had clearly shown an intention to bind the estate, the widow having been originally included as representing minor sons, and that the decree could be executed on making the minor adopted son a party to the proceedings.

In the case before us the mother was alone impleaded as the sole representative of the estate, though there was at the time an adopted son. We are therefore of opinion that the inheritance was not properly represented, and that the decree will not bind the son.

The case quoted on the other side—*Ramakrishna v. Namasi-vaya*(1)—has no application to such a case as the present. There the suit was to have it declared that the shares of the sons were liable to be sold in execution of a decree against the father,—in other words, that the father had represented the sons in the transaction,—but here there is no question but that the mother did not represent the son.

The defendants' appeal must be allowed and the decrees of the Courts below reversed, the plaintiff's suit being dismissed with all costs throughout.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

QUEEN-EMPRESS

against

SABAPATI.*

1888.
July 5.

Penal Code, s. 471—Using a forged document—Fabrication of a receipt as a voucher to cover a contemporaneous embezzlement.

A postmaster misappropriated a certain sum of money, and at the same time made a false document purporting to be a receipt signed by the person to whom the money was payable. He was convicted of using a forged document under s. 471 of the Indian Penal Code. It was contended that no forgery had been committed, because the receipt was made merely to cover the embezzlement—*Empress of India v. Jivanand* (I.L.R., 5 All., 222):

Held, that the conviction was right.

A debtor, who fabricates a release to screen himself from liability to pay the

(1) I.L.R., 7 Mad., 295.

* Criminal Appeal No. 76 of 1888.

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debt, cannot be said not to be guilty of forgery, because he intended by the fabrication to cover a dishonest purpose.

APPEAL from the sentence of J. A. Davies, Sessions Judge of Tanjore, in calendar case No. 48 of 1887.

The facts found by the Sessions Court were as follows:—

Prisoner was a local postmaster, and, as such, received Rs. 15 transmitted by a money-order from Ceylon to pay to one Subramanyam. On the 20th January 1887, prisoner credited himself with the amount in his books and certified the payment on a receipt which purported to be marked by Subramanyam on January 20th. It was proved that Subramanyam did not receive the money until October 1887, after a complaint had been made to the postal authorities. The Court found that the prisoner misappropriated the money and had forged the receipt as a voucher in support of payment, and that, embezzlement being proved, the receipt was used by the prisoner with a guilty knowledge.

It was contended for the prisoner that if the receipt was false it was made to hide the prisoner's guilt, and, therefore, there was no forgery—*Empress of India v. Fateh* (I.L.R., 5. All., 217)—and that the prisoner had not used the receipt, as it was his successor who forwarded it to head-quarters and not himself.

The prisoner was convicted under ss. 409 and 471 of the Indian Penal Code and sentenced to three years' rigorous imprisonment and a fine of Rs. 15.

Sadagopacharyar for appellant.

The Public Prosecutor (Mr. Powell) for the Crown.

The Court (Muttusami Ayyar and Wilkinson, JJ.) delivered the following

JUDGMENT:—The prisoner, who was recently the Postmaster of Orathanad, has been found guilty of (1) using as genuine a alleged forged document, and (2) of criminal breach of trust. With reference to the first charge, it is urged that the receipt found to be a forgery was not made with the intention of causing wrongful loss to Government, nor with the intention of defrauding Government, but if made by the prisoner was merely made with the intention of concealing the embezzlement of the money. Such an intention does not, it is argued, in law, render the case one of forgery; and we are referred to *Empress of India v. Fateh*(1), and *Empress of India v. Jivanand*(2). The Sessions Judge was of

(1) I.L.R., 5 All., 217.

(2) I.L.R., 5 All. 222.

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opinion that the cases were not in point, because in the present case it was not showed that the false document was made subsequent to the embezzlement. We entertain no doubt that the forgery and the criminal misappropriation form parts of one criminal transaction. Having regard to the definition of forgery, we are unable to hold that there was no forgery. There was clearly an intention to cause wrongful loss to Government by conveying the false impression that the receipt contained an acknowledgment of payment by the payee, and the fact of misappropriation in our opinion merely shows that there was an intention to cause wrongful gain to himself. A debtor who forges a release to screen himself from liability to pay the debt cannot be said not to be guilty of forgery, because he intended by the forgery to cover a dishonest purpose.

On the merits the appeal was dismissed.

APPELLATE CIVIL.

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

ARIABUDRA AND ANOTHER (DEFENDANTS), APPELLANTS,
and

DORASAMI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 244, Questions to be decided under—Hindu Law, Obligation of son to pay debt of deceased father—Nature of obligation.

D obtained a decree against the father of A and R, Hindus, on a hypothecation bond whereby certain land was pledged as security for repayment of a loan. The decree declared the land liable to be sold for repayment of the debt. The judgment-debtor having died before the decree was executed, A and R were made parties to the proceedings in execution and the land was attached. A and R objected to the attachment on the ground that their shares in the land were not liable to be sold in execution of the decree as they were not parties to the suit. This objection was allowed, and D brought a suit for a declaration that the property was liable to be sold. That suit was dismissed on the ground that a suit for a declaration would not lie. D then sued to recover from A and R the balance due under the decree against their father after crediting the amount recovered by the sale of their father's share. It was objected that the suit was barred by s. 244 of the Code of Civil Procedure:

* Second Appeal No. 568 of 1887.

1888.
February 27.
March 15.

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DORASAMI.

Held, that the duty of a son under Hindu law to pay his father's debt out of his own share of ancestral estate is not a matter which can be decided under s. 244 of the Code of Civil Procedure.

The questions contemplated by s. 244 are those which relate to the enforcement of the obligation created by the decree. The obligation to pay the father's debts out of the son's share of the ancestral estate is not an obligation created by a decree against the father.

APPEAL from the decree of J. A. Davies, District Judge of Tanjore, confirming the decree of S. Subbayar, District Munsiff of Nega-patam, in suit No. 349 of 1884.

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

Subramanya Ayyar for appellants.

Bhashyam Ayyangar for respondent.

JUDGMENT.—In original suit No. 329 of 1876 the respondent obtained a decree against the appellants' father upon a hypothecation bond executed by him in 1866. To this suit, however, the appellants were not parties, but the decree passed therein declared that the hypothecated property was liable to be sold, if necessary, in execution. The judgment-debtor having died before the decree was executed, execution was taken out against the appellants as his legal representatives and the property under hypothecation was placed under attachment. They objected to the attachment and the sale of their interest in the hypothecated property in execution of a decree to which they were not made parties, and their objection being allowed, the execution-creditor instituted original suit No. 83 of 1880 to have it declared that their shares were also liable for his debt. In second appeal No. 618 of 1881 it was held that the suit was not maintainable on the ground that the respondent sought for a declaratory decree only, though he was entitled to further relief. The High Court, however, observed that the execution-creditor, the respondent, would not be precluded from instituting an independent suit against the appellants to recover from them the balance of the judgment-debt which remained unsatisfied to the extent of the value of the ancestral property which had come to their hands. Thereupon the suit from which this second appeal arises was instituted by the respondent, and both the lower Courts decreed his claim on the ground that the decree-debt was neither illegal nor immoral, and therefore one which the appellants were bound to satisfy out of the ancestral property in their hands.

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It is argued in second appeal that the liability of the ancestral property in their hands was a matter which ought to have been dealt with in execution proceedings, and that no separate suit will lie under s. 244 of the Code of Civil Procedure, and that the observation of the High Court in second appeal No. 618 of 1881 was a mere *obiter dictum* by which the appellants are not bound; and our attention is drawn to the decision of the Privy Council in *Chowdry Wahed Ali v. Mussamut Jumace* (1) and to the decision of this Court in *Kuriyali v. Mayan* (2). It is provided by s. 244 that all questions arising between the parties to the suit in which the decree is passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by order of the Court executing the decree and not by a separate suit. The question, therefore, for decision in this second appeal is whether the son's pious obligation under the Hindu law to pay the debt of his father out of his share in the ancestral property is a matter which relates to the execution of a decree against his father within the meaning of that section. We are of opinion that it is an obligation distinct from that created by the decree which was passed against the father, that if the decree-debt was either illegal or immoral, the sons would be under no obligation to satisfy it, though the decree against the father might be perfectly valid, and that the questions contemplated by s. 244 are those which relate to the enforcement of the obligation created by the decree. It is one thing to execute a decree as we find it, and another to add to the obligation created by it so as to extend its scope. The cases cited by the appellants' pleader do not in our opinion support his contention. In *Chowdry Wahed Ali v. Mussamut Jumace* the Privy Council observed that the question whether the property proceeded against in execution belonged to the judgment-debtor or to his legal representative in his own right was material for the purpose of fixing the legal representative with a liability *quâ* legal representative, and therefore one which related to the execution of the decree. The same view was taken by this Court in *Kuriyali v. Mayan*; and s. 234 of the Code of Civil Procedure is referred to as showing the nature of the inquiry which it is necessary to make in order to fix the legal representative with liability as such in execution. Though the

(1) 11 B.L.R., 149.

(2) I.L.R., 7 Mad., 255.

ARIABUDRA legal representative is, as ruled by the Privy Council, certainly a party to the decree under execution, he is so only for the purpose of the obligation created by it being enforced against him and the execution-creditor is not at liberty to insist on the enforcement of any obligation which is not included in it. In *Suraj Bansi Koer v. Sheo Proshad Sing*(1), the claim asserted by sons to the recovery of their shares in ancestral property sold in execution of a decree against their father was entertained and decreed by the Privy Council in a subsequent suit, and the present suit, though brought by the execution-creditor, rests on the same principle, viz., the obligation on which the second suit is based is distinct from that created by the decree in the first suit. Another contention in appeal is that the claim is barred by limitation. The suit was clearly one to enforce payment of money charged on immovable property, and the contest was whether the charge was validly created by the father as against his son. The claim is therefore not barred by limitation, and we dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

MOIDIN AND ANOTHER (DEFENDANTS), APPELLANTS,
and

OOTHUMANGANNI (PLAINTIFF), RESPONDENT.*

Limitation—Adverse possession—Redemption of land by one of two co-mortgagors and re-mortgage thereof—Possession under second mortgage for more than 12 years.

A and B, two brothers, being entitled to certain land, mortgaged it in 1852 to C. In 1864 A redeemed the mortgage and re-mortgaged the land to D for the same amount. In 1885 the defendants (sons of A) redeemed the mortgage to D. In 1886 the plaintiff (son of B) sued defendants and the representatives of C and D to redeem a moiety of the land on payment of a moiety of the amount due on the mortgage of 1852. The defendants pleaded, *inter alia*, that the suit was barred by limitation as the land had been held adversely since the mortgage of 1864:

Held, that in the absence of proof that the land was held with an assertion of adverse title the plaintiff was entitled to a decree.

APPEAL from the decree of T. Kanagasabai Mudaliar, Subordinate Judge of Tanjore, confirming the decree of T. Venkatarama

(1) L.R., 6 I.A., 88.

* Second Appeal No. 849 of 1887.

Chetti, District Munsif of Pattukota, in suit No. 279 of 1886. The facts necessary for the purpose of this report appear from the judgment of the Court (Muttusami Ayyar and Parker, JJ.).

Krishnasami Ayyar for appellants.

Ambrose for respondent.

JUDGMENT.—The appellants' father and the respondent's father were brothers, and in 1852 they jointly mortgaged the property in dispute for Rs. 200 to the grandfather of defendant No. 1. In 1864 the appellants' father redeemed the mortgage and re-mortgaged the property for the same amount and on the same terms to defendant No. 4, and in 1885 the appellants redeemed the second mortgage. Thereupon, the respondent brought the present suit to redeem the mortgage with respect to his moiety of the property in suit. Both the Courts below decreed the claim, and several objections are taken in second appeal.

It is urged that the mortgage which the respondent sought to redeem is stated in the plaint to be the mortgage of 1852, though it ceased to exist in 1864, and that the lower Courts were in error in passing a decree in his favor. We observe, however, that the appellants resisted the respondent's claim and relied, *inter alia*, on the redemption of the first mortgage in 1864. The Court of first instance recorded the fourth issue to ascertain the effect which such redemption had on the respondent's claim as co-mortgagor. We see no reason for saying that the appellants were taken by surprise, and that the Court ought not to have decreed to the plaintiff the relief he was entitled to upon the facts found.

Another objection urged in appeal is, that the respondent's claim is barred by limitation, and that the appellants' possession through defendant No. 4 from 1864 was adverse to it. The redemption of the original mortgage by the appellants' father in 1864 created in his favor only a charge on the share of respondent's father in the property mortgaged for his proportion of the mortgage debt and the expenses incurred in redeeming and obtaining possession of the mortgaged property. The possession arising from such redemption is then referable to the first mortgage, so far as the respondent's interest in the property is concerned, in the absence of distinct evidence to show it was acquired or retained with an assertion of adverse title and thereby became hostile to the respondent's claim. The finding of the Courts below on this point is that there is no satisfactory evidence

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of adverse title. It is said that the separate residence of the appellants' branch of the family, the division of a few salt pans which originally formed family property, and the recital in (exhibit I) that the property is that of the appellants, constitute sufficient evidence of adverse title, and that the lower Courts have failed to give due effect to it. We are not prepared to hold that the evidence relied on has not been considered, on the other hand the lower Courts have come to the conclusion that it is consistent with the appellants' possession as trustees in respect of the respondent's moiety of the property in dispute. Although the respondent attested exhibit I, and although there is a recital in it that the property in question is that of the appellants, we must construe the expression as intended to have application as between them and the party in whose favor it was executed. The impression which the respondent's attestation conveys is rather in favor of a belief that he had an interest in the property than that he had no interest in it. We may also refer, in support of our view that the period of limitation did not run from 1864, to the decision of the Bombay High Court in *Ramachandra v. Saddashie*(1). As to the decision on *Umr-un-nissa v. Muhammad*(2) to which the appellants' pleader draws our attention, we observe that it is not a case in point, the only question decided there being that the period of limitation could not be taken to have run from the date of the death of the co-mortgagor's predecessor in title. The appellants' pleader next relies on ss. 74 and 95 of the Transfer of Property Act, as showing that, notwithstanding the redemption by the appellants' father, they were not entitled to obtain possession of the property under mortgage, and that the possession which they actually obtained must, therefore, be taken to have been adverse to the respondent's claim. This contention cannot be upheld; the true construction of s. 95 is that the co-mortgagor redeeming the whole of the mortgaged property has as well a right of obtaining possession as of treating the co-mortgagor's share of the mortgage debt as a charge on the latter's interest in the property redeemed.

The second appeal must fail, and we dismiss it with costs.

(1) I.L.R., 11 Bom., 422.

(2) I.L.R., 3 All., 24.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

MORGAN (DEFENDANT), APPELLANT,

and

THE GOVERNMENT OF HAIDARABAD (PLAINTIFF),
RESPONDENT.*

1888.
February, 15,
16, 17, 21, 22,
23, 24.
March 22.

Contract Act, ss. 17, 19.—Contract induced by fraud—Right to rescind.

If a vendor has been guilty of fraud within the meaning of s. 17 of the Indian Contract Act by actively concealing a fact which it was material for the purchaser to know, and the purchaser was induced thereby to purchase, the fact that the purchaser by exercise of ordinary diligence might have ascertained the truth affords no answer to a suit to recover the purchase money. Such a case does not fall within the exception to s. 19 of the Contract Act.

APPEAL from the decree of W. E. Clarke, Subordinate Judge, Nilgiris, in suit No. 57 of 1885.

The facts appear from the judgment of the Court (Kernan and Muttusami Ayyar, JJ.).

Mr. Norton for appellant.

The Acting Advocate-General (Mr. Spring Branson) and Mr. Brown for respondent.

The material portion of the argument for the purpose of this report was as follows:—

Mr. Norton. There was no suppression of material defect which vendor was bound to disclose. If there was suppression, it did not influence plaintiff. If it did influence plaintiff, he could have discovered the facts by reasonable diligence (section 17 of the Contract Act). Simple concealment is not fraud, and even active concealment must be with intent to deceive or to induce the party to enter into a contract. The concealment must be *dans locum contractui*—*Pulford v. Richards*(1), *Attwood v. Small*(2): as to *scienter* being the gist of the action, *Dickson v. Reuter's Telegraph Company*(3): as to representation being not one of fact but of law only—

* Appeal No. 8 of 1887.
(2) 6 C. & F., 444, 447.

(1) 17 Beav., 87.
(3) L.R., 3 C.P.D., 1.

MORGAN v. THE GOVERNMENT OF HYDRABAD. (KERNAN, J.—Lady Souter's statement as to tenancy at will is not absolute. She merely says it appears to be a tenancy at will and refers to quarrels between landlord and tenant.)

(MUTTUSAMI AYYAR, J.—The statement is not her own, but purports to be received from Mrs. Morgan.)

Trower v. Newcome(1); where representations are vague purchaser cannot rely on them—*Rashdall v. Ford*(2); misrepresentation of law—*Lewis v. Bowen Jones*(3).

(MUTTUSAMI AYYAR, J.—In all the cases you quote the facts in reference to which the mistake arose were known to both parties. In this case plaintiff knew nothing about the lease.)

When opportunity is afforded for inspection, party cannot complain of misrepresentation—*Keates v. Cadogan*(4).

As to s. 18 of the Contract Act and the exception there was no duty on us to disclose lease.

As to s. 55 of the Transfer of Property Act, the lease is registered and could have been discovered—*Peat v. Gurney*(5).

If time is not originally of the essence of a contract, it cannot be imported—Contract Act, ss. 39, 55. *Macbryde v. Weekes*(6) shows that a party cannot plead misrepresentation if, with knowledge thereof, he extends the time, because it shows he did not consider such misrepresentation essential, and also that time, if reasonable, can be imported into the contract. Here time was extended from 19th February to 2nd June, and the letters show a re-affirmation of the contract—*Webb v. Hughes*(7), *Crawford v. Toogood*(8) contract for immediate possession, vendor could not complete. *Held*, time was not of the essence of the contract, and, as there were negotiations after date of agreed possession, there was a waiver. At the most plaintiff is entitled to damages only; he has never tendered conveyance or purchase money—(Contract Act, s. 55).

Mr. Spring Branson.

(KERNAN, J.—The only blot in plaintiff's case is negligence in not making inquiries of Sir F. Roberts as to terms of tenancy. This and the question of constructive notice is all there is in defendant's favor).

(1) 3 Merrivale, 704. (2) L.R., 2 Eq., 750. (3) 4 B. & C., 506.
(4) 10 C.B., 591. (5) 1 Eng. & Ir. App., 377. (6) 22 Beav., 533.
(7) L.R., 10 Eq., 281. (8) L.R., 13 Ch. D., 153.

As to notice of tenancy being notice of terms, *Crofton v. Ornsby*(1), *Taylor v. Stibbert*(2), *Caballero v. Henty*(3).

(MUTTUSAMI AYYAR, J.—Is there any case which shows that it is not the duty of the vendor to disclose all facts material to the purchase?)

As to argument that statement of a tenancy at will is one of law and not of fact, *Gibson v. Ingo*(4). The doctrine of constructive notice is based on the irresistible presumption that the agent must have informed the principal. Here the presumption has no place. Cowdell admits he never gave notice and that the Morgans consented—*Rolland v. Hart*(5).

KERNAN, J.—This is an appeal from a decree made by the Subordinate Judge, Nilgiris, on the 18th of August 1886, whereby a contract between the plaintiff and the defendant for the sale of a house and cottage and 25 acres of land at Ootacamund, called Snowdon, was rescinded and the defendant was decreed to pay to the plaintiff 40,000 rupees and interest.

The defendant is the owner of the property, of which she made a lease to Sir F. Roberts on the 13th April 1883 for the term of four years from that date, or for such less time as his then appointment of Commander-in-Chief of the Madras Army should remain unchanged, or as he might hold an appointment enabling him to remain at Ootacamund. Sir F. Roberts went into possession and remained there until September 1885.

That lease contains restrictive provisions against certain acts being done by the lessee, and there was in it a provision that, on breach of any of those provisions, the defendant should be at liberty to re-enter and terminate the lease.

Lady Souter, who resided at Bombay House, Ootacamund, was, in the years 1883 and 1884, a friend of the defendant, who informed her of the lease. In 1884 the defendant was desirous of selling her property at Snowdon, of which the property leased was part, and she communicated the desire to Lady Souter. In a letter from Lady Souter to the defendant, dated 19th August 1884, the former writes that she had received a telegram from the plaintiff stating he was anxious to buy her house, and also saying she wished to do the defendant a good turn and sell her (defendant's)

(1) 2 Sch. & L. (Ir. Rep.), 591. (2) 2 Veseyjr, 437.
(3) L.R., 9 Ch. App., 447. (4) 6 Hare, 124.
(5) L.R., 6 Ch. App., 678.

