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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

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High Court ... ... H. G. WEDDERBURN, *Inner Temple.*
K. BROWN, *Inner Temple.*

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1st January—31st December 1889.

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

Puisne Judges.

Hon'ble J. Kernan (*Retired*).
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,, G. A. Parker.
,, F. Wilkinson.
,, H. H. Shephard.
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Hon'ble J. H. Spring Branson *Advocate-General.*

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Toddy-drawers failing to remove their toddy to a shop or distillery "within a reasonable time" after it is drawn, are punishable under section 55 (*a*) of the Abkári Act, though their licenses do not refer to the Government notification, made under the Act, prescribing its immediate removal.

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On a petition presented by the Agent of the Court of Wards a District Court made an order which purported to have been made under Act XIX of 1841, s. 5. The conditions prescribed by ss. 3 and 4 were not shown to exist :—*Held*, the order of the District Court was illegal, and was subject to revision under s. 622 of the Code of Civil Procedure.

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1865, VII (Madras), s. 1—*Water-cess—Overflow from Government works—Water supplied or used for purposes of irrigation :*

Surplus water from Government irrigation works flowed on to land of the plaintiffs which they were in the habit of cultivating with dry crops and stagnated there rendering such cultivation impossible. The plaintiffs did not want the water to flow on to their land, but being unable to exclude it, planted paddy as the best crop to cultivate under the above circumstances. Water-cess was levied on the plaintiffs under color of Act VII of 1865 :—*Held*, the water was not supplied or used for purposes of irrigation within the meaning of Act VII of 1865, s. 1, and the plaintiffs were not liable to pay the water-cess.

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1869, III (Madras)—*Penal Code, s.* 174—*Disobedience to lawful order of public officer—Summons by Revenue officer to give evidence in pauperism inquiry—Standing Order of Board of Revenue (Madras), No.* 48*a*:

The accused, who were parties to a petition pending in a District Court, were summoned by a tahsildar to give evidence on an inquiry by him as to whether or not the petitioner was a pauper; they omitted to attend on the summons, and were charged in respect of such non-attendance under s. 174 of the Indian Penal Code and were convicted:—*Held*, the conviction was bad, the tahsildar not being authorized to issue the summons under Act III of 1869 (Madras).

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,, X, s. 3—Civil Procedure Code Amendment Act:
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ALIYASANTANA LAW—*Yajaman—The rights of the senior member of the family being a female:*

The senior member of an Aliyasantana family, if a female, is *primâ facie* entitled to the yajamanship; and, in the absence of a special family custom or a binding family arrangement to the contrary, the management of the family affairs by another member is to be presumed to be by the sufferance of the yajaman for the time being.

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ALTERATION IN BOND SUED ON—*Materiality of alteration—Fraud—Evidence:*

Suit on a bond, the date of which had been altered from 11th September to 25th September, while it was in the possession of the plaintiff. Fraud was not proved, and the period of limitation reckoned from the 11th September had not expired:—*Held*, that the bond was void as such, and was not receivable in evidence to prove the debt—*Christacharlu* v. *Karibasayya* (I.L.R., 9 Mad., 399) followed.

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Sale of sulphur and ammunition by the agent of one holding a license (in form VI) under Act XI of 1878 is not illegal.

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BOUNDARY ACT, ACT XXVIII OF 1860 (MADRAS), ss. 21, 25, 28—*Limitation Act*, 1877, *ss.* 6, 14—*Appeal from decision of Boundary officer—Limitation—Award by arbitrators—Irregular procedure:*

The appeal allowed by s. 28 of the Madras Boundary Act, XXVIII of 1860, is one from a decision recorded in the presence of the parties and duly intimated to them as required by s. 25 of the said Act. In 1883 a plaint, by way of appeal from a decision purporting to be passed under s. 25 of the Boundary Act, was presented to the Court of a District Munsif and returned on the ground that the subject-matter of the suit was beyond the jurisdiction of the said Court. The plaint was then filed in the District Court more than two months after the date, when the decision of the Boundary Settlement officer was communicated to the parties:—*Held*, that s. 14 of the Limitation Act, 1877, applied, and that the suit was not barred by limitation. The true construction of s. 6 of the Limitation Act, 1877, is that, save as to the *period* of limitation, the other provisions of the Act are applicable to cases governed