MORGAN house for her for Rs. 1,20,000, and, if agreeable to defendant, she would telegraph as follows:—

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"Bombay House not for sale, but Snowdon, a magnificent property, would suit your Highness' requirements. Will send particulars telegraph wishes." Lady Souter's letter proceeds thus:—"To prove that the Nizam is coming here, I have just had the enclosure from Nawab Sahib (Muneer Ool Moolku, the Revenue Minister to plaintiff), who was here a few days ago, and in that letter you will see he hopes to be here in the hot weather if it would suit you to sell."

In reply to that letter, the defendant wrote exhibit 31 saying: "I am exceedingly obliged by your kind offer of help in selling Snowdon to the Nizam, and which we have already placed before the Nawab. Your proposed telegram will do splendidly. I leave all in your hands. I shall be content if I got my price, 1 lakh." By exhibit AT to the defendant, 30th August 1884, Lady Souter replied she had telegraphed to the Nawab Sahib and the Prime Minister.

A letter written by the defendant to Lady Souter (AV without date) says, that immediate reply could not be expected; that they, the plaintiff and his Prime Minister, apparently were not in haste to secure a house, and might wish to consult the Nawab who came there and had seen all the houses offered for sale, and that General Morgan long ago offered Snowdon for sale. Perhaps he might draw a reply.

Lady Souter wrote to the Nawab a letter (exhibit AX), 12th October 1884. After referring to matters not material, she referred to the attractions of Ootacamund and to her telegraph to the Prime Minister, and gave particulars of the number of rooms and measurement of them in Snowdon. Lady Souter also wrote a letter (exhibit AY) to the Nawab, dated 18th October 1884, in reply to a letter of his, no copy of which was produced, and after referring to Mrs. Morgan's desire to sell for 1 lakh, she says: "Mrs. Morgan has not shown me any paper or agreement with her tenants, the Roberts, but she has told me they are tenants at will only, and that she could at any time get rid of them on giving a month's notice. I took care to tell Mrs. Morgan what you told me when here, that H. H. and nobles and staff would very probably come up here next March or April for the hot months, and they would require houses to live in."

The plaintiff or any of his Ministers did not give any reply to that letter of Lady Souter, and on the 10th December 1884 the defendant wrote to Lady Souter (exhibit AZ) as follows:—"The sale of Snowdon to the Nizam seems a hopeless matter. If he had wanted it, I suppose he would have said so. I cannot ask you to write again. I think I shall write myself and see what will come of it."

Accordingly on the 11th of December 1884 the defendant wrote exhibit A to the Nawab Sahib, which was as follows:—

"SIR,—Sometime ago I heard from Lady Souter that you had written to her regarding your wish to purchase a house in Ootacamund, on which that lady very kindly suggested Snowdon House.

"I should feel greatly obliged by your letting me know if any such intention still exists on your part, and if so, whether my house is likely to suit, as I am asked to enter into arrangements which will prevent my selling for five years to come, and these arrangements will take place early in 1885.

"An early answer will greatly oblige."

On the 17th of December 1884 Major Gough, Private Secretary to the Nawab, wrote to the defendant: "The Nawab has asked me to acknowledge your letter of the 11th instant and to say that if the house referred to by you is the one regarding which Lady Souter had written to him, the Nawab would like to see the plan and particulars." In reply the defendant, on the 22nd of December 1885, wrote (exhibit C):—

"Snowdon House is the same that my very good friend Lady Souter wrote about.

"I beg to enclose a plan of the land, traced from the Government map, and also a rough sketch of the house and out-houses to give you an idea of their proportions and relative position.

"This plan of land includes the cottage, but I am not aware if this is wanted also.

"Should only the house be wanted, then the division of land would be guided by the swamp, which divides the properties, subject of course to any wish expressed for more land on the opposite side of the valley; in such case I would ask that an offer be made me for the house alone and a stated portion of land. The price I ask for the house and cottage is Rs. 80,000 (eighty thousand).

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"I am now drawing Rs. 450 monthly rent, which represents a capitalised value of 70,000 at 8 per cent., exclusive of the timbered land. Water is abundant.

"The position and view are second to none on the hills: the road to church and library is in splendid order and by measured mile is $1\frac{1}{4}$ mile only.

"Government House land adjoins that of Snowdon, to which residence there is a fine and direct approach. I beg that you will give me as early an intimation as you can of the Nawab's wishes, as I fear to become too deeply involved in arrangements now pending, and which I do not wish to jeopardise; therefore I beg this matter may be private until you express a desire to buy.

"I should mention that Rs. 130 represents the cottage rent out of the 450."

The defendant wrote to Major Gough the exhibit D, dated 22nd of December 1884, telling him not to lose time in laying before the Nawab any information which may be required: she says she enclosed a rough sketch of the cottage rooms and that she let to her present tenant as he made concessions, and would not let so low to another tenant, and that with higher rent the capitalised value would be increased, and that she understated the value at Rs. 70,000 at Rs. 8 per cent.

Major Gough replied by letter of the 27th of December, exhibit E, acknowledging her two letters and enclosures and saying he laid them before the Nawab, who had requested him to ask the price of the cottage alone. By telegram F and letter of the 3rd of January 1885 to Major Gough the defendant stated she would take Rs. 15,000 for the cottage. On the 20th January Major Gough wrote exhibit H to defendant, stating he would inform her as soon as he was able to ascertain from His Highness what his intentions were.

On the 21st January 1885, Major Gough sent exhibit I, a telegram, as follows:—

"Since writing you yesterday, I am authorized by the Minister to inform you that H. H. the Nizam will purchase your house and cottage with land for Rs. 80,000 according to terms of your letter of December twenty-second."

By letter of the same date as the telegram Major Gough confirmed the telegram.

By telegram (exhibit T), 22nd January 1885, and by letter of

the same date to Major Gough the defendant, agreeing to the proposal for Rs. 80,000 in the same letter, says: "should H. H. have no lawyer in these parts, may I suggest Messrs. Cowdell and Woolley, to whom, if you will kindly send Rs. 40,000, the title-deeds will be immediately handed over by Mr. Rowlandson, solicitor, Madras, and the balance can stand over till the deed of sale is complete."

The contract was thus concluded.

On the 24th of January 1885 the defendant wrote exhibit M, pressing Major Gough to send Rs. 40,000.

On the 27th of January 1885 Major Gough telegraphed (exhibit N) to Messrs. Cowdell:—"Remitting you through Bank of Madras Rs. 40,000, half cost of Snowdon. Please attend to legal conveyancing for Nizam's Government."

On the 28th of January 1885 defendant wrote to Cowdell and Co., giving a plan, but requesting them to keep the new arrangement private for a few days (exhibit 55). By letter of the 4th February (exhibit Q) the defendant says: "Cowdell received the deeds and paid over the money," and requested arrangement that the balance should be paid to her credit on the deed being signed.

By letter (exhibit S) Major Gough replied:—

"I am in receipt of your letter, dated the 4th instant, and in reply beg to inform you that the remaining moiety of the purchase money will be remitted to Messrs. Cowdell and Co., who will pay it to you as soon as you have signed the deed of sale and the registration of the property is completed in favor of His Highness the Nizam's Government. Please, therefore, communicate with Messrs. Cowdell and Co. as to where you wish the amount paid to your credit."

The remaining 40,000 and 1,000 rupees for stamps and fees were remitted to Messrs. Cowdell by Major Gough on the 7th day of February 1885. On the 12th February 1885, with a letter of that date, U. Cowdell and Co. sent a draft of the proposed deed to the Nizam's Government. Pending the negotiation, the defendant, on the 9th of January, by letter (exhibit No. 37) to Messrs. Cowdell, writes that in August 1883 she wrote to the Commander-in-Chief that, in consequence of breaches of the special contract lease he had rendered it void, and if he remained, he should do so as tenant-at-will, and that he gave no reply; and she

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says: "now I want formally to break that lease and give notice to quit;" and on the 22nd of January Messrs. Cowdell and Co. wrote a letter of that date to the Chief, referring to the agreement of 17th March 1883, also referring to the defendant's letter of 31st August 1883, cancelling, as it said, the lease, and they thereby give notice to him to deliver possession on the 1st February 1885. On the 26th January Messrs. Barclay and Morgan, on behalf of the Chief, by letter of that date to Messrs. Cowdell and Co., denied that there was any ground for cancelling the lease and declined to give possession.

By letter (exhibit W) dated 13th February 1885, Mr. Cunningham, at request of Sir F. Roberts, wrote to the Nawab, stating that Sir F. Roberts had a lease of Snowdon as long as he remained in Madras. On the 17th of February Major Gough, by exhibit X to Messrs. Cowdell and Co., directed further proceedings to be stayed.

On the same day Messrs. Cowdell wrote to Mr. Morgan stating Major Gough's letter.

On the 18th of February 1885, Messrs. Smith and Wilkins, Solicitors, wrote exhibit AA:—

"Mrs. Morgan has placed in our hands your letter to her of the 17th instant on the subject of the sale of Snowdon premises with instructions to reply to same. Mrs. Morgan is greatly surprised at His Highness' action in attempting to stop the sale on the grounds alleged, as His Highness had due notice of the premises being let and it was consequently his duty to ascertain terms of lease, before making the contract, Mrs. Morgan being totally ignorant of the purposes for which His Highness required the premises. However, as you are aware of the conditions of the lease and the alleged breaches thereof, in respect of which Mrs. Morgan has terminated the lease under the power in that behalf contained therein, and given the tenant through you notice of termination, you are in a position to advise your client thereon, and of his rights of action to recover possession.

"Mrs. Morgan will be happy to do every legal act in her power to assist your client in recovering possession; but she requires the due performance of the contract for sale."

On the 19th February Major Gough wrote (exhibit AC) to the defendant: "Under instructions from His Highness' Government, I have the honor to enclose a copy of my letter to Messrs. Cowdell and Co., the Solicitors of His Highness' Government.

His Highness' Government was rather taken by surprise when informed through the Residency of the existence of a lease of Snowdon, &c., for an indefinite period. However, Messrs. Cowdell and Co. will, in the course of business, communicate with you in regard to the subject."

On the 23rd February Major Gough wrote to the defendant (exhibit AE):

"I beg to acknowledge receipt of your letter, dated the 19th instant, in which you make mention for the first time in your correspondence with me regarding the sale of Snowdon, of the existence of a lease under which possession is held by Sir Frederick Roberts.

"There is, of course, no idea of accusing you of suppressing the fact of the house being rented; but there is no doubt that the lease was, and is, an obstacle to the house being available for the use for which it was to have been purchased, and had the existence of the lease been made known, His Highness' Government would not have cared to purchase it.

"I am also desired to say that His Highness' Government is very averse to causing the slightest inconvenience to Sir Frederick Roberts, and the fact of the transaction involving any such inconvenience would alone have been sufficient to deter the Government from the purchase. It is, therefore, to be hoped that, under the circumstances, you will see fit to agree to the cancelment of the transaction, without there being any necessity for legal proceedings."

"P.S.—I think it will be right that I should send a copy of your letter and this reply to Messrs. Cowdell and Co."

On the 25th February Messrs. Smith and Wilkins wrote to Messrs. Cowdell:

"Yours of 24th instant to hand with copy of letters from the Private Secretary of the Nizam, dated the 17th and 19th instant, which were apparently written before His Highness could have received from you a copy of our letter to you of the 18th instant, and your advice on the subject of same. The lease to Sir Frederick Roberts, as it existed, was not for 'an indefinite period' as alleged, but for a certain term, or such less term as Sir Frederick Roberts' official duties might allow him to remain on the hills as therein stated, with right of renewal; so that, according to present information, even if the lease now existed, it would anyhow termi-

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nate on the 29th of November 1886 with Sir Frederick Roberts' appointment of Commander-in-Chief of the Madras Army. You are aware, however, that the lease does not exist, the same having been terminated by Sir Frederick Roberts' breaches, &c., as already advised, and your client will, on completion of the sale, be in a position to take action against, and eject Sir Frederick Roberts, by reason of such breaches, &c. Our client is at a loss to understand the statement in His Highness' letter of the 19th instant that His Highness' Government 'from the beginning had been led to believe, and were under the impression that possession for occupancy would be given immediately on the completion of the purchase.' Our client never led His Highness to any such belief or impression, and had no idea as to the purposes for which His Highness required the premises. In fact, His Highness was not only duly informed of the tenancy by our client's letters of the 21st and 22nd December 1884 and otherwise, but His Highness subsequently (and without making any inquiries from our client as to the nature of the tenancy) made an unconditional purchase of the premises, which was duly ratified, and in respect of which His Highness through you paid our client on account Rs. 40,000, which money was paid by you to the mortgagees on account of our client to redeem the mortgage and deeds. We must request you will not part with these documents, but hold the same on account of our client, who, we submit, is solely entitled to same, pending completion. Our client cannot, as you are aware, execute a conveyance under the terms stated in His Highness' letter of the 19th instant, or permit him to withdraw from the contract. Our client, however, as stated in our letter to you of the 18th instant, will be happy to do every legal act in her power to assist His Highness in recovering possession; and she now awaits a definite reply from him to our letter of the 18th instant, as well as this letter, which reply she requests may be sent by telegram as she has made arrangements to leave for England on the 1st of April and wishes to have matters definitely settled before her departure."

On the 4th March 1885 Major Gough wrote to the defendant (exhibit AK):

"In acknowledging the receipt of your letter, dated the 25th ultimo, I have been requested to say that a discussion on the legal merits of the matter is really unnecessary. His Highness'

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Government considers itself very much aggrieved, and hopes, for the sake of all parties concerned in this business, that it may be brought to a satisfactory termination without further unpleasantness. His Highness' Government cannot for a moment think of having any thing to do with suits for ejectment, &c., against anybody, and neither is it in a position to advise you to pursue any particular course—conciliatory or otherwise—as regards your present tenant. If you are, however, desirous that any specific period, not exceeding two months, should be allowed to you for the purpose of arranging privately, as you propose to put His Highness' Government in possession of the house, this will be allowed. At all events His Highness' Government desire to inform you that, unless possession is obtainable by the first week in May at the latest, the purchase cannot be proceeded with."

On the 3rd of June Messrs. Cowdell and Co. wrote to the defendant the letter (exhibit 47).

"With reference to your letter, dated the 15th ultimo, we are directed by His Highness the Nizam's Government to intimate that unless immediate possession of 'Snowdon' be given, His Highness' Government will decline to complete the purchase of that property, and will take legal steps for the recovery of the first moiety of the purchase money, viz., Rs. 40,000, remitted to you on the 27th of last January."

On the 10th of June defendant wrote the exhibit 49 to Messrs. Cowdell and Co:

"In reply to your letter, informing me by desire of H. H. the Nizam's Government, that immediate possession of the property they have purchased is required by them, I beg to say that I am prepared to give them possession any day convenient to themselves on payment to me of the balance still due. The right of entry on the houses I will shortly inform you of. I do not expect it will be long delayed now."

The suit was filed on the 13th of June 1885 and alleged that defendant knew in 1884 that plaintiff wanted a house at Ootacamund for occupation early in 1885, and requested Lady Souter to write to the plaintiff's Minister to mention that Snowdon was for sale; that through her agent defendant represented to the plaintiff that Sir F. Roberts was tenant-at-will, and also that defendant did not bring to the notice of the plaintiff, or his agent, that Sir F. Roberts was tenant under the lease of the 13th April 1883 or any

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other lease. The plaint stated that the defendant concealed from the plaintiff the fact of the existence of the lease, though she knew that Sir F. Roberts was not a tenant-at-will as represented by her and her agent, and that she would be unable to put the plaintiff in occupation of the property. The plaint further alleges that he (plaintiff) was not aware of the existence of the lease at the time he agreed to buy, and that if he had been so aware, he would not have entered into the contract.

The relief prayed was—

1. Cancellation of the contract for sale.
2. Payment by defendant of Rs. 40,000 and interest.
3. That the plaintiff be decreed to have a lien on the property until payment and the costs of the suit.

The plaint also prayed that if the above relief be refused, in the alternative, that the defendant should convey the property sold on payment by the plaintiff of the balance of the purchase money and for the costs of suit.

The defendant in her written statement denied that Lady Souter was her agent, and stated that on the 21st or 22nd of December 1884 the defendant sent to the plaintiff plans of the houses and lands and twice referred to the occupation by Sir F. Roberts, and that the plaintiff or his agent inspected the property with the permission of Sir F. Roberts and were aware he was the tenant thereof; that on the 21st of January 1885, after a month from defendant's offer of the 21st of December 1884, plaintiff accepted defendant's offer, and had in the interval opportunity of inquiring the details of Sir F. Roberts' tenancy had they wished to learn the same and whether there was a document evidencing its terms as in the ordinary course of business there would be; also that the defendant was not informed of the purpose for which the plaintiff required the property, and that there was no stipulation that immediate occupation should be given; that Sir F. Roberts had broken the terms of his lease and that defendant believes he had forfeited his right to hold under the lease, and that she had previously given him notice and believed she was entitled to exercise the power of re-entry and offered plaintiff to take steps to enforce such right without prejudice to the sale; that no time was fixed for the completion of the contract, and that time was not the essence of the contract, and that the delay in disposing of Sir F. Roberts' occupation was not unreasonable; that she

cannot now be restored to her former position owing to plaintiff's act, and by way of counter claim she asks for a decree for payment of the unpaid purchase money and interest and damages for delay in completion of the contract.

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There were 22 issues framed by the Subordinate Judge; upon many of such issues there was no argument before us. The following questions deducible from the issues and the arguments were those pressed before us:—

1. Whether Lady Souter was an agent of the defendant authorized by the defendant to state to the plaintiff or his ministers that Sir F. Roberts held as tenant-at-will only, or liable to be put out of possession of the property upon issuing a month's notice?

2. Whether the defendant in the negotiations with the plaintiff through Major Gough, from the 11th of December 1884 and up to the completion of the contract on the 21st of January 1885, knew, or had good reason to believe, that the purpose or one of the purposes for which the plaintiff entered into the contract for the property, was that he might have the occupation thereof during the hot season of 1885, commencing from about the month of March or April 1885?

3. Whether the plaintiff during the negotiations with Major Gough believed that if the fact of the lease was disclosed to him before the contract was agreed to, that the plaintiff would not enter into the contract?

4. Whether the defendant wilfully abstained from informing the plaintiff's agent, Major Gough, between the 10th of December 1884 and the 21st of January 1885 of the existence of the lease? If so, did she abstain with intent to deceive the plaintiff or induce him to enter into the contract?

5. Whether the defendant actively concealed the fact of such lease from Major Gough with intent to deceive the plaintiff or induce him to enter into the contract?

6. Whether the plaintiff had the means of discovering that such lease existed with ordinary diligence, and did the plaintiff exercise such diligence?

7. Was the plaintiff under the circumstances bound to exercise such diligence?

8. Whether plaintiff had notice of the lease through his solicitors, Cowdell & Co.?

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9. Whether plaintiff, with knowledge of the existence of the lease, waived his right to rescind the contract?

On the 1st question whether Lady Souter was the defendant's agent, authorized to state that Sir F. Roberts held only at will or liable to be put out at a month's notice, we think Lady Souter was such agent. In the letter of 18th August 1884 Lady Souter informed the defendant that the Nizam intended to go to Ootacamund in the hot weather of the next year and for that purpose required to buy a house and proposed to send a telegram to the Nawab offering Snowdon for sale and sent draft of telegram. By the letter of the defendant she accepts Lady Souter's offer and says the telegram will do splendidly and that she left all in her hands. No doubt such authority would not justify Lady Souter in making any untrue statement respecting the defendant and her property. But it would justify Lady Souter in stating any details of the circumstances of the property so far as the defendant had informed her in order to lead to a purchase. Now if Snowdon was in the possession of a tenant by lease, extending beyond the next season, it would hardly be useful to offer the place to the Nizam who wanted it, as defendant was informed, for the next hot season. It therefore was important for Lady Souter to state if she was so informed by the defendant, that, though the house was then tenanted, yet that the tenant could be obliged to leave when the Nizam might require it for occupation.

Lady Souter states that the defendant told her that she had a dispute with her tenant and had given him notice; that he had broken his covenants and should hold only as tenant-at-will. Lady Souter says that the defendant several times in the year 1884 said so, and that Mr. Hodgson was present. The defendant in her evidence says: "In September 1883 I told Lady Souter of the action of the Roberts' and of my letter of the 31st of August 1883 (exhibit No. 23.) I told her the whole story. The breaches by Sir F. Roberts took place to my own knowledge." Mr. Hodgson also says he was present when defendant said Sir F. Roberts was only tenant-at-will, and he details a conversation between August 1884 and October 1884 at which he and Lady Souter and the defendant were present, in which Lady Souter remarked to the defendant: "You will of course remember the purpose for which the Nizam wants the house, and that he is coming here to live." He says the question of the occupation of

Sir F. Roberts then came up, and Lady Souter said: "Of course, you know the house will be wanted about March or April," and that defendant said the Roberts' were only tenants-at-will and she could give notice to go away at any time and there would be no difficulty on that head. Mrs. Morgan denies that she told Lady Souter that the Roberts were tenants-at-will. But the phrase tenant-at-will was used by the defendant in her notice to Sir F. Roberts (exhibit No. 23) of the 31st of August 1883. She tells him: "If you remain it must be as my tenant-at-will subject to the usual notice to vacate the premises and not as a lessee." Moreover, Lady Souter in August and in October (exhibits AQ and AX) told the Nawab that the defendant had said that the Roberts were only tenants-at-will and could be turned out on a month's notice. At the time Lady Souter wrote those letters she could not have anticipated any dispute on the matter, nor can it be thought she wrote so with a view to make evidence for the future.

On the 2nd question the admission of the defendant in her evidence and by her counsel at the hearing proves that she knew that the purpose, or one of the purposes of the plaintiff in contracting for Snowdon, was that he might have the occupation of Snowdon as a residence. But the defendant says she did not know when the plaintiff expected the occupation to begin. There was certainly no certain time fixed by the contract at which possession for the purpose of occupation was to begin. However, the defendant was informed by Lady Souter in August 1884 (exhibit AQ), and she and Mr. Hodgson both in their evidence say that the defendant was informed by Lady Souter that the house would be wanted by the Nizam to live in for the hot season of 1885, beginning in March or April of that year. The Nawab and Mr. Furdonjee, it is proved, were in Ootacamund in the year 1884, prior to, and early in, August of that year looking at houses. In exhibit AV defendant in writing to Lady Souter says that the Nawab had seen all the houses offered for sale. It is only in the season that it is hot in the plains that the hills are resorted to by natives for change. We think the reasonable conclusion is that the defendant was quite aware in the negotiation for the sale that plaintiff required the house for occupation for the hot season of 1885.

The 3rd and 4th questions are inseparably mixed together, and the evidence and the inferences thereupon leading to con-

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clusions on those points are the same. We propose to take them together.

There is no doubt that the price asked by the defendant for the purchase was a very good price and was so considered by the defendant; see her letter (exhibit B H.), 11th February 1885, to Mr. Hodgson, in which she thanks him for congratulation on the sale and says: "No doubt I should not have found it so easy to get a private individual to buy a large property like that, and in such a case I should have been obliged to wait." That price was a reduction of Rs. 20,000 at least in the sum asked by Lady Souter. When the defendant asked that price making the reduction it was a great object with her to secure the amount. She knew that the lease was in existence and had not been cancelled. See her letter, 9th January 1885. She asserts she did not know whether Sir Frederick Roberts would give up possession, but we find it difficult to believe this. She knew she had received rent from her tenant up to and in January 1885. See letter of the 14th January 1885 from Sir F. Roberts. She knew that the Nizam would require possession for occupation at all events about March or the beginning of April, and she most probably feared that if he was aware there was a lease to a tenant for four years from 13th April 1883 with about two years more to run, that the plaintiff would not enter into the contract. She instructed her solicitors by letter of the 9th of January 1885 to break Sir Frederick Roberts' lease formally and to give notice to Sir F. Roberts to give her possession on the 1st of February 1885. In her letter (exhibit B) of the 21st of December 1884 she requested Major Gough to keep the matter of the proposed sale and purchase private *until he expressed a desire to buy*. She says in the letter her reason for that request was that she was deeply involved in arrangements that she did not wish to prejudice. No doubt she had been theretofore and was then in treaty for a loan of Rs. 30,000 on the property, and in that transaction she put forward the lease. But the question is, was the reason she gave the real reason for the request, or was it that she feared, if Major Gough mentioned the matter to others, the existence of the lease might be discovered by the plaintiff or his agents? Her request for secrecy certainly tended to prevent Major Gough or the plaintiff from obtaining any information about the property or the lease from any one except from herself. Although that letter was written by her in answer to the letter of Major Gough requesting to be furnished

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with particulars of the property, she did not mention anything about the lease, while she admits that she deliberately did not mention it, and that she did not think it necessary to mention it, as she mentioned there was a tenant. The defendant was aware that the Nawab Sahib had been in Snowdon in 1884 with Sir F. Roberts and knew the latter was the tenant. The effect of the request contained in the letter, if complied with, as it apparently was, would, as she most probably knew, be to prevent inquiry by the plaintiff or his agents from Sir F. Roberts until the contract was concluded, when it might be too late. The defendant contends that the contract for purchase by the plaintiff was unconditional, and that the plaintiff was informed by her of the tenancy, and was aware Sir F. Roberts was the tenant. She contends that the plaintiff and his agents had ample opportunity, by the exercise of diligence, of finding out how Sir F. Roberts held the property, and that he was bound to inquire. She also contends that she *bonâ fide* believed that Sir F. Roberts had by breaking of covenant forfeited his right as lessee, and was only tenant-at-will or from month to month, and that it was not necessary for her to refer to the lease for any purpose. It is true that in the letters that passed between the defendant and Major Gough the purchase was apparently unconditional, of the estate as defendant held it—and subject to the existing tenancy, though this phrase is not used. It is also true that plaintiff's agent had opportunity of ascertaining, by the exercise of ordinary diligence, that Sir F. Roberts held, or alleged he held under the lease, and if the true result of the evidence is that the defendant was not guilty of fraud within the meaning of s. 17 of the Contract Act by actively concealing the fact of the lease, or by suggesting that the tenancy was from month to month when she knew the lease still existed, then such unconditional purchase and the absence of inquiry by the plaintiff would be a defence so far to this suit.

But if the true result of the evidence is that she was guilty of such fraud, and if the purchaser was induced by that fraud, then the unconditional purchase and absence of inquiry with ordinary diligence by the plaintiff would not afford a defence to this suit.

As to the allegation that Sir F. Roberts had forfeited his lease, it is important to refer to s. 55 of the Transfer of Property Act, which provides that receipt of rent, except after suit, shall be a waiver of right of re-entry for breach of covenant

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and the defendant had received rent in January 1885 for the month of December then ended. The conduct of Mrs. Morgan after the contract reflects some light on her prior conduct. A letter written by Mrs. Morgan to Major Gough on the 23rd of February 1885 (exhibit AD.) appears to show what her view, after the contract, was of the fact that she did not mention the lease. She begins by regretting that there should be a misunderstanding as to the terms on which the minister purchased Snowdon and says then: "I do not think you can accuse me of having suppressed the fact that my house was *rented*, as in both my notes of the 21st and 22nd I mentioned the amount of rent I was drawing. The minister's offer to buy was unconditional, but though this fact renders me legally safe as I am advised, yet I shall endeavour to procure the immediate possession required, and which I hope to effect as my tenants have received notice to quit in August 1883 and again now early in January before you had bought in consequence of breaches of special covenants." Now in that letter, though she says she did not suppress the fact that the house was rented, she does not say that she did not suppress the only important fact, viz., that it was leased.

In a letter from defendant to Major Gough, dated the 22nd of January 1885, the day after conclusion of the contract, the defendant asks Major Gough to send Rs. 40,000, and on the 24th January again wrote pressing for Rs. 40,000. In her letter of the 28th January 1885 to Messrs. Cowdell she tells them they will that day hear, if they did not before, the new arrangements as to Snowdon, and begs them to keep the matter *private* for a few days, and requests them to expedite the preparation of the deed of sale.

At the date she wrote that letter Rs. 40,000 had not been paid. Her letter shows a desire to have the contract immediately carried out. It was natural she should wish the matter concluded soon. But the pressure for its completion with the request for secrecy leads to the idea that she had a special object in view in desiring completion in such haste. There is no explanation of this secrecy, and looking to her prior conduct and the knowledge she had of the circumstance, it seems to us that the desire for haste and secrecy was but the following out of the idea entertained by her before the contract was concluded, viz., to prevent information reaching the plaintiff of the existence of the lease until all the money was paid and the sale completed.

The defendant was bound under s. 55, cl. 1 of the Transfer of Property Act to answer to the best of her information all relevant questions put to her by the plaintiff through Major Gough in respect to the property.

The request for particulars in Major Gough's letter comes within that clause, and the defendant was bound to have stated the fact that the lease had been made, although she might have stated her view that the rights under it were forfeited. It is very difficult to believe she *bonâ fide* thought such rights were forfeited.

In her evidence she says that when she wrote the letters of the 21st and 22nd December and sent the telegram in January accepting the offer, she thought the Chief might refuse to go out, but she considered he held at her pleasure; that if she then knew the Chief did not consider his lease cancelled, she did not think she would have mentioned the lease to Major Gough as she would have exercised her right to put the Chief out, and she was under the impression that if she mentioned she had a tenant, it was not necessary to mention the lease. We have examined the evidence carefully to see if it affords reason to believe that defendant could have acted *bonâ fide*, though under mistake, in not disclosing the lease during the negotiation, but we have been unable to find any such reason. She is, as the evidence shows, a lady much accustomed to the business of managing property and perfectly capable of conducting affairs according to what she considers is for her interest. There is no doubt she knew that plaintiff required the house for occupation, but she says she did not know when exactly it was required. We see no reason to doubt that in the negotiation when she wrote the letter of the 22nd December 1884 she had very good reason to believe, and did believe, that the plaintiff required the house for occupation in the hot season of 1885, and knew he would also require possession for such occupation in March or April. The conclusion we are forced to arrive at on the facts is that the defendant in such negotiation feared and believed that, if the fact of the lease was then disclosed, the plaintiff would not accept her offer or enter into a contract for purchase with her; and that, therefore, in such negotiation she wilfully abstained from informing plaintiff through Major Gough (in reply to his request for particulars) of the existence of the lease with intent to deceive the plaintiff through his agent, Major Gough, and induce the plaintiff to enter into the contract. When it suited

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her interest to state that Sir F. Roberts held under lease she did so. Mr. Hamlin states that in December 1884 or January 1885 his trustee was requested to lend the defendant Rs. 30,000 on the property, and that defendant wrote him a letter (searched for and proved to be lost), in which she stated that Sir F. Roberts held a lease.

It is necessary to refer to the information, if any, which the plaintiff's agent had as to the nature of the tenancy. We think the evidence establishes that Lady Souter was authorized, as before mentioned, by the defendant to represent that the tenant of the house was only tenant-at-will, or could be put out on a month's notice. That information was given by Lady Souter in the letter before mentioned to the Nawab Sahib. Mr. Ferdunjee, Secretary to the Nawab Sahib, says the house was wanted for no other purpose than occupation in the season of 1885, and that the purchase would not have been gone into if they were aware that anything would prevent plaintiff from occupying the house in that season. He says he knew before the purchase that Sir F. Roberts was tenant at Snowdon, that the Nawab Sahib's Finance Minister had dined there with Sir F. Roberts in 1884; but he says in the letter AY from Lady Souter it was stated the tenant was tenant-at-will. He says such statement was acted on by the plaintiff's officials (agents or ministers) and that as a fact it was on Lady Souter's letters that the property was brought to their notice and action was taken in regard to the purchase of Snowdon as far as he knows. He said the principal objection to the purchase by the plaintiff was that immediate occupation could not be given.

Major Gough in his evidence referred to the negotiation by letter and stated that the house was wanted for the Nizam to live in; that he [witness] did not know that possession could not be got immediately; that he understood the reference in defendant's letter to tenant to mean a tenancy which could be terminated at will, and that he did not understand such tenancy to mean a lease; that if he was informed there was a lease, he would not have proceeded without special instructions, and would have advised the plaintiff to have nothing to do with the purchase.

Cross-examined.—Says he drew his conclusion as to tenancy at will from the Revenue Minister; that he does not recollect the words of the Minister, but that he concluded that the tenancy

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could be determined to suit the plaintiff's convenience, and that had he known of the existence of the lease, he would not have sent either of the two sums of Rs. 40,000 each to Messrs. Cowdell and Co. He states that the plaintiff went to reside in Ootacamund about the middle of May 1885.

We think the just conclusion from the evidence is that the plaintiff, through his agent, entered into the contract under information conveyed to him by the defendant through her agent, Lady Souter, that he could have the house and property for occupation by him in the hot season of 1885, commencing about March or April of that year, and that the defendant, in order to deceive the plaintiff and induce him to enter into the contract, actively concealed the fact of the execution of the lease, which she was well aware had not been cancelled, but was then in existence, and that, by reason of such concealment, the plaintiff was deceived by the defendant and did enter into the contract, being induced to do so by such concealment. We think, therefore, the contract was voidable at the option of the plaintiff under the provisions of the Contract Act, ss. 17 and 19.

Although the plaintiff could, before concluding the contract, by the exercise of ordinary diligence, have discovered that in fact the property proposed for purchase was on lease for an unexpired period of about 1½ years, and although such ordinary diligence was not used, and though, in a case within the exception to s. 19 of the Contract Act, such diligence should be used, still this was not a case within that exception, and the absence of exercise of diligence by the plaintiff is not a defence open to the defendant, as she actively concealed the fact of the execution of the lease in order to deceive the plaintiff and induce him to enter into the contract. We do not think on the evidence that the plaintiff waived his right to avoid the contract after he discovered the fraud. On the contrary he insisted that the defendant should not compel him to accept the purchase encumbered by the lease.

The payment of Rs. 40,000 to the defendant and the remittance of the further sum of Rs. 40,000 to Mr. Cowdell were made before the plaintiff or his agent was informed of the existence of the lease.

It does not appear on what date the exhibit W. was received by the Nawab from Mr. Cunningham, saying Sir F. Roberts held under lease, but on the 17th day of February 1885 Major Gough

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telegraphed to Messrs. Cowdell and Co. and wrote them a letter of the same date to stay proceedings. And Messrs. Cowdell on that day wrote to the defendant declining to proceed with the purchase on the ground of the discovered evidence of the lease, and on the 19th of February 1885 Major Gough wrote to the defendant the letter, exhibit AC, enclosing copy of his letter to Messrs. Cowdell and Co. Again on the 4th March 1885 Major Gough wrote letter, exhibit AK, stating that plaintiff's Government were very much aggrieved, but offering to allow the defendant two months to procure possession. The letter stated that unless possession was given in the first week of May, the purchase would not be completed. On the 3rd of June 1885 Messrs. Cowdell and Co., by direction of the plaintiff, wrote to the defendant exhibit No. 47, that if possession was not given immediately, His Highness' Government would decline to complete the purchase and sue for Rs. 40,000.

As to the defence on the ground of notice to the plaintiffs, though Messrs. Cowdell and Co., Solicitors for both the plaintiff and the defendant, and who knew of the existence of the lease, there is the plain answer that Messrs. Cowdell and Co. did not become solicitors or agents for the plaintiff until the 2nd of February, which was several days after the contract was concluded. Therefore any notice they had of the existence of the lease could not affect the plaintiff before the conclusion of the contract. Any such notice after the contract was made was unavailing to affect plaintiff with notice before the conclusion of the contract.

As a matter of fact, Messrs. Cowdell and Co., or any of them, did not inform the plaintiff or any of his agents of the existence of the lease. The first information to the plaintiff or his agents was given by the letter from Mr. Cunningham.

We do not find any evidence of the allegation in defendant's written statement that the plaintiff, through his agent, inspected the property or any part of it with the permission of Sir F. Roberts.

On the other hand it is clear there was no contract for immediate possession. We do not, however, think that the disinclination of the plaintiff to disturb Sir F. Roberts was at all the cause why the plaintiff did not proceed with the contract.

The plaintiff had paid part of the purchase money and had sent Messrs. Cowdell the rest of it without notice of the lease or

of the suppression of it; and we think there is no doubt the existence of the lease was the sole reason why the plaintiff did not execute the contract.

We think this appeal should be dismissed with costs.

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APPELLATE CRIMINAL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.**

QUEEN-EMPRESS

against

KUTTI AND OTHERS.*

1888.
July 18.

Penal Code, s. 225—Criminal Procedure Code, ss. 59, 239, 535 and 537—Arrest of thief—Rescue from custody of private person—Irregular procedure.

To support a conviction under s. 225 of the Indian Penal Code, it is not necessary that the custody from which the offender is rescued should be that of a police man: it is enough that the custody is one which is authorised by law:

Held, therefore, that rescue from the custody of a private person who had arrested a thief in the act of stealing was an offence.

A magistrate tried A for theft and B and C for rescuing A from lawful custody and convicted A, B, and C in one trial.

A appealed, and B and C appealed separately. No objection was taken in the petitions of appeal to the procedure of the magistrate:

Held, on revision, that the convictions might stand.

IN calendar case No. 6 of 1888 before the Second-class Magistrate of Kodaikanal, Kallamangalam was charged with theft, and in calendar case No. 7 Kutti Chetti and two others were charged with rescuing Kallamangalam from lawful custody. The magistrate tried both cases together and convicted all the accused in one trial. Two appeals were preferred, one by Kallamangalam and the other by the other prisoners. None of the appellants (who appeared by the same pleader) took exception to the procedure of the magistrate in their appeal petitions. The Joint Magistrate of Madura (C. H. Mounsey) dismissed the appeal (25) of Kallamangalam, but reversed the convictions of the other prisoners (appellants in appeal No. 21) on the ground that rescue from legal custody within the meaning of s. 225 of the Penal Code did not include

* Criminal Revision Case No. 211 of 1888.

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the case of rescuing a thief from the custody of a private person who had captured the thief in the act of stealing.

The District Magistrate of Madurai referred the case to the High Court, being of opinion that the order of acquittal in appeal No. 21 was illegal, and that the procedure of the second-class magistrate was also illegal.

The accused did not appear.

Mr. Wedderburn for the Crown.

The custody of the complainant was legal—Weir, p. 125. The procedure was illegal, but s. 537 of the Criminal Procedure Code applies. The case does not fall under s. 530, and the prisoners were not prejudiced. [See also s. 239, but see *Queen-Empress v. Chandi Singh*(1)].

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

JUDGMENT :—The appellant in case No. 25 was properly convicted of theft, and we see no reason to interfere with the order made by the joint magistrate confirming the conviction and the sentence. The order made in appeal No. 21 cannot, however, be supported. When the appellants in case No. 21 rescued the appellant in case No. 25, the latter was, in our opinion, in lawful custody. We do not consider it necessary that the custody from which a person is rescued should be the custody of a police officer to support a conviction under s. 225 of the Indian Penal Code. It is sufficient that the custody is one authorised by law. Although it was irregular to try the prisoners in both cases together, we see no reason to think that they have been prejudiced by the irregularity. We set aside the order made by the joint magistrate in appeal No. 21 and direct that the appeal be re-heard with reference to the foregoing remarks.

We decline to interfere with the order made in appeal No. 25.

(1) I.L.R., 14 Cal., 395.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

QUEEN-EMPRESS

against

MONU AND ANOTHER.*

1888.
July 18.

Criminal Procedure Code, ss. 4, 191(a), 200, 530, and 537—Third-class Magistrate taking cognizance of case on receipt of a yadast from a Revenue officer and convicting accused without examining complainant.

A Revenue officer sent a yadast to a third-class magistrate, charging a certain person with having disobeyed a summons issued by the Revenue officer. The third-class magistrate thereupon tried and convicted the accused under s. 174 of the Penal Code. The District magistrate referred the case on the ground that the conviction was bad under s. 530 (k) of the Code of Criminal Procedure :

Held that as the yadast amounted to a complaint within the meaning of s. (4), although the complainant was not examined on oath as required by s. 200, the conviction was not illegal.

CASE referred by S. H. Wynne, District Magistrate of South Canara.

The facts were stated as follows :—

“Two persons were in these cases convicted of disobedience to summons under s. 174 of the Penal Code.

“The cases were taken up by the Third-class Magistrate of Uppinangadi on a yadast from the Deputy Tahsildar of Beltan-gadi.

“Under s. 191 of the Code of Criminal Procedure, the only way in which a magistrate is empowered to take cognizance of a criminal case is (a) on complaint, (b) on police report, and (c) on information or suspicion.

“Under s. 200 the complaint must be sworn to before process can issue. It is only a first- or second- class magistrate that can be empowered to take up cases on information or suspicion (s. 191, paragraph 3), and this magistrate only held third-class powers. His procedure was, therefore, illegal, and under s. 530 (k) of the Code of Criminal Procedure his proceedings are void.