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by special and local laws of limitation. The omission by the Collector to pass a decision in accordance with an arbitrator's award and to furnish a copy to the parties as required by s. 21 of the Boundary Act is fatal to the award. The power given by s. 21 being a judicial power, a Collector must exercise his independent judgment and should not refer the award for acceptance to the Board of Revenue and Government, nor should he adjudicate when, as Agent to the Court of Wards, he represents one of the rival claimants.

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CANARA—*Evidence Act, s.* 116—*Estoppel—Landlord and tenant—Kumaki land—Unassessed waste reclaimed by plaintiff—Patta granted to defendant :*

The plaintiff, who was the holder of a *warg* in Canara, demised adjacent waste land to one who brought it into cultivation and remained in occupation for two years. The land was not assessed to revenue in the name of either of these persons. At the end of two years the tenant let into occupation a sub-tenant who subsequently assigned his right to the defendant, the holder of a neighbouring *warg*. The defendant obtained a *patta* for the land from the revenue authorities. In a suit by plaintiff to eject the defendant :—*Held*, (1) that the defendant was not estopped from setting up a title adverse to the plaintiff and that his possession became adverse when the *patta* was granted to him ; (2) that the plaintiff was not entitled to eject the defendant.

Subbaraya v. *Krishnappa* 422

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CHAMPERTY—*Bonâ fide litigation—Absence of corrupt motive—Inadequacy of price :*

In consideration of a loan of Rs. 30 made by plaintiff to defendant to enable defendant to recover from strangers certain land, defendant sold to plaintiff a portion of the said land, the value of which was about Rs. 100. The District Court held that the transaction was champertous and dismissed a suit by plaintiff to enforce his rights :—*Held*, that the inadequacy of the price was not of itself sufficient to invalidate the transaction.

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CHARITABLE ENDOWMENT—*Trust property sold in execution—Rights of heirs of the creator of the trust against execution purchaser :*

A trust-deed of certain property executed by a member of a Hindu family provided that neither he nor his heirs should incumber or alienate it but that in case of necessity his heirs might maintain themselves out of the income while administering the trusts of a certain charity. The provisions of the trust were not proved to have been observed by the settlor or his family, and the settlor on one occasion disclaimed the trust. The trust property was attached and sold in execution of personal decrees passed against the settlor and another member of his family. The widow of the latter, after the death of the settlor, sued to recover the land from the execution purchaser as heir to the settlor :—*Held*, the plaintiff was not entitled to recover the land—*Rupa Jagshet* v. *Krishnaji Govind* (I.L.R., 9 Bom., 169) distinguished.

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CIVIL PROCEDURE CODE, 1859, s. 246—*Limitation Acts—Act IX of* 1877, *sch. II, art.* 15—*Act XV of* 1877, *sch. II, arts.* 11, 13—*Objection to execution :*

A petition under s. 246 of the Code of Civil Procedure of 1859, objecting to the execution of the decree by the attachment of certain land on the ground that the land was the property of the petitioner, was heard and dismissed in July 1875. In July 1877, within twelve years from the dispossession of the objector, he filed a suit against the decree-holder who had purchased at the execution sale, for the possessson of the land held by him as purchaser at the execution sale :—*Held*, that the suit was not barred by limitation.

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CIVIL PROCEDURE CODE, 1882, ss. 2, 268, 272—*Official Trustees' Act* (*XVII of* 1864)—*Public officer—Attachment by notice :*

A decree against a married woman provided that the amount due under it should be payable out of the separate estate of the judgment-debtor. The judgment-debtor was entitled to a life-interest in certain trust funds under a settlement of which the Official Trustee was the trustee. The decree-holder proceeded to execute his decree against this life-interest by notice to the Official Trustee under s. 272 of the Code of Civil Procedure, but there were no funds in the hands of the Official Trustee which would have been attachable under s. 268. The decree-holder now applied that the life-interest might be sold :—*Held*, that the interest of the judgment-debtor was not validly attached. *Semble*—The Official Trustee is a public officer within the meaning of s. 2 of the Civil Procedure Code.