“I do not think there has been any failure of justice, but

* Criminal Revision Cases Nos. 181 and 182 of 1888.

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s. 537 of the Code of Criminal Procedure begins 'subject to the provisions herein before contained,' which I take to refer to the preceding sections of the chapter, of which s. 530 is one. Section 537 therefore does not, I believe, apply to the case. I was about also to refer to the ruling in *Queen-Empress v. Chandu Singh*(1): 'We do not think that s. 537, which cures errors, omissions, or irregularities, is intended to cure or does cure an absolute illegality;' but that it has occurred to me that the Madras High Court have ruled differently on the particular point in question before the Calcutta High Court (Criminal Revision Case No. 495 of 1887).

"I request that the case be submitted for the orders of the High Court."

The defendants did not appear.

Mr. Wedderburn for the Crown.

The yadast is a complaint within the meaning of s. 4 of the Criminal Procedure Code. It states that the accused failed to obey the summons issued to them by a Revenue officer and requests the magistrate to take action. The complainant was not examined on oath as required by s. 200, but s. 530 says nothing about this irregularity. The error, therefore, falls within the purview of s. 537.

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

JUDGMENT:—The yadast received by the third-class magistrate from the tahsildar contained allegations made in writing with a view to his taking action under the Criminal Procedure Code that the accused had committed an offence. Reading together s. 4 and s. 191 of the Code of Criminal Procedure, we consider that it was a complaint of facts constituting an offence punishable under s. 174 of the Indian Penal Code. The omission to examine the tahsildar under s. 200 is only an error of procedure. As the accused have not been prejudiced by the irregularity, we decline to interfere in revision under s. 537 of the Code of Criminal Procedure.

(1) I.L.R., 14 Cal., 395.

APPELLATE CIVIL.

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

RAMAKRISHNA (PLAINTIFF), APPELLANT,

and

KURIKAI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1888.
Apl. 19, 20.

Transfer of Property Act, s. 136—Purchase of elephant with authority to recover the same from a stranger.

The owner of certain land, in consideration of a sum of money, transferred to the plaintiff, a pleader, the right to elephants caught in pits in the owner's land, and the right to sue for the recovery of such elephants from any person in possession of them. The plaintiff sued the defendants to recover possession of an elephant which had been trapped and was in defendant's possession at the time of the transfer to plaintiff. The suit was dismissed on the ground that the plaintiff had bought an actionable claim within the meaning of s. 136 of the Transfer of Property Act, 1882:

Held that the section was not applicable.

APPEAL from the decree of F. H. Wilkinson, District Judge of South Malabar, reversing the decree of A. Annasami Ayyar, District Munsif of Ernad, in suit No. 607 of 1885.

The plaintiff in this case was a second-grade pleader, practising in the Court of the District Munsif of Ernad, and the defendant No. 1 was an Inspector of police of Ernad taluk, defendant No. 2 being his son.

Plaintiff sued to recover possession of an elephant and Rs. 100 damages.

The Munsif decreed plaintiff's claim for possession of the elephant and dismissed the rest of the claim.

On appeal the District Judge found that the owner of the land on which the elephant had been captured by the defendant had, in consideration of a sum of money, authorised the plaintiff "to remove by means of suits the opposition of any one who interfered with the elephant-pits on the owner's land and the elephants trapped therein and to get possession of the elephants" for himself.

* Second Appeal No. 899 of 1887.

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His judgment then proceeded as follows :—

"But can it be said that plaintiff purchased an actionable claim? I think so. The Elaya Tirumulpad acknowledges the receipt of Rs. 1,000 as the consideration for the license (paragraph 5, exhibit F). Sale is the exchange of property for a price. Prior to the execution of exhibit F, plaintiff had, as I have shown, no right to any elephant which fell into any pit in the Punnapula forest, whether such pit had been prepared by his agents or otherwise. The ownership of the elephant, which was trapped on the 8th November, vested in the Kovilagam. By exhibit F the Elaya Tirumulpad, in consideration of the receipt of Rs. 1,000, transferred to the plaintiff, *inter alia*, the right to the elephant then standing in Kader's stable, and authorised him to obtain possession of it by suit. Both plaintiff and his assignor were aware that the elephant was then in the possession of the defendants and that plaintiff would have to enforce his claim by filing a suit in the Ernad District Munsif's Court. The transaction was opposed to law.

"I reverse the decree of the Lower Court and dismiss plaintiff's suit. Each party will bear his own costs throughout."

The plaintiff appealed.

Subramanya Ayyar and *Sundara Ayyar* for appellant.

The mere transfer of ownership is not a transfer of an actionable claim within the meaning of s. 130 of the Transfer of Property Act. It could not have been meant that the subject matter of the several chapters of this Act should be governed by this section. The mere ownership of a movable is not an actionable claim—*Modun Mohun Dut v. Futtarunnissa*(1). An observation of Lord Blackburn seems to favour this view: "If property is transferred, the right to sue for it passes as an incident." It has also been held in *Makath Unni Moyi v. Malabar Kandapunni Nair*(2) that the owner of the land in which the pit is dug is in law the captor of the elephant if it falls into the pit.

Narayana Rau for respondents.

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

JUDGMENT :—This suit is brought to recover an elephant of which the defendants are in possession, having captured it on the land belonging to the Kovilagam. It is found by both Courts that

the defendants have no right to the elephant, inasmuch as the licenses under which they claim were given by one who had long previously been dismissed from the management of the Kovilagam property.

The plaintiff claims under a document dated the 10th November 1885, which, while giving him the liberty to trap elephants, appears to vest in him the property in the particular elephant now in dispute. The ownership in the elephant, originally in the Kovilagam, was transferred to the plaintiff, and as the transfer was made for good consideration, the transfer was by way of sale. The only ground on which the suit was dismissed was that the transaction was vitiated by s. 136 of the Transfer of Property Act, inasmuch as the plaintiff is a pleader in the District Munsif's Court. We cannot agree with the District Judge in thinking that there has been a transfer of an actionable claim in this case. The thing transferred was movable property belonging to the grantor, though not actually in his possession. No doubt by acquiring ownership in the elephant, the plaintiff acquired the right to sue for its recovery, but he acquired that right of action only as incidental to his right of ownership. It has been held with regard to s. 135, in which the same phrase "actionable claim" is used, that the section does not affect cases in which there has been a transfer of ownership of immovable property by an owner not in possession at the time, *Modun Mohun Dut v. Futtarunnissa*(1). The same reasoning must apply to a transfer of movable property. We concur with that decision and hold that the plaintiff was not the transferee of an actionable claim so as to be affected by the provisions of s. 136.

We must, therefore, reverse the decree of the District Judge and restore that of the District Munsif.

The plaintiff must have his costs throughout.

The memorandum of objections is dismissed with costs.

(1) I.L.R., 13 Cal., 297.

(1) I.L.R., 13 Cal., 297.

(2) I.L.R., 4 Mad., 268.

APPELLATE CIVIL.

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

BALAYYA (DEFENDANT NO. 1), APPELLANT.

and

KISTNAPPA (PLAINTIFF), RESPONDENT.*

1888.
February 28.
March 15.

Madras Civil Courts Act, 1873, s. 16—Suit by reversioner to recover land granted to Hindu widow—Presumption as to death of widow from absence, not a question of succession or inheritance.

Plaintiff sued as reversioner to recover certain land granted in lieu of maintenance to a Hindu widow. The widow had left her village 16 years before suit and had not been heard of since:

Held, that the question whether a presumption arose that the widow was dead was not a question regarding succession or inheritance to be decided according to Hindu law within the meaning of s. 16 of the Madras Civil Courts Act, 1873.

PLAINTIFF, as reversioner, sued in 1885 to recover certain land which had been granted by his deceased father to one Laksmakka for maintenance. The land was in possession of the defendant who had purchased it in execution of a decree obtained against Laksmakka in 1873. It was found by the Munsif that Laksmakka had not been heard of since 1870, she having gone on a pilgrimage. The Munsif held that under Hindu law as Laksmakka was 30 years old when she left her village, 20 years must elapse before she could be presumed to be dead. He cited *Parmeshar Rai v. Bisheshar Singh*(1) in support of the proposition that the question was to be governed by Hindu law and not by the Evidence Act, s. 108. The suit was dismissed as premature. On appeal the District Judge held that under Hindu law 12 years was the period and not 20 years. He cited *Janmajay Mazumdar v. Keshab Lal Ghose*(2); *Guru Das Nag v. Matilal Nag*(3); and *Parmeshar Rai v. Bisheshar Singh*. The period fixed by the Evidence Act, s. 108, being less than 12 years, the decree was reversed and a decree was given for plaintiff.

* Second Appeal No. 700 of 1887.

(1) I.L.R., 1 All., 53.

(2) 2 B.L.R., A.C., 134.

(3) 6 B.L.R., App., 16.

BALAYYA
v.
KISTNAPPA.

Defendant appealed.

Ramachandra Rau Sahab for appellant.

Bhashyam Ayyangar for respondent.

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

JUDGMENT:—The land in dispute was given by the respondent's father to his step-mother Laksmakka to be enjoyed by her during her life on account of her maintenance. Laksmakka went on a pilgrimage and she had not been heard of for 16 years when the present suit was brought. In July 1873, the appellant purchased the land in suit in execution of a money-decree which he had obtained against her. The respondent claimed the land on the ground that Laksmakka was dead and that it reverted to him. The appellant resisted the claim. There was no evidence as to whether Laksmakka was really alive or dead. It is found that she was about 30 years of age when she left her village. The District Munsif held that no presumption of death could arise under Hindu law before the expiration of 20 years and dismissed the suit; but on appeal the District Judge observed that 12 years was the period necessary to raise a presumption of death under Hindu law and decreed the claim. The contention in second appeal is that a period of 20 years is necessary under Hindu law to raise a presumption of death. It is urged for the respondent that the question raised for decision is not one of succession, and that it is not governed by Hindu law under s. 16 of Act III of 1873.

That section provides that where in any suit or proceeding it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Hindu law shall form the rule of decision in cases in which the parties are Hindus.

We are of opinion that the present case is not one of inheritance or succession, and the question raised for decision relates to the right of reversion under the terms of a grant, and is one rather of contract than of succession or inheritance. The decision of the District Judge 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.

1888.
March 12, 27.

SRINIVASA (DEFENDANT NO. 4), APPELLANT,

and

TIRUVENGADA AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code, s. 11—Right to an office in a temple.

Plaintiffs sued for an injunction to prevent defendant from interfering with their right to present to certain persons at a certain festival in a certain temple a crown and water. The lower Courts found that plaintiffs possessed the right claimed and granted the injunction:

Held, that the suit was cognizable by a civil court under s. 11 of the Code of Civil Procedure, and that the injunction was properly granted.

APPEAL from the decree of W. F. Grahame, Acting District Judge of Trichinopoly, confirming the decree of A. Kuppusami Ayyar, District Munsif of Trichinopoly, in suit No. 67 of 1885.

Plaintiffs sued for a perpetual injunction restraining defendant No. 4 (appellant) from interfering with them in the exercise of their hereditary right to distribute water and a gold crown to certain persons at a certain festival in a certain temple at Srirangam. They claimed Rs. 5, damages for loss of dignity and power, and one anna eight pice, damages for loss of boiled gram.

The Munsif dismissed the claim for damages, but granted the injunction.

Both parties appealed.

The District Judge dismissed the plaintiffs' appeal as to loss of dignity, because the claim could not be assessed in money, and as to the loss of gram, because, being only 2 pice in value, *de minimis non curat lex*.

He also dismissed the appeal of defendant No. 4.

Defendant No. 4 appealed to the High Court, and plaintiffs filed objections to the decree *quoad* the claim for gram.

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

Pattabhiramayyar, Sadagopacharyar, and S. Subramanya Ayyar for appellant.

Parthasaradhi Ayyangar for respondents.

JUDGMENT.—The first point contended is that the claim is not one for an office, but for a mere honor and dignity, and is, therefore, not one for which a suit will lie in a civil court.

The Courts below have found that plaintiffs have established their claim to the hereditary office mentioned in the plaint. But it was also found that the pecuniary benefit said to be attached to the office and to consist in the money-value of some cooked Bengal gram was the result of voluntary offerings made by worshippers and was not a pecuniary benefit in the nature of wages payable from the income of the temple. The office itself was found to consist in distributing sacred water and serving the gold crown to the adyapakals during a particular festival.

The ordinary test is whether there is any specific pecuniary benefit attached to the office claimable in the nature of wages, however small that benefit may be. If there be, the right to such benefit is a question which the courts are bound to entertain—*Narasimma Chariar v. Sri Kristna Tata Chariar*(1). This same principle was approved by the Privy Council in *Krishnama v. Krishnasami*(2).

This case came again before the High Court—*Krishnasami v. Krishnama*(3). It was there held that where the right to a particular office in a temple (there the recital of certain verses in a religious service) is established, the right should be protected by processual remedies, even though no loss of specific pecuniary benefit be established. (See I.L.R., 5 Mad., 318, 319).

In support of this contention the appellants' pleader quoted the following cases:—*Narayan Vithe Parab v. Krishnaji Sadashiv*(4), *Rama v. Shivrani*(5), *Shankara Bin Marabasapa v. Hanma Bin Bhima*(6), *Karuppa v. Kolanthayan*(7), but in all these cases the claim was for a mere honor or dignity, or else for damages caused by loss of voluntary offerings.

The case recently decided in the High Court at Calcutta—*Mamat Ram Bayan v. Bapu Ram Atai Bura Bhakat*(8)—is very

(1) 6 M.H.C.R., 449.

(3) I.L.R., 5 Mad., 315.

(5) I.L.R., 6 Bom., 116.

(7) I.L.R., 7 Mad., 91.

(2) I.L.R., 2 Mad., 62.

(4) I.L.R., 10 Bom., 233.

(6) I.L.R., 2 Bom., 470.

(8) I.L.R., 15 Cal., 159.

* Second Appeal No. 174 of 1887.

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GADA.

similar to the present, and it was held that a suit for the establishment of a right to an hereditary office, such office being a trust for the performance of particular duties in a temple, would lie under s. 11 of the Code of Civil Procedure, even though the right to be established brought no profit to those claiming it.

We are, therefore, of opinion that the suit is maintainable.

It was next urged that the suit is not one in which a perpetual injunction could properly be granted. It is found, however, that the plaintiffs have a status in the temple as holders of a certain hereditary office, and when that status is violated, they are entitled to be protected by such processual remedies as are available in the circumstances of the case, even though no legal dues or damages are payable to them. The decision in second appeal No. 664 of 1887 turned upon the special circumstances of that case, and is not inconsistent with this view.

Taking this view, we are of opinion that the second appeal must fail, and we dismiss it with costs. The memorandum of objections is also dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

SESHAGIRI (PLAINTIFF), APPELLANT,

and

PICHU (DEFENDANT No. 4), RESPONDENT.*

Revenue Recovery Act, 1864, s. 35—Contract Act, ss. 69, 70—Right to contribution where part owner pays revenue due on whole estate to save his own interests.

In 1881 while the patta of certain land held on raiyatwari tenure stood in the name of defendant No. 1, the real owner being defendant No. 2, the revenue fell into arrear. Subsequently plaintiff and defendant No. 3 each bought a portion of the land, and defendant No. 3 sold his portion to defendant No. 4. After this, the land in plaintiff's possession was attached for the said arrears of revenue, and plaintiff paid the whole amount to prevent a sale. Plaintiff sued to recover from defendants 1 to 4 a portion of the arrears paid by him. He also prayed that the land in the possession of defendant No. 4 might be held liable.

The claim was decreed, but on appeal by defendants 3 and 4, the suit was dismissed as against them.

* Second Appeal No. 43 of 1887.

Plaintiff appealed making defendant No. 4 alone respondent:

Held, that plaintiff was entitled to a decree for contribution against defendant No. 4 and to a charge on the land in his possession.

APPEAL from the decree of V. Srinivasacharyar, Subordinate Judge at Negapatam, reversing the decree of V. Malhari Rau, District Munsif of Mannargudi, in suit 366 of 1885.

Plaintiff sued to recover Rs. 85-9-0 and interest thereon from defendants 1 to 4 and for a decree in default of payment against certain land in the possession of defendant No. 4.

The Munsif decreed the claim. Defendants 3 and 4 each appealed and the suit as against them was dismissed.

Plaintiff appealed making defendant No. 4 only respondent.

The facts of this case are fully set out in the judgments of the Court (Kernan and Muttusami Ayyar, JJ.).

Rama Rau for appellant.

Subramanya Ayyar for respondent.

KERNAN, J.—Whether the plaintiff is entitled to contribution from defendant No. 4 with a right to recover the amount from the lands in that defendant's possession does not depend on the provisions of the Act II of 1864 as decided by the Subordinate Judge. That Act, s. 35, relates to the rights of persons having interest in land as against the "defaulter," i.e., the tenant to Government.

Defendant No. 4 is not a "defaulter" within that Act. Section 69 of the Contract Act does not provide for this case.

The plaintiff's case is founded on the equitable principle that equality is equity and that he who had the advantage should bear the burden. Defendant No. 1 owned 7 velis of land subject to the burden. Defendant No. 1 owned 7 velis of land subject to the burden. Plaintiff was the mortgagee of 4 velis, $3\frac{1}{2}$ kulis of that land from the defendant No. 1 and in suit No. 108 of 1882 plaintiff bought the interest of defendant No. 1 therein.

Defendant No. 3 in June 1882 purchased the interest of defendant No. 1 in velis 4 and odd, the residue of the 7 velis. Defendant No. 4 purchased from the defendant No. 3 on the 1st July 1882. For recovery of arrears of Government kist due by defendant No. 1 for fasli 1291 (1st July 1882), the whole 7 velis, including the 4 velis mortgaged to the plaintiff, was attached and was about to be sold, and the plaintiff in order to save his interest in the land paid off, on the 6th October 1882, Rs. 191-3-1 to Government, being the arrear on the whole 7 velis. The rent

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due to Government is the first charge on all the land demised by the patta held by defendant No. 1, and Rs. 85-9-0 is the share of that rent which the land of defendant No. 4 ought to bear if plaintiff is entitled to recover contribution.

The lands of defendant No. 4 and of the plaintiff are both liable to a common burden, neither of them can get his land free from the claim for the revenue without paying the amount due on the whole lands. *Secretary of State for India v. Narayanan*(1). It would be against equity and good conscience that the common burden should be thrown exclusively on either lot of land or on either of the parties. This subject was much discussed by a Bench of five Judges in Calcutta, *Kinnu Ram Das v. Mozaffar Hosain*(2). In that case many authorities were considered, and by a majority of three Judges to two it was decided that a plaintiff in the same position as the plaintiff here was not entitled to a decree that the lands of the defendant were subject to a charge to repay the defendant's share of the common liability for rent paid by plaintiff. I agree with the opinion of the minority for the reasons expressed by Mr. Justice Mitter in his judgment. I wish to add that *Harbert's Case* (referred to in s. 477, Story) is an authority that in case of persons liable to payment of a common burden affecting their lands, the lands of one alone shall not be liable. In that case it is said "when two or more are bound on a recognisance or statute each is bound in the whole, yet the land of one only shall not be excluded." Further it is said "so it appears by those cases that when land shall be charged by any lien, the charge ought to be equal and one alone should not bear all the burden, and the law on this point is grounded in great equity." It is there pointed out that the remedy is by common law writ. The same principle applies to this case, but the remedy given by a Court of Equity is different and more effectual. Story, s. 477, instances the case of a man owning several acres of land subject to a lien and who aliens one part of the land to each of three people. In that case, he says, if one man is compelled to pay the debt in order to save his land, he shall have contribution from the other alienees. See also Story, ss. 483-484. In *Swain v. Wall*(3), Chief Baron Eyre says, "If we take a view of the case both in Law and Equity, we shall

(1) I.L.R., 8 Mad., 130.

(2) I.L.R., 14 Cal., 809.

(3) 1 Ch. Rep., 149.

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find that contribution is bottomed and fixed on general principles of justice." The observations of Story were not confined to mere personal claim against the party sued for contribution.

The argument that the transfer of the land to plaintiff was not registered is beside the question. *Mangamma v. Timmapaiya*(1). I would reverse the decree of the Lower Appellate Court so far as regards defendant No. 4, the respondent, with costs and the costs of this appeal and restore the decree of the Munsif.

MUTTUSAMI AYYAR, J.—I am also of the same opinion. The contest in this second appeal has reference to the liability *inter se* of two part owners of land held under one patta on the raiyatwari tenure in respect of arrears of revenue due upon it. The first defendant owned 7 and odd velis of land in the Devadanam village in the district of Tanjore. The land was registered in the Collector's books in the name of defendant No. 2, the mother of defendant No. 1, and the patta was issued in her name. On the 22nd December 1882, the plaintiff purchased 4 and odd velis out of 7 and odd velis in execution of a mortgage decree which he obtained in O.S. 108 of 1882, and he has since been in possession of the same. In February or March 1882 defendant No. 3 purchased 3 and odd out of 7 and odd velis of land in execution of a money decree which he obtained against defendant No. 1 in O.S. 215 of 1881 on the file of the Court of First Instance. In July 1882 defendant No. 3 resold 3 and odd velis which he had purchased to defendant No. 4 and placed him in possession. On the 6th October 1882, the sum of Rs. 191-3-1 was due to Government for arrear of revenue payable on the entire holding, and in view to its realisation 7 mas and 81½ kulis out of 4 and odd velis purchased by the plaintiff was placed under attachment in order that the same might be sold under Act II of 1864. To prevent the impending sale, the plaintiff paid the whole arrear, of which Rs. 85 represented the proportion due on the 3 and odd velis purchased by defendant No. 3 and resold to defendant No. 4. Thus in October 1882 when the plaintiff paid the arrear of revenue, defendant No. 2 was the mirasidar or the registered holder, defendant No. 3 was the prior owner, and defendant No. 4 the then owner of 3 and odd velis of land; the plaintiff was the owner of 4 and odd velis, of which a part was attached under

(1) 3 M.H.C.R., 134.

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Act II of 1864, and defendant No. 1 was the prior owner of the entire holding and one who had beneficial enjoyment of the produce of the land in fasli 1291 for which year the arrear became due.

The plaintiff's case was that Rs. 85 was a debt payable by defendants Nos. 1 to 4, and that it was a charge on the 3 and odd velis in the possession of defendant No. 4. There was no express contract between the plaintiff and the defendants in regard to the payment made by him, and the District Munsif considered that his decision must rest on s. 35, Madras Act II of 1864, and ss. 69 and 70 of the Contract Act, 1872. Applying those provisions of law to the facts stated above, he came to the conclusion that the amount claimed by the plaintiff was a charge on the land in the possession of defendant No. 4, and that defendants Nos. 1—3 and 4 were also personally liable, because there was an implied promise on their part to repay what the plaintiff was compelled by law to pay for their benefit and decreed the claim making defendants 1—3 and 4 personally liable, and declaring the 3 and odd velis of land in the possession of defendant No. 4 liable to be sold in default of payment. From this decree defendants Nos. 3 and 4 appealed, and the Subordinate Judge exempted them and the land claimed by them from all liability. From this decision the plaintiff has preferred this second appeal.

Defendant No. 3 has not been made a respondent to this appeal, and the decree of the Subordinate Judge is not therefore open to revision so far as it relates to him.

Nor is the decree liable to be revised so far as it relates to the defendants Nos. 1 and 2, for there was no appeal from that portion of the decree of the District Munsif which was against them to the Subordinate Court. The contest in this appeal is then confined to the liability of defendant No. 4 and of that portion of the holding which he had purchased. The special law applicable in this Presidency to the recovery of arrears of revenue is Act II of 1864, and it was urged by the appellant's pleader that s. 35 of that enactment was not applicable, because the appellant was neither a mortgagee nor a tenant and had no interest in the land in respondent's possession which was neither attached nor about to be attached. He contended also that ss. 69 and 70 of the Contract Act were likewise inapplicable.

Act II of 1864 defines first a land-holder and declares that the

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land is security for the public revenue. It then declares when the revenue is payable every year by the land-holder, when it is to be treated as being in arrear, and that the land-holder is the real defaulter. Section 5 declares the defaulter's person and property, movable and immovable, responsible for the arrear. Section 40 directs that the land brought to sale for arrears of revenue shall be sold free of all incumbrances, and s. 35 declares it lawful for any person claiming an interest in land which has been or is about to be attached to obtain its release by paying the arrears, and that if he is a *bond fide* mortgagee or other incumbrancer on the estate, the payment made by him shall constitute a debt from the defaulter to him and shall be a charge upon the land, but shall only take priority over the other charges according to the date at which the payment was made. In this connection it is also desirable to refer to Regulation XXVI of 1802 which makes the registered holder liable at the instance of Government so long as the registry stands in his name. Now as to the liability of defendant No. 4 and of the land purchased by him for the proportion of the arrear due thereon, it seems to me there can be no doubt. As I read Act II of 1864 and the prior Regulations which were consolidated by it, the arrear of revenue is a debt due by the real owner of the land and it is a charge on the whole and every part of the holding registered as one estate for purposes of revenue. As to registered holders they and their property are declared liable at the option of Government in order that Government may not be hampered on the collection of revenue by being compelled to hold a complicated enquiry as to real ownership on each occasion when the revenue is in arrear. The right which the Government has to proceed against the registered proprietor does in no way alter the liability of the real owner or of his holding for the arrear of revenue. The contention therefore between two real part owners that neither of them was the defaulter within the meaning of the Act cannot be supported. The reason is that the revenue is a debt due by the real owner and a charge on the holding, and that the registered holder who might not be the actual proprietor when the arrear accrued due is declared liable as an additional facility towards the realisation of revenue by officers of Government. The legal relation then between the appellant and the respondent is that of two part owners of land held on raiyatwari tenure under a single patta subject to a joint burden.

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So long therefore as they choose to hold under one patta, they do so with the knowledge that either of them or his portion of the holding is liable at the instance of Government for the arrear due on the entire holding or any portion of it. It follows that when either is thus compelled to pay the whole arrear by the attachment of his portion of the holding, the payment made by him so far as it relates to the arrear due by the other part owner on his own portion of the holding is one made under compulsion of law for his benefit and in satisfaction of a charge on his portion. The respondent who bought his 3 and odd velis subject to the statutory charge thereon for arrear of revenue and to the incidents of a joint holding is in the same position in which a principal debtor who is primarily liable for a debt stands in regard to his surety, and he is therefore clearly liable in a suit for contribution. Again his quota of arrear was a charge on his portion of the holding, and the appellant who paid it under compulsion of law and freed it from the statutory burden must be taken, in the absence of a special contract, to have intended to preserve the charge for his benefit. I do not see why a party who liquidates a statutory charge under compulsion of law ought to be treated differently from a person who advances money to satisfy a prior mortgage intending to preserve the security for his benefit. The only distinction between the two cases seems to me to consist in this, namely, the one the intention is a question of fact to be determined with reference to the circumstances of each case as ruled by the Privy Council, whilst in the other it is a matter of legal inference. In *Gokul Doss Gopal Doss v. Rambux Seochand*(1) the Judicial Committee say in advertence to the payment of a prior charge or mortgage, "The doctrine of *Toulmin v. Steere*(2) is not applicable to Indian transactions. The obvious question to ask in the interest of justice, equity, and good conscience is what was the intention of the party paying off the charge. He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest." As to s. 35 on which much stress was laid by the appellant's pleader, it is

(1) L.R., 11 I.A., 133.

(2) 3 Mer., 210.

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true that the land in respondent's possession was not attached or about to be attached and that the appellant had no interest on it. But it must be remembered that that section is not exhaustive and that it gives effect to two rights mentioned above, namely, the right to claim contribution and the right to treat the amount to be contributed as a charge subject, however, to the condition that the charge shall not prevail against prior incumbrances in cases in which the person paying the arrear does so to protect his own interest in land actually under attachment or about to be attached. The case before us is similar in principle and it is governed by the rule of equity and good conscience, if not by s. 35. The part owner made the payment not only to protect his own land but also because he was legally compellable to make the payment by reason of the joint holding. As to the case *Kinu Ram Das v. Mosaffer Hosain Shaha*(1), I am inclined to agree with the minority of the learned Judges who decided it, and Act II of 1864 is further not in force in Bengal. I am of opinion that the decree appealed against should be set aside and that of the District Munsif restored with costs throughout so far as it relates to defendant No. 4, respondent.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

VOLKART BROTHERS (DEFENDANTS), APPELLANTS,
and

VETTIVELU NADAN AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1887.
Dec. 20.
1888.
April 27.

Sale—Exchange—Trade usage, Proof of—Contract Act, ss. 49, 77, 92, 151.

According to mercantile usage in the cotton trade in Tuticorin, where a dealer delivers cotton to the owner of a cotton press, not in pursuance of any special contract, the property in the cotton vests in the owner of the cotton press who is bound to give the merchant in exchange cotton of like quantity and quality:

The transaction is not a sale but an agreement for exchange:

Where therefore cotton thus delivered was accidentally destroyed by fire:

Held, that the loss fell on the owner of the press.

(1) I.L.R., 14 Cal., 809.

* Appeal No. 109 of 1886.

VOLKART
BROTHERS
v.
VETTIVELU
NADAN.

APPEAL from the decree of K. R. Krishna Menon, Subordinate Judge at Tinnevely, in suit 21 of 1884.

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

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

Subramanya Ayyar for respondents.

[After stating the pleadings the Judgment proceeded as follows:—]

The contest in this case is whether the defendants are liable to pay the plaintiffs the value of 352 candies and 265 pounds of cotton alleged to have been delivered in excess of other cotton contracted for and delivered.

The first issue was whether the excess quantity of cotton called "over-delivery cotton" was delivered by the plaintiffs to the defendants or to the Press Company. We agree with the Subordinate Judge, for the reasons given by him, that such delivery was made to the defendants by the plaintiffs.

The second issue raises the question whether the over-delivery cotton was sold to the defendants by the plaintiffs or whether the property in such cotton ceased to be the property of the plaintiffs before the fire.

The contract cotton delivery was finished on the 4th of July 1884 and delivery of excess cotton made after that on different days up to and on the 30th July 1884.

The evidence for the plaintiffs uncontradicted by any evidence for the defence establishes that the plaintiffs had, prior to 1884, supplied cotton to the defendants on contract, and had also, according to the custom prevailing in Tuticorin between dealers and merchants, delivered, in excess of such contract, other cotton; and that the over-delivery of cotton was made in July 1884 according to the manner of former deliveries, and that the defendants through their agent, before accepting delivery, had such cotton examined outside the walls of the compound where their office was, and, when it was approved of, it was marked with a stamp on the cover of the bundles and moved through the gates inside the walls of the compound and taken charge of by the defendants.

The plaintiffs or any one on their behalf did not give any evidence of any special agreement between the parties as to the purpose for which, or of the terms on which, such excess cotton

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was delivered to the defendants. The defendants allege that dealers bring such over-deliveries when they do not know where to warehouse their cotton not on contract, and that such over-deliveries are allowed as a matter of favor for the convenience of dealers, the cotton remaining entirely at their risk. But the defendants have given no evidence to support such allegation.

The plaintiff's case is that the dealing between the plaintiffs and defendants in respect of such over-delivered cotton was subject to a usage of trade existing at Tuticorin in respect of over-deliveries.

If such usage of trade at Tuticorin is proved distinctly and if it is not inconsistent with any special contract between the parties in respect of such over-deliveries, it, according to the English Law, binds the parties. See *Smith's Leading Cases*, 6th Edition, 549—551, notes to *Wigglesworth v. Dallison*. In *Chitty on Contracts*, page 58, 8th Edition, it is stated that Lord Ellenborough decided that "if there be an invariable, certain and general usage or custom of any particular trade or place, the law will imply on the part of one who contracts or employs another to contract for him upon a matter to which such custom or usage has reference a promise for the benefit of the other party in conformity with such usage or custom, provided, that is, there be no express stipulation between them which is inconsistent with such usage. To be binding, however, such usage must be uniform and universal, but when such invariable usage is proved, it is to be considered as the basis of the contract between the parties and their respective rights and liabilities are held to be precisely the same as if without any usage they had entered into a special agreement to the like effect." In *Ghose v. Manikchund* (1) Sir J. Coleridge in giving judgment says: "It remains now to consider the other ground on which plaintiff relied—the evidence of mercantile usage. To support such a ground there needs not either the antiquity, the uniformity or the notoriety of custom which in respect of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case, but in the result it is enough if it appear to be so well-known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract." The usage must be

(1) 7 M.I.A., 282.

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shown to be certain and reasonable and so universally acquiesced in that everybody in the particular trade knows it or might know it if he took the pains to enquire.

The parties plainly meant by the delivery and acceptance of the over-delivery cotton that there was some unexpressed agreement between them in reference to parts of an implied contract and they both with free consent so acted. We see nothing in the Contract Act to prevent the usage of trade known to both of them being adopted as the basis of their agreement or implied contract.

We do not find that the Contract Act refers expressly to contracts being qualified by the annexation of incidents by usage of any particular trade or place. Section 49 of the Evidence Act allows evidence of the opinion of third parties to be given when the Court has to form an opinion of the usages of any body of men. Section 92, proviso 5, admits parol evidence of usage or custom by which facts not expressly mentioned in any contract are usually annexed; such usage is of course usually annexed to trade contracts. It seems to us to be also according to equity and good conscience to allow such usage of trade known to both parties to be admitted in explaining the meaning of their acts when no special agreement in respect of the subject to which the usage applies was proved.

It is necessary to state, before referring to the evidence of usage of trade, that the defendants do not appear to have personally carried on trade in Tuticorin, but that they carried on the trade of merchants by agents appointed for that place, and that in the years 1883 and 1884 prior to and in July of that year Mr. Ebeling was the agent of the defendants and manager of this business there, and such business was carried on in certain buildings and other premises belonging to a company called the Volkart United Press Company. That company was registered as a Limited Company in Bombay, but was entirely separate from defendants' company. That company had a press in their building for pressing cotton, and the defendants used for several years to get cotton in their possession, whether purchased by them or held as over-delivered cotton, pressed there. Mr. Ebeling was agent of the Press Company. The evidence proves that there are several merchants at Tuticorin who also have cotton presses which they use to press cotton. On the 30th of July a fire took place in the building of the Press Company when the cotton press and the plaintiffs'

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over-delivered cotton or a very large part thereof was burned and plaintiffs sue to recover the value of the whole over-delivery. The defendants allege that twenty-two bundles were uninjured and were tendered to the plaintiffs. The evidence for the plaintiffs as to the alleged usage of trade is as follows:—

Mr. J. Milligan, a cotton merchant at Tuticorin for 13 or 14 years, says: "When loose bundles are examined at the gate, those that are accepted are stamped and taken inside the compound. Such accepted bundles are afterwards pressed at our convenience. After being pressed they are marked with the initials of the names of the persons to whom they are to be shipped. But no marks are put with reference to the names of the dealers. When cotton is once accepted and stamped it is kept at our risk. After pressing, all the bales are put in one heap. The different dealers' names cannot then be known. After cotton is once accepted and stamped we deal with it as we like. And we ship it without the slightest reference to the dealers. This I speak with reference to my own firm. We would also at any time advance money on over-delivery cotton. After cotton is once examined and stamped at the gate, I understood it is under our control. I have always understood that this is the custom prevailing all over Tuticorin. We had three or four fires during the last 13 years in our Press office alone, and in all those cases we paid in full the value of the cotton accepted by us. My Press office is not distinct from our firm. I know also Volkart United Pressing Company (Limited). This is distinct from the Volkart Brothers. Mr. Ebeling was the agent of both the companies. Now another gentleman is come, I believe, in the same capacity. But I have no knowledge of it. In the case of over-delivery cotton the dealers take their own time to settle the price. Sometimes we ask them to settle the price within a month or two. Even then they take their own time and we can't compel them. But we don't keep that cotton until the settling of the price. We ship it at our convenience. Cotton once accepted and stamped would not be bought by other firms in unpressed state. In case of over-delivery cotton after it is pressed it is within the right of the dealer to sell it to other firms after paying the pressing charges. He can carry them off and do with it as he likes. Mr. Ebeling was, I think, in Tuticorin for 5 years as the agent of both the firms mentioned above.

Cross-examined.—We have three kinds of transactions in

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respect of cotton—(1). For ready-money purchase or on contract; (2) taking cotton on consignment; (3) receiving over-delivery cotton. The price of the over-delivery cotton is settled with reference to the market price at the time of settling and not according to the contract price. The time of settlement depends upon the will of the dealer. The European merchants will offer a certain price. When both don't agree there will be no settlement. Cotton contracts are always reduced to writing, and the contracts are regularly numbered and filed. Sometimes the contracts are made verbally and some time afterwards they are reduced to writing. Whether I am to make advance upon over-delivery cotton or not depends upon my own will. Dealers never got back from us the cotton that is once sold to us. But in case of over-delivery cotton they may take it back. Whether I purchase the over-delivery cotton or not is a matter entirely left to my own option.

Re-examined.—In the case of written contracts the price of cotton is always fixed. But in the case of over-delivery cotton it is not settled. Sealing and stamping simply denotes that we have approved of the quality of the cotton delivered. The cotton delivered may be in fulfilment of the contract or over-delivery cotton.

[After setting out the evidence given by other witnesses, the judgment proceeded as follows:—]

The plaintiffs gave no further evidence either as to the usage of trade at Tuticorin or the usage of the defendants on the subject of over-delivery. The only witness who gave express evidence as to the usage of trade at Tuticorin, in respect of the liability of a merchant who accepts possession of over-deliveries, was the first witness J. Milligan, who, speaking of over-deliveries accepted and stamped and brought inside the compound, says, "when cotton is once accepted and stamped it is kept at our risk." Again he says, "after cotton is once examined and stamped at the gate, I understand it is under our control. I have always understood this is the custom prevailing all over Tuticorin. We had 3 or 4 fires during the last 13 years in our Press office alone, and in all these cases we paid in full the value of the cotton accepted by us."

The fourth witness, a broker, states that there was a fire at Milligan's, that loss was sustained and Milligan paid the loss, and that it is the custom of the village. He says he speaks the custom

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of the village as spoken amongst merchants of the village, that he does not know of any one who sustained loss and did not pay the damages.

The evidence of this witness is inaccurately given, the language is not clear, and cannot safely be much relied on. The second witness, speaking of cotton brought to his godown and accepted, says, "All cotton that is accepted and stamped is under our control. If it is in fulfilment of contract it is at our risk, and if it is over-delivery then also we are responsible."

The third witness, agent of Gaddum Bythell, says, "we take deliveries of over-delivery cotton if we are satisfied with it and stamp it. The cotton then remains at our risk. We make no charge for insuring it."

Neither of these two witnesses expressly purports to speak of the usage of trade except his own usage. But they are in the trade at Tuticorin and usage of trade may be proved by multiplying instances of usage of different merchants if it appears to be the same as that of other merchants. It does not appear how many merchants deal in the trade in Tuticorin. It appears that the defendants insured the goods in the buildings at Rs. 50,000, and moreover the fifth witness, one of defendants' witnesses, says that Mr. Ebeling, the defendants' agent, had at the time of the fire in July over-delivered cotton in the defendants' possession and was paid therefor out of the 50,000 received for the mortgage money by the defendants; the same witness says that Subba Pillai had likewise over-delivery cotton in the defendants' premises at the date of the fire and which was burnt, and that a sum was paid on account of defendants to him after the loss of the cotton and deducting an advance.

The sixth witness, who has been employed by the defendants for 20 years and is still employed by them, says that in his experience during 20 years cotton caught fire on three occasions and money was paid therefor—that the manager received the amount from the Insurance Company and paid it to the owner of the cotton. He says that cotton of Ebeling and Subba Pillai was burnt and was paid for on account of defendants, but he does not know whether such cotton was included in the insurance.

The evidence of these two witnesses, though not very precise or quite accurate, shows with reasonable certainty that when losses took place by reason of fire in the defendants' premises, the

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owners of over-delivered cotton were paid on account of the defendants for the loss. If the payment to owners of over-deliveries so made were made under any special circumstance, the defendants should have proved the circumstance.

The defendants have given no evidence whatever to disprove the usage of trade or to explain the evidence of payment in their account of over-delivery cotton to the owners on loss arising by fire in their premises. We think that the evidence may properly be taken as certain and reasonable and as acquiesced in by the defendants, that the merchant is, in the case of over-delivery, liable to pay the owner for loss caused by fire while the cotton was in his possession.

The plaintiffs contend that the defendants are liable as bailees, even though no such usage of trade at Tuticorin was proved. Assuming the defendants were bailees, there is no evidence to prove that defendants did not take as much care of the over-delivered cotton of the plaintiffs as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quantity and value as the goods bailed—s. 151, Contract Act. The cotton goods of the plaintiffs, their own property by purchase, were in the same place where the defendants' goods were when the fire took place, and that place was the ordinary and usual place for such goods both of the plaintiffs and of the defendants to be in at the time the fire broke out. The evidence on both sides leads me to conclude that the fire was the result of the accident by reason of some stones in the cotton being crushed by the wheels of the press machine which produced sparks which set the cotton on fire. The defendants appear to have insured their own goods in the premises against fire; and assuming they did not in like manner insure the plaintiffs' goods, We do not see that their omission to do so proves that the defendants did not take such care of plaintiffs' goods as is contemplated by s. 151 of the Contract Act. The insurance of plaintiffs' goods could not protect them against fire though the result might be to relieve the plaintiffs from loss by fire.