Abdul Lateef v. *Doutre* 250

2. ——————————, s. 13—Res judicata :

Certain land was attached and sold in execution of a decree against the dharmakarta of a devasthanam. One claiming to be the lawful successor in office of the judgment-debtor now sued the purchaser for a declaration that the sale was invalid :—*Held*, the suit should not be dismissed on proof that the plaintiff had failed to obtain a declaration of his right to the dharmakartship against another claimant to the office, in a suit to which the present defendant was not a party.

Ramalingam v. *Thirugnana Sammandha* 312

3. ——————————, s. 13—Res judicata—*Competent Court—Pecuniary valuation of suit—Court Fees Act, s.* 12, *sch. II, art.* 17, *iii—Suit for declaratory decree :*

A suit for two declarations filed in a Subordinate Court was valued by the plaintiffs at a sum in excess of the pecuniary jurisdiction of a District Munsif. It was pleaded that the matter in dispute was *res judicata* by reason of decrees passed in District Munsifs' Courts. No objection was taken in the Subordinate Court to the valuation of the suit :—*Held*, that the plea of *res judicata* failed. *Per* Muttusami Ayyar, J.—For the purposes of jurisdiction the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one for possession of the property regarding which the plaintiff seeks to have his title declared.

Ganapati v. *Chathu* 223

4. ——————————, s. 13—Res judicata—*Declaratory decree—Maintenance suit, decree in—Annual payments :*

A Hindu widow obtained a decree in 1876 which provided that she should receive future maintenance annually at a certain rate, but did not specify any date on which it should become due. In 1887 she filed the present suit claiming arrears of maintenance at the rate fixed in the decree of 1876 :—*Held*, that the suit did not lie. *Sabhanatha* v. *Lakshmi* (I.L.R., 7 Mad., 80) distinguished.

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5. ——————————, s. 13—Res judicata—*Decree in suit by a karnam binds his successor :*

The karnam in a certain mitta sued to recover certain land as part of the *mirasi* property attached to his office. It appeared that the plaintiff's father and predecessor in office had sued by virtue of his office to recover the same land and that his suit had been dismissed :—*Held*, that the plaintiff's claim was *res judicata*.

Venkayya v. *Saramma* 236

6. ——————————, s. 13—Res judicata—*Previous suit dismissed as premature :*

A suit by the assignee of a mortgage bond against the mortgagor was dismissed on the ground that the plaintiff was not entitled to sue for want of notice to the defendant under s. 132 of the Transfer of Property Act. The plaintiff then gave express notice of the assignment to the mortgagor and

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sued on the bond again :—*Held*, the claim was not *res judicata*, and the second suit was accordingly not precluded by s. 13 of the Code of Civil Procedure.

Ramireddi v. *Subbareddi* 500

7. ——————, **ss. 32, 588 (2)**—*Appeal against order that a plaintiff be made defendant :*

An appeal lies under Civil Procedure Code, s. 588 (2), against an order under s. 32 that a plaintiff be made defendant.

Lakshmana v. *Paramasiva* 489

8. ——————, **s. 43**—*Hindu law—Maintenance—Suit to declare maintenance fixed by a decree a charge on land :*

A Hindu woman having obtained a decree for maintenance against her husband, now alleged that he had alienated part of his property with a view to defeat her claim for maintenance, and sued him for a declaration tha certain land which he had not alienated was liable for her maintenance :—*Held*, that no cause of action was shown.

Saminatha v. *Rangathammal* 285

9. ——————, **43, 244**—*Separate suit on disallowance of objection to execution—Evidence Act, s. 44—Competent Court :*

In execution of a decree the defendant, who was sued as the representative of her deceased brother, objected under s. 244 of the Code of Civil Procedure to the attachment of certain lands to which she set up independent title. The objection was disallowed and the land was sold. She then sued the execution purchaser to set aside the Court-sale and obtained a decree against which no appeal was preferred. She now sued for possession :—*Held*, that the suit lay notwithstanding the order under s. 244. *Per cur.*—The words "not competent" in s. 44 of the Evidence Act refer to a Court acting without jurisdiction.

Ketlilamma v. *Kelappan* 228

10. ——————, **s. 45**—*Suit for declaration—Multifariousness—Malabar law—Suit by junior members of tarwad :*

Suit by some of the junior members of a Malabar tarwad against the karnavan and the other members of the tarwad, and certain persons to whom some of the tarwad property had been alienated by the karnavan, for a declaration that the alienations were not binding on the tarwad :—*Held*, that the suit was not bad for multifariousness.—*Vasudeva Shambaga* v. *Kuleadi Narnapai* (7 M.H.C.R., 290) followed.

Abdul v. *Ayaga* 234

11. ——————, **s. 53**—*Rent Recovery Act (Madras)—Act VIII of 1865—Suit in Civil Court to enforce exchange of patta and muchalka—Declaratory decree—Amendment of plaint :*

A suit in the Court of a District Munsif to enforce acceptance of a patta and execution of a muchalka by defendant in respect of a holding in a village to which plaintiff claimed title, was dismissed as not being maintainable :—*Held*, that the suit should not have been dismissed, but the plaint should have been amended by the addition of a prayer for a declaration of the plaintiff's title : and that the court then would have had jurisdiction to grant by way of consequential relief the relief originally sought.

Narasimma v. *Suryanarayana* 481

12. ——————, **s. 53**—*Specific Relief Act, s. 42—Amendment of plaint—Suit to declare alienation by Hindu widow invalid—Death of widow pending appeal by plaintiff—Right of appellant to proceed with appeal—Plaint not to be amended by claim for possession :*

The proviso to s. 42 of the Specific Relief Act that "no Court shall pass a declaratory decree where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so" refers to the position of plaintiff at the date of suit : where a suit was brought for a declaration that certain alienations of land made by a Hindu widow to the defendants were

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not binding on plaintiff, her reversionary heir, and pending appeal by the plaintiff, the widow died :—*Held*, (1) that the plaintiff was entitled to proceed with his appeal ; (2) that plaintiff could not be permitted to amend his plaint and claim possession.

Govinda v. *Perumderi* 136

13. ——————, **s. 209**—*Stipulated interest—Interest after filing plaint :*

A creditor having stipulated for interest at a certain rate is entitled to a decree for interest at that rate up to the date of decree—*Mangniram Marwari* v. *Dhowtal Roy* (I.L.R., 12 Cal., 569) dissented from.

Ramachandra v. *Devu* 485

14. ——————, **s. 232**—*Order rejecting petition for execution by transferee of decree—No appeal from such order :*

A petition, by one claiming to be the purchaser at a Court-sale of the interest of a decree-holder under a decree, for execution of the decree was rejected :—*Held*, no appeal lay from the order rejecting the petition.

Sambasiva v. *Srinivasa* 511

15. ——————, **s. 234**—*Sale in execution of decree against deceased Muhammadan's estate—Representation of deceased by some only of his next-of-kin—Sale held to be valid :*

V., a Muhammadan woman, died, leaving her husband and several minor children as her representatives. In execution of a money decree obtained against V., the creditor attached certain land which belonged to V. and made her husband and two of her children parties to the execution proceedings. The land was sold and purchased by the decree-holder :—*Held*, in a suit brought by the children of V. to set aside the sale on the ground, *inter alia*, that some of them were no parties to the proceedings in execution, and that the others, being minors at the time, had not been represented by a guardian appointed by the Court, that the sale was valid.