We therefore think the defendants were not, under the circumstances, liable in their character of bailees to make good the loss to the defendants.

There has been no finding by the Subordinate Judge on the fifth issue, viz., whether the fire was caused by the negligence of

the defendants, and if either party so desire it the case must be remitted for a finding on that issue.

The second issue is whether there was a sale of the over-delivered cotton to the defendants, and whether this ceased to be the property of the plaintiffs before the fire.

The Contract Act in s. 77 defines sale as an exchange of property for a price. It involves the transfer of the ownership of the thing sold from the buyer to seller.

The word "price" though ordinarily meaning money, also means recompense which may not be in money. Section 78 of the Contract Act provides that sale is effected by offer and acceptance of price for ascertained goods or ascertained goods for a price. The illustration to s. 78 shows that price means rupees or money.

The Transfer of Property Act in s. 4 enacts that the section in that Act relating to contract shall be taken as part of the Contract Act. Section 54 of the Transfer Act enacts that "sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. It appears, therefore, that, unless the dealing between the plaintiffs and the defendants as proved by the usage of trade and acts of the parties amounted to a transfer of the cotton for a price in money paid or to be paid, there was no sale within the Contract Act. See the English law to the same effect. Addison on Contracts, 8th Edition, p. 865.

The evidence is that after the over-delivery cotton is accepted and marked, it is under the control of the merchant and is taken from the bundles and cleaned and then pressed, and that the over-delivery cotton of any dealer is not in the cleaning and pressing kept separate from the other cotton in the merchant's possession to be cleaned and pressed, and that all such cotton becomes mixed and is divided into two classes; and that, after cleaning and pressing, the cotton of the different dealers cannot be known, and it would not be possible to return to the dealers their own cotton, but cotton of the same sort as that supplied would be returned to him—that there are 2 classes "good fair" and "fully good fair"—that the dealers are at liberty to sell the goods so pressed to others, and the merchant who has had them pressed would deliver such pressed goods to the order of the dealer on payment of pressing charges; that if the merchant who pressed the goods wishes to buy them from the dealer, he has to

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settle the price with the latter, and that the price is the market price at the day of settlement of such price.

From this evidence it is clear that the dealing is not one in which a price is to be paid in money by the merchant for the over-delivered cotton. But according to the course of dealing, the dealer is entitled to get from the merchant cotton cleaned and pressed of the same quantity and quality as the over-delivered cotton, and the dealer may sell such pressed cotton to third parties to whom the merchant is bound to deliver according to the dealer's order. But if the merchant offers the dealer to purchase the pressed cotton, and if the dealer agrees to sell, the market price of the day of that sale is the price. We think therefore there was no sale to the defendants under the Contract Act of the over-delivered cotton.

The effect of the dealing was that the property in the over-delivered cotton necessarily passed from the plaintiffs to the defendants, as plaintiffs were not entitled to get back the same cotton delivered by them, but were only entitled to get cotton cleaned and pressed of the same quality and weight in exchange for their own cotton. The cleaned and pressed cotton might or might not be in whole or in part, or no part of it might be that which the plaintiffs had delivered to the defendants.

The dealing therefore amounted to an agreement for an exchange. Exchange is defined by the Transfer of Property Act thus:—Section 118; when two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things, being money only, the transaction is called an "exchange."

Here there was no exchange of this pressed cotton when the over-delivery was made, but the plaintiffs and defendants had prior dealings of the like kind, and we see no reason why, when the exchange was made by the plaintiffs of their goods, the agreement for the exchange by the defendants at a future day should not be valid.

The sixth witness for the plaintiffs proved delivery on previous occasions by the defendants of goods cleaned and pressed by them in place of over-delivery of plaintiffs' cotton on the order of the plaintiffs who bought such claims and pressed goods from the plaintiffs.

The property in the over-delivery of cotton delivered by the plaintiffs to the defendants therefore passed on the delivery by

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plaintiffs to the defendants, and the defendants must therefore bear the loss arising from the fire. The circumstances of the case in *The South Australian Insurance Co. v. Randell*(1) were somewhat different from those in this case, and the delivery of the property to the miller was made in order that he might sell the same as his own. The property therefore passed and the former was to receive either other grain or the price of the grain. The action was one on a policy of assurance effected by the miller who contended that the property passed to him and was rightly described as property in which he was interested and not trust property. No doubt it was stated in the judgment that there was a sale of the grain to the miller. But it is questionable whether under the Indian Contract Act such circumstances would be held to amount to a sale.

As to the amount claimed, we think the Judge is right in giving a decree for the sum admitted by the defendants, as the plaintiffs have not proved satisfactorily that they are entitled to any greater sum.

We also agree in the Judge's findings on the 3rd and 4th issues.

Unless either party desires a finding on the 5th issue, the appeal must be dismissed with costs. Neither party desires a finding on the 5th issue. We dismiss the appeal with costs.

APPELLATE CIVIL.

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

THIRUMALAI (PLAINTIFF), APPELLANT,
and

SUNDARA (DEFENDANT No. 1), RESPONDENT.*

Civil Procedure Code, s. 258—Mortgage in satisfaction of decree—Adjustment not certified—Mortgage invalid.

In a suit brought by a Hindu to recover certain land, defendant pleaded that he held the same under a mortgage granted to him by plaintiff's mother and guar.

(1) L.R., 3 P.C., 101.

* Second Appeal No. 764 of 1887.

NOTE.—Section 258, last clause, as amended is:—

Unless such payment or adjustment has been certified as aforesaid, it shall not be recognized as a payment or adjustment of the decree by any court executing the decree.

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dian in satisfaction of a decree obtained against plaintiff's deceased father. Plaintiff contended that, as the mortgage was in adjustment of a decree and the adjustment had not been certified to the Court, the mortgage could not be recognized by virtue of s. 258 of the Code of Civil Procedure:

Held that, as there had been no certified adjustment of the decree, the mortgage could not prevail against plaintiff's claim—*Haji Abdul Rahiman v. Khoja Khaki Aruth* (I.L.R., 11 Bom., 6) followed and *Mallamma v. Venkappa* (I.L.R., 8 Mad., 277) distinguished.

APPEAL from the decree of J. A. Davies, District Judge of Tanjore, modifying the decree of S. Dorasami Ayyangar, District Munsif of Valangiman, in original suit No. 139 of 1886.

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

Mahadeva Ayyar for appellant.

Rama Rau for respondent.

JUDGMENT.—The plaintiff brought this suit to recover his ancestral property from the defendant No. 1, who claimed to hold it on the strength of a mortgage executed by the plaintiff's mother and guardian. This mortgage is found to have been executed by the plaintiff's mother (defendant No. 5) for the purpose of satisfying a decree obtained by defendant No. 1 against her on a bond executed by the plaintiff's father, and exception is taken by the plaintiff to the mortgage on the ground that it was given in adjustment of a decree, which adjustment was not certified to the Court, and, therefore, in accordance with the provisions of s. 258 of the Civil Procedure Code, ought not to be recognized by any Court. Section 258 declares that if any money payable under a decree is paid out of Court, or the decree is otherwise adjusted to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court which should execute the decree; and, in the last clause, the section provides that no such payment or adjustment shall be recognized by any Court unless it has been certified as aforesaid. The question is whether the default on the part of the decree-holder in discharging the duty cast upon him by this section does not compel the Court to refuse recognition to the adjustment and thus render invalid against the plaintiff the mortgage which the defendant has set up. There can be no doubt that, except on the footing that the mortgage was executed in satisfaction of the decree, it would not be enforceable against the plaintiff. In order to relieve the minor's property from the obligation which the decree cast upon it, it was

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competent to his guardian to execute a mortgage; but if that object failed and the decree remained unsatisfied and, therefore, enforceable against the minor's property, it seems clear that the mortgage could not be binding on him.

In a case very similar to the present, except for the circumstance that the decree-holder was the plaintiff endeavouring to enforce the mortgage which had been executed in adjustment of the decree, the Bombay High Court held that, inasmuch as the adjustment had not been certified to the court under s. 258, the suit would not lie. This decision, which is that of a Full Bench, was put on the ground that the uncertified adjustment could not be recognized by any Court and that, therefore, there was no valid consideration for the mortgage (*Haji Abdul Rahiman v. Khoja Khaki Aruth*)(1). It was contended before us that s. 258 appears in a group of sections relating to the execution of decrees and that the "Court" intended in the last clause was the Court executing the decree, and that at any rate the section did not apply when a separate suit was brought on a cause of action founded on the adjustment. For this position the Full Bench decision in *Mallamma v. Venkappa*(2) was cited, which decision, it was argued, was in conflict with the above-cited Bombay decision. It must be allowed that Farran, J., when concurring in the latter decision, did think it necessary to disapprove of the decision of this Court. But the other two learned Judges who formed the Full Bench, so far from concurring with him on this point, suggested that the cases might be distinguished. On examining, it seems to us that a clear distinction may be drawn between it and the present case. In that case the defendant, who was the decree-holder, had, under an arrangement made with the plaintiff in adjustment of the decree against the latter, been placed in possession of certain land belonging to the plaintiff, and in her suit the plaintiff alleged that the defendant, while so enjoying the lands, had nevertheless executed the decree, and she sought to recover the loss sustained by her by reason of such enjoyment of the lands by the defendant. It was as though the plaintiff had made a money-payment in satisfaction of the decree and had, on the decree being executed notwithstanding, sought to recover the money on the ground that the consideration had wholly failed. And so in the judgment of the

(1) I.L.R., 11 Bom., 6.

(2) I.L.R., 8 Mad., 277.

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Full Bench it was said: "The question which we have to consider is whether, when a payment has been made, or a new contract entered into for the purpose of satisfying a decree, and the object has failed by reason that the provisions of the law which are essential to its recognition as a payment or satisfaction of the decree have not been complied with, the person injured is deprived of a remedy by suit." This question was answered in the negative, it being held that full effect could be given to those provisions without construing them to debar the institution of a suit for the recovery of money paid or damages for breach of the contract to certify. The precise point decided was that the former suit would lie, viz., the suit to recover the money received by the defendant, the consideration for which had wholly failed. This decision is in no way inconsistent with the decision of the Bombay High Court and does not involve any recognition of the uncertified adjustment as an adjustment of the decree. On the contrary it is because there was no adjustment that the plaintiff was held entitled to recover the money, and, similarly, in the present case, it is because there has been an entire failure of consideration that we think, agreeing with the decision of the Bombay Full Bench, that the mortgage, which in the absence of such adjustment cannot be enforceable, should not prevail against the plaintiff.

We must, therefore, reverse the decree of the District Judge and restore that of the District Munsif. The defendant must pay the costs of this appeal and of the appeal to the District Court.

APPELLATE CRIMINAL—FULL BENCH.

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

QUEEN-EMPRESS

against

SAMBOJI AND OTHERS. *

Abkari Act (Madras), ss. 9, 11, 55.

Under the Madras Abkari Act, 1886, a permit is not necessary where toddy is carried from the licensee's trees to his shop within the limits of his farm, or

* Criminal Revision Case No. 418 of 1887.

where, the licensee having a general permit, the persons carrying the toddy are in his employment.

CASE referred under s. 438 of the Code of Criminal Procedure by H. G. Turner, District Magistrate of Vizagapatam.

The case was stated as follows:—

"In this case the Taluk Magistrate acquitted illegally, I should say, 14 persons charged by the Salt and Abkari Department with having transported toddy without permits under s. 55 of the Madras Abkari Act I of 1886."

The facts of the case are shortly these:—

"A salt petty officer saw the accused conveying toddy which was 94 seers in all and asked them to show their permits. Four of them produced permits, but they turned out to be time-expired; the rest had no permits at all. They were then charged as stated above and placed before the Taluk Magistrate of Srungavarapukota, before whom they admitted they had no permits, but pleaded that they were the private shareholders of a licensed shop, and that they were taking the toddy for sale to that shop. The Taluk Magistrate acquitted them on the grounds (1) that they had no intention to defraud the renter or the Government of revenue, and (2) that their omission to possess permits 'though seemingly an offence under the strict letter of the law is yet not such under the spirit of it.' The Sub-Magistrate's grounds of acquittal are erroneous. Section 55 of Act I of 1886 under which the accused are charged does not contemplate a fraudulent or dishonest intention, and the High Court have lately held that under s. 11 a permit is required for the transport of toddy from a date garden to a licensed shop though it be by the shopkeeper himself, and that time-expired permits are no permits at all.—*Vide* High Court's order, dated 25th April 1887, in Criminal Appeal 443 of 1886. I would therefore recommend that the acquittal may be set aside and such order passed in the case as the High Court may please."

On the 14th December 1887, (Collins, C.J., and Muttusami Ayyar, J.) referred the case to a Full Bench.

The Public Prosecutor (Mr. Powell) for the Crown.

The Full Bench (Collins, C.J., Kernan, Muttusami Ayyar, and Parker, JJ.) delivered the following

JUDGMENT:—It is clear from s. 11 of Act I of 1886 that the holder of a license should take a general permit in addition to the

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license. It is also provided by that section that permits shall protect servants and other persons employed by those to whom they are granted. The accused, however, did not rely for their protection on any general permit held by the licensee to whose shop they said they were conveying the toddy from a certain date garden, and four of them produced time-expired permits, which were held to be no permits at all in Criminal Appeal No. 443 of 1886. But it was held in *The Queen v. Pottachi*(1) with reference to the old Act that the servants of a sub-renter might carry toddy from his trees to his shop within the limits of his farm though their inability to produce a pass from him at once might render them liable to be arrested and detained until it appears that they are protected. Reading s. 9 of Act I of 1886, which prohibits the transport of toddy from one local area into another, together with s. 55 which prescribes a penalty for unauthorised transport of liquor, it appears that a separate permit is necessary only when the toddy is carried from the area included in the licensee's farm to another local area. If it appears, therefore, that the accused were conveying toddy from the licensee's trees to his shop within the limits of his farm, or that he had a general permit, and that they were acting as his servants or persons employed by him, they are not liable to be convicted. As it is not shown that the accused were transporting toddy from the area included in the license into a different area and that the licensee had not a general permit, we decline to interfere.

(1) I.L.R., 7 Mad., 161.

APPELLATE CIVIL.

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

ABRAHAM AND OTHERS (PLAINTIFFS),

and

HOLMES (DEFENDANT).*

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April 20.

*Army Act, 1881, s. 144—Sub-Conductor, Ordnance Department, is a soldier—
Civil Procedure Code, s. 468.*

A Sub-Conductor of Ordnance on the Madras Establishment of Her Majesty's Indian Military Forces, holding a warrant from the Government of Madras, is a soldier within the meaning of s. 144 of the Army Act, 1881.

In a suit to recover Rs. 183-7-0 a summons having been sent by the Court to the Commissary of Ordnance to be served on the defendant, his subordinate, the Commissary of Ordnance returned the summons unserved and referred to s. 144 of the Army Act, 1881, as his reason for such action:

Held, that the Commissary of Ordnance was bound to serve the summons under s. 468 of the Code of Civil Procedure, although the defendant might be entitled to the privilege given by s. 144 of the Army Act, 1881.

CASE referred under s. 617 of the Code of Civil Procedure by A. J. Mangalam Pillai, Subordinate Judge at Tadpatri, in a Small Cause suit.

The facts were stated as follows:—

"This is a suit by Messrs. Abraham and Company of Bellary against Sub-Conductor S. Holmes for recovery of Rs. 183-7-0 due by him on account of goods purchased from plaintiffs from time to time.

"The Commissary of Ordnance, to whom the summons was sent for service on the defendant, returned the said summons unserved, stating that in accordance with s. 144, Army Act of 1881, soldiers are not liable to be sued for any debt, unless the sum exceeds thirty pounds over and above all costs of suits.

"Thereupon I requested information as to the grounds upon which he considered Sub-Conductor Holmes to be a soldier.

"In reply he stated, referring to Sub-Conductor Holmes' warrant that Sub-Conductor Holmes is a Warrant officer not holding

* Referred Case No. 13 of 1887.

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an honorary commission, and therefore under Army Act, s. 190, cl. 6, is included in the expression of soldier.

"Then I requested him to forward for perusal, the warrant of Sub-Conductor Holmes. He accordingly sent a copy of the warrant.

"Upon perusal of the said warrant, I requested information whether Sub-Conductor Holmes is bound to render continuously for a term military service to Her Majesty in any part of the world. In his reply he again quoted s. 190, cls. 6 and 8 of the Army Act of 1881.

"The warrant does not contain any condition that Sub-Conductor Holmes is bound to serve Her Majesty in any part of the world continuously for any term of years, and the Commissary of Ordnance himself admits in his letter No. 5238 of the 10th February last, that Mr. Holmes is not bound to serve Her Majesty for any particular term, and that Mr. Holmes belonging to Her Majesty's Indian Military Forces, would not ordinarily be required to serve out of India, and relies upon what he designates as instructions contained in the Manual of Military Law, viz., that the word soldier practically includes all persons subject to military law other than officers.

"But I think that the exemption from the jurisdiction of the civil courts in respect of soldiers relates only to soldiers of the regular forces, who, as defined in the Act, are bound to serve Her Majesty continuously for a term in any part of the world.

"I therefore submit for the decision of their Lordships the Judges of the High Court the following questions, viz.:—(1) Whether on the grounds stated by the Commissary of Ordnance, Sub-Conductor Holmes is exempt from the jurisdiction of the civil Courts? (2) Whether he was justified on the basis of his own view of the law in refusing to serve the summons issued by me?"

The parties did not appear.

The Government Pleader (Mr. Powell) was called on to show cause why the Commissary-General should not be directed to serve the summons.

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

JUDGMENT:—We think that Sub-Conductor Holmes is a soldier of Her Majesty's Forces within the meaning of s. 144 of the Army Act, 1881.

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The Commissary-General is in error in supposing that he is not bound to accept and serve the summons. He is bound to do so under s. 468 of the Civil Procedure Code, although the soldier is entitled to the protection given by s. 144 and is not compelled to appear in Court in person.

APPELLATE CRIMINAL.

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

MANJAYA

against

SESHA SHETTI.*

1888.
April 11, 24.

Penal Code, s. 500—Statement by witness—Privilege absolute.

M.S. was convicted under s. 500 of the Indian Penal Code of defaming S.S. by making a certain statement when under cross-examination as a witness before a Court of criminal jurisdiction:

Held: that the conviction was bad.

The statements of witnesses are privileged; if false, the remedy is by indictment for perjury and not for defamation.

CASE referred under s. 438 of the Code of Criminal Procedure by J. W. Best, Sessions Judge of South Canara.

The petitioner was convicted by Mir Shujat Ali Khan, Head Assistant Magistrate of Canara, in calendar case No. 106 of 1887 and fined Rs. 15 under s. 500 of the Penal Code.

The Sessions Judge stated the case as follows:—

"The contention on behalf of the petitioner is that the words constituting the alleged defamation were elicited from him in the course of his cross-examination as a witness in a case under trial before the Third-class Magistrate at Kundapur, and are therefore privileged.

"Such no doubt, is the law in England. *Seaman v. Netherclift*(1) and *Goffin v. Donnelly*(2). As stated by Cockburn, C.J., in the former case, page 56, 'if there is anything as to which the authority is overwhelming, it is that a witness is privileged to the

* Criminal Revision Case No. 126 of 1888. (1) L.R., 2 C.P.D., 53.
(2) L.R., 6 Q.B.D., 307.

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extent of what he says in course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be and are constantly asked which are not strictly relevant to the issue; and as remarked by Field, J., in *Goffin v. Donnelly*, 'it may be a hardship upon individuals that statements of a defamatory nature should be made concerning them, but the interest of the individual is subordinated by the law to a higher interest, viz., that of public justice, to the administration of which it is necessary that witnesses should be free to give their evidence without fear of consequences.'

"I have been unable to find any decision of the Indian courts exactly in point, but in the case of *Hinde v. Baudry*(1) in which the defamatory statements complained of were contained in a petition presented to a Court by third parties with reference to a pending suit, it is stated by the learned Judges, 'if they (the petitioners) were rightfully making an application in the suit, the principle of public policy which guards the statement of a party or witness against an action would protect them whether the statement was malicious or not;' and in support of this proposition the case of *Seaman v. Netherclift* above referred to is cited.