Kunhammad v. *Kutti* 90

16. ——————, **ss. 234, 332, 588**—*Death of Judgment-debtor between order for possession in execution of decree and delivery of possession—Appeal against appellate order reversing an order under s. 332 :*

A decree-holder in a District Munsif's Court obtained an order for possession of land in execution of his decree on 20th August, on which day the judgment-debtor died. Possession was delivered on 28th August. The persons dispossessed presented a petition under s. 332 of the Code of Civil Procedure disputing his right to be put into possession, on the ground, *inter alia*, that the judgment-debtor was not represented on the record. On appeal against the appellate order of the District Judge :—*Held*, assuming that the order for possession was made prior to the death of the judgment-debtor, there was no necessity for the decree-holder to bring any other person on to the record between the date of that order and the date on which the order was executed—*Ramasami* v. *Bagirathi* (I.L.R., 6 Mad., 180) distinguished.

Biyyakka v. *Fakira* 211

17. ——————, **ss. 244, 293, 306, 309, 588**—*Court-sale—Liability of defaulting purchaser—Appeal from order under s. 293—Resale :*

At a sale in execution of a decree a decree-holder, who had obtained leave to bid, was alleged to have made a bid through his agent of Rs. 90,000, but he shortly afterwards repudiated the bid and did not pay the deposit. The property was put up for sale again on the following day under s. 306 of the Code of Civil Procedure and was in due course knocked down for a smaller sum. The judgment-debtor filed a petition under s. 293 to recover from the decree-holder the loss by resale ; the petition was rejected. On appeal :—*Held*, (1) that the question at issue was one arising between the parties to the suit and that an appeal lay against the order rejecting the petition ; (2) that the property having been forthwith put up again and sold under s. 306 of the Code of Civil Procedure, was resold within the meaning of s. 293.

Vallabhan v. *Pangumi* 454

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18. ——————, ss. 244, 462—*Execution proceedings—Decree by consent of guardian of minor defendant—Application to stay execution, &c., for want of sanction of Court under s. 462—No appeal lies from order rejecting such application :*

An application to stay execution of and to set aside a decree, passed with the consent of the guardian of a minor defendant, for want of sanction of the Court under s. 462, Civil Procedure Code, was rejected :—*Held*, no appeal lay against the order of rejection.

Arunachellam v. *Murugappa* 503

19. ——————, ss. 244, 588, 629—*Review of judgment—No second appeal against an order under s.* 629 :

When a Munsif set aside on review an order rejecting an objection to the execution of a certain decree, and the District Court on appeal refused to interfere :—*Held*, that no second appeal lay to the High Court.

Papayya v. *Chelamayya* 123

20. ——————, s. 257—*Practice—Order for payment of costs of day—Payment into Court or to party :*

Where a party to a suit was directed by the High Court to pay the costs of the day, and his solicitor paid the money into Court under s. 257 of the Code of Civil Procedure :—*Held*, that section was not applicable as the order was not a decree.

Shanks v. *The Secretary of State for India* 120

21. ——————, s. 258 :

In 1877, M. executed a mortgage to S. in consideration of a sum paid in cash and a debt due by M. to S. under a decree. S. did not certify satisfaction of the decree to the Court under s. 258 of the Code of Civil Procedure, nor was this stipulated for in the instrument of mortgage :—*Held*, in a suit to enforce the mortgage, that s. 258 was no bar to the plaintiffs' right to recover.

Sellamayyan v. *Muthan* 61

22. ——————, ss. 268, 272—*Official Trustees' Act* (*XVII* 1864) *Public officer—Attachment by notice :*

A decree against a married woman provided that the amount due under it should be payable out of the separate estate of the judgment-debtor. The judgment-debtor was entitled to a life-interest in certain trust funds under a settlement of which the Official Trustee was the trustee. The decree-holder proceeded to execute his decree against this life-interest by notice to the Official Trustee under s. 272 of the Code of Civil Procedure, but there were no funds in the hands of the Official Trustee which would have been attachable under s. 268. The decree-holder now applied that the life-interest might be sold :—*Held*, that the interest of the judgment-debtor was not validly attached. *Semble.*—The Official Trustee is a public officer within the meaning of s. 2 of the Civil Procedure Code.