"With reference to the above authorities I submit the case for the consideration and orders of the High Court."

The defendant did not appear.

Narayana Rau for complainant.

The Court (Collins, C.J., and Shephard, J.) delivered the following judgments:—

COLLINS, C.J.—I am of opinion that the petitioner (defendant) was wrongfully convicted of defamation. The petitioner had brought a charge against a man named Sessa Shetti and was under cross-examination as a witness, and in answer to a question by one of the defendants, he said that Sessa Shetti was "not a Nadawar and was not a member of his family." Sessa Shetti then charged the petitioner with defamation under s. 500, Indian Penal Code, and the Head Assistant Magistrate being of opinion that the petitioner's answer as above caused harm to the reputation of Sessa Shetti, convicted him and fined him Rs. 15 and Rs. 2-12-0, costs, being of opinion that even if petitioner did not know the answers

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to be false, yet he did not know them to be true, and the circumstances under which the statements were made indicated a total absence of legal and actual good faith. I apply the observations of Cockburn, C.J., in the case of *Seaman v. Netherclift*(1) and of Field, J., in *Goffin v. Donnelly*(2) as to the rules of public policy which subordinated the interest of the individual to that of a higher interest, viz., public justice and of this Court, in the case of *Hinde v. Baudry*(3). The Judges there said that the principle of public policy guards the statements of a witness against an action whether the statements were malicious or not. I think the same observations will apply if the criminal law is set in motion and proceedings are taken under s. 500 of the Indian Penal Code. If the petitioner gave false evidence, he can be punished for that offence. I therefore hold that the petitioner was wrongfully convicted of defamation, and I set the conviction aside and direct the fine and costs to be refunded if paid, to the petitioner.

SHEPHARD, J.—I agree with the learned Chief Justice in thinking that the accused has been wrongly convicted, and I would only refer to the opinion strongly expressed by the Judicial Committee in *Baboo Gunnesh v. Mugneeram*(4) that witnesses are free from any other consequences with respect to statements made by them as such, except that of indictment for perjury. This opinion was expressed with reference to a civil action for damages, but that, as it appears to me, makes no difference. If the ground of the principle is that "it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages," public policy must no less require that they should not be exposed to the fear of prosecution except, as I have observed, the prosecution for perjury.

(1) L.R., 2 C.P.D., 53. (2) L.R., 6 Q.B.D., 307. (3) I.L.R., 2 Mad., 13.
(4) 11 B.L.R., 321, followed in I.L.R., 15 Cal., 264.

(1) I.L.R., 2 Mad., 13.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

QUEEN-EMPRESS

against

POTADU.*

1888.
Sept. 4.

Penal Code, s. 224—Criminal Procedure Code, s. 59—Escape from legal custody.

The accused was arrested in the act of stealing and was handed over to the village magistrate, who forwarded him in custody of the village servants to a police station. The accused escaped on the way. He was convicted under s. 224 of the Penal Code. On appeal the conviction was reversed on the ground that the custody was not legal:

Held, that the conviction was right. Section 59 of the Code of Criminal Procedure which requires a private person who arrests a thief in the act to take the thief to the nearest police station, is sufficiently complied by sending the offender in custody of a servant.

REFERENCE under s. 438 of the Code of Criminal Procedure by G. T. Mackenzie, Sessions Judge of Kistna.

The case was stated as follows:—

“The accused was caught in the act of stealing cattle from a yard. He was arrested and was handed over to the village magistrate. The karnam wrote a report and the village magistrate ordered two village servants to take accused with the report to the police station. On his way the accused escaped from the custody of the village servants. The Repalle Taluk Magistrate convicted the accused under s. 379 and under s. 224 of the Penal Code. The joint magistrate confirmed the conviction of theft, but has reversed the conviction of escape from lawful custody. The joint magistrate relies on the decision of the High Court in *The Queen v. Bajiagan*(1), where village servants had arrested a man on suspicion of his being a thief. The present case can be distinguished as the arrest was legal under s. 59 and as the prisoner was made over to the village magistrate, but the joint magistrate does not distinguish and says: ‘This ruling seems

to me to apply exactly to the present case.’ The arrest was legal under s. 59, and I submit that the custody of the village servants conducting the prisoner to the police station was legal custody. It must be admitted that s. 59 empowers only the person who saw the offence and made the arrest to take the prisoner to the police station, and that s. 42 does not justify any other person in assisting him, but to construe the Code thus strictly would lead to strange results. In this case the age of the witness who saw accused stealing the calf is not given, but possibly he is a mere boy. When he called for help three men came to his assistance and that is usually what happens, although the Code does not expressly permit such assistance. I therefore submit that after a private person has made an arrest under s. 59, other private persons may lawfully conduct the prisoner to the police station.

“Moreover, in this case, the person who made the arrest carried the prisoner before the village magistrate. The Code saves the powers of a village magistrate and he has power to try cases of petty theft. In this case the village magistrate decided to send the case for trial before the taluk second-class magistrate, and the accused was despatched with a report in custody of the village servants. This is the usual course, and if the joint magistrate is right in holding that it was illegal, the decision will much impair the utility of village magistrates.

“The High Court have held that a village magistrate, being a magistrate, has inherent powers, such as that of sending a summons, although no specific mention of such powers is made in the regulation. I submit that a village magistrate in a case such as this is, where a thief has been legally arrested and has been made over to him, has power to send the prisoner to the police station in custody.”

Counsel did not appear.

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

JUDGMENT:—We agree with the Session Judge that the custody from which the accused made his escape was lawful. The accused was arrested by a person in whose view the offence of theft was committed, and the arrest was therefore legal under s. 59 of the Code of Criminal Procedure. The direction that

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he shall make over the person arrested to a police officer without unreasonable delay is sufficiently complied with by his being forwarded in the custody of a servant or of the village servant in this case. The intention is to prevent arrest by a private person on mere suspicion or information, and not to impose on him the obligation of taking the party arrested in person to a police station. The original custody continued and did not terminate. This case is distinguishable from *The Queen v. Bojjigan*(1). We set aside the order of discharge made by the joint magistrate in Revision Case No. 144 of 1888, but having regard to the lapse of time, we will not direct any further proceedings.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

YACCOOB (PLAINTIFF), APPELLANT,

and

MOHAN SINGH (DEFENDANT No. 2), RESPONDENT.*

Civil Procedure Code, s. 57—Return of plaint when Court has no jurisdiction.

An Appellate Court is not bound to return the plaint under all circumstances where defect of jurisdiction appears.

APPEAL from the decree of C. S. Crole, District Judge of North Arcot, modifying the decree of V. Subramanya Sastri, District Munsif of Vellore, in suit No. 417 of 1886.

The facts necessary for the purpose of this report appear from the judgments of the Court (Muttusami Ayyar & Wilkinson, JJ.).

Bhashyam Ayyangar, Sadagopacharyar, and Subramanya Ayyar for appellant.

The Acting Advocate-General (Mr. Spring Branson) and Seshagiri Ayyar for respondent.

WILKINSON, J.—In his plaint plaintiff prayed for a decree declaring his right to grant pattas to, and to collect rent from,

(1) I.L.R., 5 Mad., 22.

* Second Appeal No. 1072 of 1887.

the raiyats of Virdampet, for possession and for a declaration that the lease of defendant No. 2 was inoperative against him.

The defendants demurred to the jurisdiction of the District Munsif's Court urging that the suit should have been filed in the District Court. Thereupon plaintiff's vakil maintained that the suit was one for specific performance. Defendant's vakil accepted this contention, and as remarked by the Munsif, "the suit" in his Court "was all along treated as one for specific performance." He gave plaintiff a decree for possession against both the defendants. Defendant No. 2 alone appealed to the District Court on the ground *inter alia* that the suit was not "wholly" a suit for specific performance. The District Judge reversed the decree of the Munsif so far as defendant No. 2 was concerned, holding that the suit as a suit for specific performance would not lie. Defendant No. 2 was no party to, and had no notice of, the contract, specific performance of which was sought, and that, if it had been a suit for possession, the District Munsif would have had no jurisdiction. Plaintiff appeals. It is admitted by his pleader that the suit was not a suit for specific performance of a contract and that the District Munsif had no jurisdiction to try the suit for possession, but it is contended that the plaint should be returned for presentation in the proper Court.

I have no doubt that the suit was one for possession, that it was not rightly valued, and that had it been, it would not have been cognizable by the District Munsif.

But in order to wrest jurisdiction plaintiff's pleader elected to treat the suit as one for specific performance and the suit was tried as if it had been so framed. The plaintiff is bound by the statement of his pleader and this second appeal must therefore fail as it is conceded that the contention of the pleader for plaintiff in the Court of first instance cannot be maintained.

With reference to the question whether or not the plaint should be returned for presentation to a Court having jurisdiction, I remark that the question does not really arise. The plaintiff may have the right now to institute in the proper Court a suit for possession, but I cannot treat the present suit as such. I do not agree with the contention of the learned pleader for the plaintiff that s. 57 of the Civil Procedure Code is *imperative* at this stage of the case. No doubt it is so at the institution of a suit. If on presentation of plaint the Court finds that it has no jurisdiction,

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it is bound to return the plaint. But this is before the issue of process to the defendant.

This Court has no doubt in many cases returned the plaint for presentation to the proper Court, even in second appeal, but the principle on which it has acted is that laid down by the Privy Council in the case of *Mohummud Zahoor Alikhan v. Mussumat Thakooranee Rutta Koer*(1), viz., that this Court has the power to do what the Judge of the Court of first instance might, under the Civil Procedure Code, have done at an earlier stage of the case.

Had the Legislature disapproved of the practice, a rule would have been introduced into the Code when it was recast by Act XIV of 1882. The absence of any provision for the return of a plaint at the later stages of a case seems to me to indicate that the Legislature desired to leave the matter to the discretion of the Court, so that where, as in the present case, the suit may have been persisted in with full knowledge that as a suit for possession it would not lie in the Court of a District Munsif, the Court might refuse to exercise the power it undoubtedly has of returning the plaint.

Moreover in the present case there is the decree of the District Munsif against defendant No. 1 still subsisting so that the Court having acted judicially upon the plaint, it must be retained as part of the record.

This second appeal therefore fails and is dismissed with costs.

MUTTUSAMI AYYAR, J.—I am also of opinion that this appeal must be dismissed with costs. As a suit for specific performance, this action must fail, for, it is found that the respondent had no notice of the lease in favor of the appellant. As a suit by a lessee to recover possession of the property demised, the District Munsif, it is conceded, had no jurisdiction to entertain it. The question then for consideration is whether the plaint should be returned to the appellant for presentation to the proper Court. The appellant's pleader refers to s. 57, Civil Procedure Code, and contends that it is imperative and applicable in all stages of the suit. That section is inserted in the chapter on the institution of suits and it prescribes the procedure to be followed on the presentation of plaints and before the issue of summons. If the plaint is returned at a later stage of the suit, it is returned not because

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s. 57 is in terms applicable, but because the Court may do at any stage of the suit what it might have done at an earlier stage. On this principle the plaint is ordinarily returned at whatever stage defect of jurisdiction may appear. But it is not correct to say that the Court has not only the power but is bound to order the return of the plaint though there was craft in the mode in which the appellant conducted the suit in the Court of first instance and though there was no appeal from its decree so far as it affected one of the defendants. In the case before us the District Munsif directed defendant No. 1 to pay the plaintiff's costs: and as he preferred no appeal, the District Judge reversed the decree only so far as it related to defendant No. 2 who was the appellant before him. As the case stands before us the suit cannot be treated as if it were never instituted, and the plaint must be on the record because the original decree is operative so far as it relates to the first defendant in respect of costs.

It is no doubt true that as the plaint was originally framed, the suit was one for possession of the land demised, but when the respondent pleaded to the jurisdiction of the Court, the appellant's vakil contended that it was a suit for specific performance and therefore was not governed by s. 7 of the Court Fees Act. Thereupon the respondent's pleader withdrew his plea and both parties proceeded to trial on the footing that the suit was one brought for specific performance. It is not clear whether the appellant's vakil misled the respondent's vakil from an erroneous belief that he was at liberty to alter the frame of the suit at or before the first hearing or from a desire to induce the latter to give up the plea of jurisdiction: but there is no doubt that the respondent was misled. It is not in my opinion fair to allow the appellant to say in second appeal that he is not bound by the election made by his vakil even for the purposes of this suit. The principle on which the Courts follow the procedure prescribed by s. 57 after issues are settled and evidence is recorded and in appeal is discussed by the Full Bench of the Bombay High Court and the limitations subject to which it is to be applied are also discussed there. *Prabhakarbhat v. Vishwambhar Pandit*(1).

The appellant's pleader appears to me to overlook the fact that during the progress of a suit, special circumstances may

(1) I.L.R., 8 Bom., 313.

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supervene which might render it impossible to treat the suit as if it was never instituted at all or unfair to the respondent to permit the appellant to ignore the basis on which the parties proceeded to trial in the Court of first instance.

PRIVY COUNCIL.

SRI AMMI DEVI (PLAINTIFF)

and

SRI VIKRAMA DEVU, A MINOR, BY THE AGENT TO THE COURT OF
WARDS (DEFENDANT).

[On appeal from the High Court at Madras.]

Failure to prove alleged authority to widow who had purported to adopt to her deceased husband. Query; as to effect upon an adoption of an adopted child being the only son of his father.

Whether an elder widow who had purported to adopt a son to her deceased husband under his authority had received such authority orally or by will, was disputed by a junior widow, the Courts below differing as to the question of fact. Upon the evidence, the finding of the Subordinate Judge that no such authority had been given, was maintained.

The Courts below also differed as to whether the adoption if authorized was validly effected, the boy adopted having been the only son of his natural father. Whether this is a disqualification invalidating an adoption, is a question that has not come before Her Majesty in Council for decision.

APPEAL from a decree (20th December 1884) of the High Court reversing a decree (17th March 1882) of the Subordinate Judge of Vizagapatam.

As to the fact of an authority to adopt having been given orally or by will, and as to the legal competency of the subject of an alleged adoption, the Courts below had differed in opinion.

The suit was brought by the appellant's mother, Sri Nilamani Patta Maha Devi, the junior widow of Krishna Bhupati Devu, zamindar of Madgole, in the Vizagapatam District, deceased, on the 25th December 1875.

The defendants were Sita Patta Maha Devi, the senior widow of the deceased raja, and Vikrama Devu, whom she had purported to adopt. The plaint alleged that the late zamindar who left no

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male issue had given no authority either oral or written to the widow to adopt a son to him; and that it was without any authority that she had purported to adopt the second defendant, who besides was the only son of his father, and, therefore, could not according to the sastras be adopted. On both these grounds it was claimed that the adoption should be set aside. The defence was that the authority to adopt had been given by the deceased raja to the senior widow both orally on the 20th December 1875, and again by his will executed on the following day, 21st, in the presence of witnesses. It was also asserted that although the boy adopted was now the only surviving son of his natural father, he was his second-born son; and that the adoption was valid.

The Board of Revenue in its capacity as Court of Wards was directed by the Madras Government on 19th October 1877 to apply to intervene for the protection of the widows; but on the application of the plaintiff, the High Court having received a report from the District Judge (s. 7, cl. 3, Regulation V of 1804) that she was competent to manage her affairs without a guardian, submitted a certificate to that effect to the Government. After the filing of the plaint the suit was before the Subordinate Judge for settlement of issues, when the Collector having obtained sanction to defend on behalf of the minor, filed his written statement to the effect that on the 20th December 1875 the late zamindar of Madgole orally authorized his senior wife, the first defendant, to adopt a son to him, and on the following day executed a will providing for the adoption of a boy. In accordance with the above, she duly adopted on the 8th November 1876 the second defendant, who, though now the only surviving son of his natural father, was his second-born son; and that the adoption of even an only son when complete was valid according to Hindu Law.

Sri Krishna Chandra Devu, the natural father of the second defendant, then was, on his own application, added as a defendant. He filed a written statement to the same effect. The issues raised the questions of the giving of the authority by the late zamindar either orally or by will, and also as to the validity of the adoption authorized.

The alleged will was as follows:—

“Will executed on the 21st day of December 1875 by (us) Sri

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Sri Sri Krishna Bhupati Devu Maharajulungaru, zamindar of Madgole, in favor of our senior wife Sri Sita Patta Mahadevigaru.

"1. Thinking that our end is approaching—as you have become sonless owing to our having no male issue—you will at least after our death make one or two adoptions for the continuance of the family and continue the line.

"2. Till the person you may adopt comes of age, you will yourself, in co-operation with the *varisu* (heir) Vaddadi Gopala Bhupatigaru, manage carefully the affairs of the whole of our Madgole zamindari, and after that will deliver over possession of the same to the person whom you may adopt.

"3. From the said zamindari estate itself the debts which we justly owe to the zamindar of Jeypore and others shall be paid.

"4. You may, as you choose, continue the mokhasas, inams, lands, and other grants made by us from the zamindari to the respective parties in enjoyment of such grants.

"5. After the discharge of debts you will give to Ammi Devi, daughter by our junior wife Sri Nilamani Devigaru, a village yielding a cist of Rs. 1,200 per annum on account of her 'pasupu kunkumu.'

"6. You will cause to be paid to our junior wife, the said Sri Nilamani Mahadevi, Rs. 2,400 per annum for her maintenance.

"7. You will yourself cause to be paid to our mistresses, Sitamma and Nilamani, Rs. 600 each per annum as long as they live.

"8. Having resolved that you should act as stated above, authority is by this will itself granted to you to take possession of the said zamindari with all our properties, movable and immovable. You shall therefore act according to this will.

"Tuesday, the 9th of Margasira Bahula, Yuva year."

This was said to have been executed by the deceased in the presence of many witnesses by stamping it with the "*matsya santakam*" or family device of a fish for his signature a few days before his death.

The Subordinate Judge, A. L. V. Ramana, found it not proved that the authority was given orally or by will; no such will, as had been alleged, having been executed. He was of opinion that the adoption of an only son, whether the first-born or an after-born son, was invalid among the regenerate classes, to one of which the parties, being kshatriyas, belonged.

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On appeal, this judgment was reversed by the High Court (Sir C. Turner, C.J., and Muttusami Ayyar, J.). Their judgment concluded as follows:—

"On the whole we consider the appellant sufficiently established that authority to adopt had been given, and that the will had been executed by the zamindar, and that the respondent failed to prove that at the time the authority was given and the will executed the zamindar was not competent to give the one or execute the other. We shall, therefore, hold that on these issues the respondent's case failed.

"There is the further point, viz., the question whether the adoption is valid in respect of the competency of the person adopted? At the hearing we were inclined to refer to a Full Bench for consideration the question, whether it has been rightly held that an eldest or only son can legally be adopted? The point has been decided in this Presidency in favor of the validity of the adoption, and in a case under the Mitakshara Law, a decision of the High Court of Bengal to the same effect has been approved by the Privy Council. We, therefore, fear that it would be useless to ask the Court to reconsider a question of law on which the highest tribunal has pronounced an opinion, seeing that the reasons on which we still entertain doubt as to the validity of such an adoption have been stated with great ability by Mr. Justice Mitter of the Calcutta High Court. The essence of adoption being gift, the competency of the giver is essential to the effectual creation of sonship, and the Hindu Law, as we understand it, declared the Hindu house-holder incompetent to give his only son. Moreover, in the various treatises which illustrate the later law obtaining in this Presidency, we find that the commentators, when discussing restrictions which some writers imposed on adoptions, and declaring that they could not apply in cases of necessity, are generally careful to add that the adoption is valid if the boy be a younger son. We should be glad if opportunity arose for the re-consideration of this question by the Privy Council; but until the present precedents are overruled, we feel ourselves constrained to follow them. We do not, therefore, direct an inquiry as to whether the appellant was the eldest or the only son of his father."

After obtaining leave to appeal from this judgment the plaintiff died, leaving an only daughter, the present appellant.

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Krishna Chandra Devu, the natural father of the adopted minor, having also died, the Court of Wards represented the minor on this appeal.

Mr. J. D. Mayne and Mr. G. P. Johnstone appeared for the appellant.

Mr. R. V. Doyne and Mr. C. C. Macrae for the respondent.

Only the question of fact, as to the authority having been given to the widow, was now argued; the argument of the question of law being postponed till it should be ascertained whether it was raised: the result being that it was not raised. (1)

On a subsequent day (21st April) their Lordships' judgment was delivered by

Lord MACNAUGHTON.—The zamindar of Madgole died on the 25th of December 1875. He left two widows but no male issue. On the 8th of November 1876 the senior widow adopted a son to her deceased husband.

In 1881 the junior widow brought the present suit to have the adoption set aside, on the ground that the senior widow had no authority from her husband to make an adoption; and also on the ground that the adoption was invalid by Hindu law, because the infant who was adopted was the only son of his natural father.

The question of Hindu law was not argued before their Lordships. In the view which they took of the evidence, it became unnecessary to have it discussed. But as this question seems to have been determined by the High Court in deference to a decision, or supposed decision of this Board, it may be as well to state that the learned Counsel on both sides informed their Lordships that they had been unable to find the decision by which the High Court conceived themselves bound.

The case presented on behalf of the senior widow and the adopted child was this:—On Monday the 20th December 1875 the zamindar verbally authorized the senior rani to make an adoption; on the following day he executed a will expressly conferring upon her authority to adopt, and at the same time he dictated a letter and sent it to the Collector at Vizagapatam

(1) In *Nilmadub Doss v. Bishumber Doss*, 13 M.I.A., 1885, the fact of adoption severing the relation of the boy with his natural father was negatived by the decision; and that the father would not be likely to give in adoption an eldest or only son otherwise than as "dwayamashyayana" was referred to among the reasons.

intimating the fact of his having executed a will to that effect. Each of these allegations was traversed by the junior widow.

Apart from the matters directly at issue, the circumstances of the case are not in dispute.

The zamindars of Madgole belonged to a family of some antiquity, with pretensions to a mythical descent. In token of their descent they used the badge or emblem of a fish on their banners and on the seal of the zamindari, and they were in the habit of authenticating documents by a drawing intended to represent the same device, and called the matsya santakam or fish signature.

The late zamindar succeeded to the family estate in 1833. The property was then much embarrassed. It became still further involved during his tenure. The principal creditor was the maharaja of Jeypore, who was in possession as mortgagee. A person of the name of Lakshmaji was the zamindar's muktyar, and he received a similar appointment from the maharaja. In 1875 Lakshmaji took a lease of the zamindari. The control of affairs was thus in his hands, and all the officials of the estate were under his orders. Lakshmaji is said by the High Court to have been a clever but unscrupulous person. Probably this statement does him no great injustice. At the date of the judgment of the High Court he appears to have been undergoing a sentence of imprisonment for forgery.

For some 13 years or more before his death the zamindar was a helpless cripple from rheumatism. He became seriously ill about a month or six weeks before he died. In a letter from the Sub-Magistrate to the Collector of Vizagapatam, dated the 25th December 1875, announcing the zamindar's death, it is stated that he had been bed ridden for three days before the 21st, "owing to excessive heat, swelling of the body, and diarrhoea, and the weakness resulting therefrom." On Monday the 20th of December he was seized with a violent attack of vomiting, and it is said that "the burning in his limbs increased largely." Under that attack, from which he never rallied, he sank on Saturday the 25th of December.

There seems to have been among the zamindar's dependants a faction opposed to Lakshmaji, and nominally, at any rate, in the interest of the senior rani. The head of this faction was one Gopala, an illegitimate brother of the zamindar. As the illness of

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the zamindar increased and his death was evidently approaching, Gopala's faction grew bolder and there were disturbances between the adherents of Gopala and those of Lakshmaji. The Sub-Magistrate was informed that rioting was apprehended. On the evening of Friday the 24th of December the Sub-Magistrate received a summons from Gopala, requesting him to enter the fort where the zamindar resided and quell a disturbance. He went there accompanied by the Inspector of Police. On entering the fort, Gopala took him to the senior rani, who was in her husband's room. The rani exclaimed: "This is just the time for preserving the matsya race, and told one of the servants to bring that paper." A paper was brought and placed in the hand of the rani, who gave it to the Sub-Magistrate, saying it was the will of the raja. The Sub-Magistrate went up to the zamindar to ask him if it was so. The zamindar's eyes were open. He seems to have made an effort to speak, but failed. He gave no sign with his hands or with his head. The Sub-Magistrate then had the document read aloud. When the will was read out Lakshmaji said, "Raja did not execute it. It is a forgery." The Sub-Magistrate then sealed up the zamindar's property as far as was practicable. He tried to find the seal of the zamindari. The rani said it was with Lakshmaji. Lakshmaji denied that he had it. The Sub-Magistrate then went to the house of the manager Narasimham. He was examined in the absence of Lakshmaji, and he stated that he had sent the seal to Lakshmaji three or four days before. The seal however could not be found, and it has not been discovered since. The Sub-Magistrate took possession of the document which was represented to be the zamindar's will, and sent it on the following day to the Collector. There is no doubt that it was produced at the trial in the same state in which it was on the night of the 24th of December. It is sealed with the seal of the zamindari, and also bears the fish signature. It purports to be attested by 20 witnesses, and to be subscribed by one Lingaya as the writer of the document.

The zamindar did not recover consciousness, and died as already stated on the 25th of December.

In March 1876 the alleged will was presented for registration. In support of the application thirteen witnesses, of whom the senior rani was not one, were examined. The acting Registrar refused registration. Among the reasons which he gave for the

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refusal, he referred to the discrepancies in the evidence of the witnesses and to their demeanour. On that occasion the witnesses who deposed to the execution stated that the zamindar sat up and signed the document in their presence. They did not, they said, see it sealed or delivered to the senior rani, but they understood that it was sent to the manager to be sealed, and that it was afterwards delivered to her.

An appeal was presented from the decision of the Acting Registrar. In view of this appeal the senior rani was examined herself. Her statement was this:—On Monday the 20th of December her husband was in a critical state. She went into his room about 9 A.M. She asked, "What is to be my fate? I have no children, and what is to become of me?" He told her to make one or two adoptions, to reign over the country, protect the second wife and concubines just as he did, and conduct the administration. On Tuesday about 3 P.M. at the time of meals he gave her the will. No one was in the room at the time but herself and the raja. On the very day he gave her the will he had sent either a will or a letter to the Collector. He signed the will in her presence, and also smeared the ink on the seal and affixed the seal himself. No one attested the will while she was there. She took the will and left it in her box for three days, and gave it to the Sub-Magistrate on the Friday.

After this evidence was given the appeal from the Acting Registrar's decision was allowed to drop. The rani's statement to Mr. Goodrich, the Acting Collector, who made inquiries into the matter at the instance of the Board of Revenue in July 1877, was that she was advised that it was unnecessary to establish the genuineness of the will, as the zamindar had given her authority to adopt. Mr. Goodrich's report was put in evidence by the rani. It may be observed, in passing, that Mr. Goodrich remarks:—"Unfortunately, there has been keen contention all through the business; many have changed sides, some more than once; and the amount of perjured evidence at the disposal of each faction has been great."

In October 1877 the Governor in Council directed the Board of Revenue to intervene in their capacity of Court of Wards for the protection of the rights of the two widows, who were registered as proprietresses of the Madgole estate.

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In December 1879 the junior widow was relieved from the guardianship of the Court of Wards.

This suit was instituted on the 8th of August 1881. The senior widow and ten other persons, four of whom had been witnesses in the registration proceedings, were examined for the defence. The senior widow was the first witness. Her account of the conversation on Monday was much the same as that which she gave on the former occasion, except that she placed the conversation at 2 jhams or 12 o'clock, and said that when she went to her husband's room there were males in the room, who were ordered to leave, and she added that the people outside could have heard her conversation with her husband, and that the interview ended by her husband saying:—"You had better go now. I shall execute a will to-morrow and give you." As regards the interview on Tuesday, she adhered to her statement that she went at 3 jhams or 3 o'clock to see her husband at meal time, and that her husband both signed and sealed the will in her presence. She added that she stayed alone with her husband about an hour talking over their past griefs and joys.

The room in which the sick man was lying was an apartment without windows. The door opened into a verandah 3 cubits wide. The room is said to have been about 7 or 8 cubits wide and 10 or 18 cubits long from north to south. The cot on which the sick man lay was close by the southern wall.

Several witnesses speak to being in the room on Monday when the rani came in. They say they went out, sat down on the verandah, and heard the whole conversation. The persons outside were about twenty in all. After the rani left the sick man repeated the conversation to them, and they congratulated him on having authorized his wife to make an adoption. He told them he was going to execute a will on the following morning, and asked them all to come quickly. Accordingly they came. Lingaya was among the first to arrive. The zamindar handed him a draft and told him to copy it. He was about an hour copying. He did not know in whose handwriting the draft was. It was in the handwriting of some Madgole man. When the will was copied it was read out once or twice, and then the zamindar sat up and signed it, and handed it back to be witnessed by those present. While the will was being signed, the zamindar dictated a letter to the Agent of the Government at Vizagapatam. It was

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written by Venkanna, not by Lingaya, the writer of the will. When the letter was finished, it was handed to the zamindar, and then the rani came in. Those present then left the room. Some went away at once; others waited in the verandah for about an hour. During that time they were not peeping in. Then they peeped through the door, which was ajar about a span, and just at that moment it happened that the zamindar called for his seal. It was taken from his box. He signed the letter. He sealed the letter and the will, and gave the will to the Rani.

Such in substance is the account given by the witnesses for the defence on whom the learned Counsel for the respondent relied. On the other hand, there are witnesses for the defence from whose evidence it may be collected that a person standing at the door of the sick man's room could not see him where he was lying; that nobody peeped through the door, and that, in fact, it was not possible to do so; and also that the conversation could not be heard outside, that the sick man's voice was feeble, and that the rani spoke low. And it is to be observed that Narasimham, the manager, ninth witness for the defence, who does not seem to have had any motive for stating that which was untrue, says that he saw the zamindar daily, from the 20th to the 24th of December inclusive, and he adds: "I did not get any papers signed by him. He was too weak to transact business or to sign papers during those days. His hand was swollen. He postponed signing chitta for a fortnight, as he could not sign."

Taking the evidence of the accepted witnesses, there are discrepancies to which the Subordinate Judge has perhaps attached too much importance. There are contradictions of more importance between the statements made by Lingaya, Venkanna, and a third witness, Bhupala Raj, in this suit, and their former depositions which were put in evidence. The account of the transaction adopted by the learned Counsel for the respondent, presents many improbabilities. The story of the assembly in the sick man's room on Monday morning, of the persons present going into the verandah and hearing there the conversation between the zamindar and the rani, and the zamindar's promise to execute a will on the following day, seems improbable. It is not a little remarkable that there appears to be no trace whatever of this story in the evidence given on the registration proceedings. It is also remarkable that the time of the rani's visit to her husband

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on Monday is now placed much later in the day than it was in her evidence in 1876. In 1876 the visit is stated to have taken place at 9 A.M., a time at which it is not likely that the zamindar would have had visitors, if one may judge from what is said to have occurred on the following day. People were asked, it is said, to come early on the following day to witness the will, and yet no one seems to have come before 10. The account of the scene, when the will is said to have been copied, signed, and attested also seems improbable. It is improbable that a person admittedly in the state in which the zamindar was should have been able to trace the fish signature with his own hand, and to take so active a part in the transaction,—sitting up without assistance, giving directions, and above all, dictating a letter of some length to the Collector, which explained his will as regards adoption, and asked the favourable consideration of the Government. It is most improbable that this scene, for which arrangements were openly made the day before, should have gone on for so many hours without attracting the notice of Lakshmaji, who is said never to have left the fort during the zamindar's illness, and to have kept a vigilant watch on the proceedings of the opposite faction.

But these improbabilities are trifling compared with the improbability presented by the document itself, and by the circumstances under which it was first introduced on the stage.

The alleged will is a remarkable document. It is clear and concise, and singularly well arranged. It provides for many things besides providing for adoption, which is said to have been the reason for its execution. It provides for an allowance for the second wife, for the testator's daughter, for his concubines, and above all, it provides for placing the administration of the estate in the hands of Gopala. Now Gopala, as we know from the statement of the senior rani herself, was in disgrace at the time. She says in her final examination: "At the time of the raja's death Gopala Bhupati was banished from the fort. It was the raja himself who precluded him from coming into the fort." In the judgment of the High Court it is stated that he had not been allowed access to the palace for some years. Whether this statement be founded on an admission at the hearing or not, Gopala's banishment, as it was the act of the zamindar himself, must in all probability have occurred before the zamindar's last illness. It is

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almost incredible that the zamindar could have meant to commit the management of his estate to a person whom he had himself banished from his presence. Then there is nothing in the evidence to show that the dispositions in the alleged will emanated from the mind of the alleged testator, or that he had anything whatever to do with the instructions from which the will was prepared. Lingaya says that he wrote the will on the Tuesday morning from a draft handed to him by the zamindar. The draft is not forthcoming, which is perhaps not to be wondered at. But the person who wrote the draft, who is said to have been a Madgole man, is not produced. No one seems to know who he was. As the zamindar could not leave his room, the writer must have come to the zamindar. There could have been no difficulty in finding the writer, and it is to be observed that the will was challenged as a forgery when first it was produced, and that Lingaya was questioned as to the writer of the draft on his first examination in 1876, so there can be no ground for suggesting that this point, which is obviously of the utmost importance, comes as a surprise to the supporters of the will. Again, there is nothing to show that the zamindar had anything to do with procuring the seal from the manager, in whose custody it was until three days before the death. It seems to have been obtained from him by a trick. Two messengers were sent for the seal. They each said the zamindar wanted the seal, and that Lakshmaji was with him at the time. It was given to the second man, because his story corresponded with that of the first. The second messenger is said not to be alive, but there was no suggestion that the first messenger was dead, and he is not produced.

On the whole, therefore, the irresistible inference seems to be that the alleged will, whether it was prepared before or after Monday the 20th, was not prepared by the instructions of the zamindar, and that the seal, by which it purports to be authenticated, was not procured from the manager by the zamindar's directions.

Under these circumstances, their Lordships are of opinion that it would not be safe to rely on the oral evidence as proof that the document propounded by the respondent does contain the last will and testament of the deceased. The burden of proof rests with the propounder of the will, and, in their Lordships' opinion, the respondent has not discharged that burden. In their

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opinion, no reliance can be placed on the alleged conversation on Monday, or on the letter which is said to have been signed by the testator on the 21st, but which, from a pencil memorandum upon it, does not appear to have been received until after the zamindar's death. It was for those who produced that letter to give an explanation of the date endorsed, if they meant to contend that that date was not, as it presumably was, the date of receipt.

In the result, their Lordships agree with the findings of the Subordinate Judge, though much of his reasoning appears to be far-fetched and ill-founded. In particular, there seems to be no ground for his strictures upon the conduct of the Sub-Magistrate.

Their Lordships will humbly advise Her Majesty that the appeal ought to be allowed, and that the respondent ought to pay the costs in the High Court and in the Court of the Subordinate Judge, whose judgment will be restored, except as regards the payment of costs. The respondent must pay the costs of the appeal.

APPELLATE CIVIL.

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

SINGARACHARLU (PLAINTIFF), APPELLANT,

and

SIVABAI AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Transfer of Property Act, s. 136—Purchase of actionable claim by officer of court—
Jurisdiction, Meaning of term.*

Section 136 of the Transfer of Property Act, 1882, provides that no officer connected with a Court of Justice can buy an actionable claim falling under the jurisdiction of the Court in which such officer exercises his functions.

The plaintiff, an officer in a District Court, having purchased the rights of the mortgagee in a bond sued to recover Rs. 2,225 due upon it in the Court of the District Munsif:

Held, that as the claim did not fall under the immediate jurisdiction of the District Court, s. 136 was not applicable.

APPEAL from the decree of C. S. Crole, District Judge of North Arcot, reversing the decree of P. Virasami Ayyar, District Munsif of Arni, in suit No. 133 of 1886.

* Second Appeal No. 1058 of 1887.

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

Bhashyam Ayyangar and Narayana Rau for appellant.

Ramachanda Rau Saheb and Ramasami Mudaliar for respondents.

JUDGMENT.—The plaintiff being a clerk in the District Court became the transferee of the bond on which the suit was brought in the District Munsif's Court. On appeal the District Judge held that the case fell within s. 136 of the Transfer of Property Act, and that the transfer was therefore void and inoperative. At the hearing we were referred to the case of *Rathnasami v. Subramanya*(1) in which the plaintiff was a vakil of the High Court, who had bought a bond and sued upon it in the Subordinate Court of Kumbakonam. It was argued in that case that as a vakil of the High Court is entitled to practise in every Subordinate Court as in the High Court, he is not at liberty to buy an actionable claim anywhere within Presidency. But the Court declined to accept this view of the section, and held that as there was no evidence that the vakil practised regularly in the Subordinate Court, the assignment to him was not affected by the section.

The effect of this decision really is to limit the operation of the section by confining it to the cases in which the claim is necessarily and immediately litigated in the Court in which the person affected exercises his functions. In the present case the Court, under the jurisdiction of which the claim actually fell, was not the Court in which the plaintiff exercised his functions. It was only by transfer, appeal, or otherwise that the District Court would have gained jurisdiction.

We do not think that this potential jurisdiction is the jurisdiction intended by the section. By way of analogy we may refer to the language of the Indian Majority Act, s. 3, where the words "every minor under the jurisdiction" have been held to mean "minor actually subjected to the jurisdiction of the Court of Wards," and not "minor who may be so subjected."

We must reverse the decree of the District Judge and remand the case for disposal on the merits.

Costs to be provided for in the revised decree.

(1) I.L.R., 11 Mad., 61.

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APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

against

VYTHILINGA AND OTHERS.*

1888.
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Registration Act, 1877, ss. 82, 83—Criminal Procedure Code, s. 195—Sanction.

Certain persons were charged with offences falling under s. 82 of the Indian Registration Act, 1877, and also with forgery of a document presented to, and registered by, a Sub-Registrar; the Sub-Registrar having granted sanction to prosecute the persons concerned without holding any enquiry, the Sessions Judge referred the case to the High Court under s. 215 of the Code of Criminal Procedure, in order that the commitment might be quashed on the ground that there was no legal sanction:

Held, that no sanction was necessary as to the charge of forgery, and that the provisions of s. 195 of the Code of Criminal Procedure were not applicable.

Case referred for the orders of the High Court under s. 438 of the Code of Criminal Procedure, by J. A. Davies, Acting Sessions Judge of Tanjore.

The facts of this case are set out in the judgment of the Court (Collins C.J., and Wilkinson, J.).

Kalianaramayyar for accused.

Pattabhiramayyar for the Crown.

JUDGMENT.—The Acting Sessions Judge of Tanjore applies to the High Court to exercise the powers vested in it by s. 215, Criminal Procedure Code, and to quash the commitment of certain persons to take their trial before the Court of Sessions, on the ground that there has been no legal sanction for the prosecution. Four persons have been committed to the Court of Sessions on the following charges: (1) defendants Nos. 1 and 4 on a charge of forgery, (2) defendants Nos. 2 and 3 on a charge of abetment of using a forged document as genuine (ss. 471 and 109, Indian Penal Code), (3) defendants Nos. 2 and 3 on a charge of abetting false personation before a Sub-Registrar (s. 82, Act III of 1877),

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and (4) defendants Nos. 2 and 3 on a charge of making false statements before a Sub-Registrar (s. 82, Act III of 1877).

The document which is alleged to have been forged purports to have been executed on the 7th January 1887. It was presented for registration and registered on the 23rd idem. The document purports to have been executed by the prosecution 1st witness (Amirthathammal) to defendant No. 1 (Vythilinga Chetti) mortgaging her lands to him as security for a loan of Rs. 1,500. Defendant No. 2 is the writer of the document, and defendants Nos. 3 and 4 are the attesting and identifying witnesses. On being applied to by Amirthathammal to grant sanction for the prosecution of the accused, the Sub-Registrar passed the following proceedings: "The document having been registered, I cannot take the initiative in the matter. Sanction is however accorded to the petitioner to prosecute the persons concerned." On the authority of *Queen-Empress v. Sheikh Beari*(1) the Sessions Judge is of opinion that, as the Sub-Registrar has taken no evidence and made no enquiry before granting sanction, the commitment is illegal.

The only offences for which a registering officer can grant permission to prosecute, are those referred to in s. 82 of the Act (III of 1877). If the permission of the Sub-Registrar was necessary for the prosecution of defendants Nos. 2 and 3 for making false statements before him and for abetting false personation, such permission was granted. But it has been held by a Full Bench of the Calcutta High Court on *Gopi Nath v. Kuldip Singh*(2) that it is not necessary that sanction should be given before instituting a charge under s. 82. The Sub-Registrar's sanction was not necessary for instituting the charge of forgery. The alleged forged document has not been given in evidence in any proceeding before a Court, and the provisions of s. 195 of the Code of Criminal Procedure have therefore no application. For these reasons we refuse to quash the commitment, and direct the Sessions Judge to proceed to hear and determine the case according to law.

(1) I.L.R., 10 Mad., 232.

(2) I.L.R., 11 Cal., 566.

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