Abdul Lateef v. *Doutre* 250

23. ——————, ss. 293, 306, 309, 588—*Court-sale—Liability of defaulting purchaser—Appeal from order under s.* 293—*Resale :*

At a sale in execution of a decree a decree-holder, who had obtained leave to bid, was alleged to have made a bid through his agent of Rs. 90,000, but he shortly afterwards repudiated the bid and did not pay the deposit. The property was put up for sale again on the following day under s. 306 of the Code of Civil Procedure and was in due course knocked down for a smaller sum. The judgment-debtor filed a petition under s. 293 to recover from the decree-holder the loss by resale ; the petition was rejected. On appeal :—*Held*, (1) that the question at issue was one arising between the parties to the suit and that an appeal lay against the order rejecting the petition ; (2) that the property having been forthwith put up again and sold under s. 306 of the Code of Civil Procedure, was resold within the meaning of s. 293.

Vallabhan v. *Panguni* 454

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24. ——————, s. 311—*Alleged irregularity attending sale in execution—Failure to prove substantial injury resulting :*

A judgment-debtor having allowed the execution-sale of immovables to be completed without objecting on the ground afterwards alleged by him, viz., insufficiency of description within the requirements of s. 287, he having been throughout aware of what the description was, the sale is not invalid on this ground alone without more. No evidence having been given in the court executing the decree of substantial injury having resulted by reason of such irregularity, *i.e.*, the alleged misdescription :—*Held*, that although the Appellate Court below had assumed that the property had been sold for less than it ought to have fetched, such substantial injury as inadequacy of price should have been proved to have occurred in order to bring the case within s. 311—*Olpherts and Macnaghten* v. *Mahabir Pershad Singh* (L.R., 10 I.A., 25) referred to and followed.

Arunachellam v. *Arunachellam* 19

25. ——————, ss. 332, 588—*Death of judgment-debtor between order for possession in execution of decree and delivery of possession—Appeal against appellate order reversing an order under s.* 332 :

A decree-holder in a District Munsif's Court obtained an order for possession of land in execution of his decree on 20th August, on which day the judgment-debtor died. Possession was delivered on 28th August. The persons dispossessed presented a petition under s. 332 of the Code of Civil Procedure disputing his right to be put into possession, on the ground, *inter alia*, that the judgment-debtor was not represented on the record. On appeal against the appellate order of the District Judge :—*Held*, assuming that the order for possession was made prior to the death of the judgment-debtor, there was no necessity for the decree-holder to bring any other person on to the record between the date of that order and the date on which the order was executed—*Ramasami* v. *Bagirathi* (I.L.R., 6 Mad., 180) distinguished.

Biyyakka v. *Fakira* 211

26. ——————, s. 462—*Application to stay execution, &c., for want of sanction of Court under s.* 462—*Execution proceedings—Decree by consent of guardian of minor defendant—No appeal lies from order rejecting such application :*

An application to stay execution of and to set aside a decree, passed with the consent of the guardian of a minor defendant, for want of sanction of the Court under s. 462, Civil Procedure Code, was rejected :—*Held*, no appeal lay against the order of rejection.

Arunachellam v. *Murugappa* 503

27. ——————, s. 462—*Oaths Act—Act X of* 1873, *s.* 9—*Consent by guardian of a minor defendant to accept the oath of the plaintiff :*

It was agreed by the defendants who were majors and by the father and guardian of a minor defendant on his behalf, that one of the issues in a suit should be determined under Oaths Act, s. 9, by the oath of the plaintiff. The oath was taken and a decree was passed accordingly :—*Held*, that the minor defendant was bound by the consent of his guardian since there was no evidence of fraud or gross negligence on the part of the latter, although the Court had not sanctioned the agreement under s. 462, Civil Procedure Code.

Chengalreddi v. *Venkatareddi* 483

28. ——————, ss. 494, 588, 622—*No appeal lies against an order for issue of notice made under s.* 494—*Revision by High Court of an order purporting to be made on appeal from such an order :*

A petition praying for a temporary injunction in a suit was presented by the plaintiff in a Subordinate Court. The Judge refused to pass orders on it without hearing the defendants, and ordered notice to issue to them. The plaintiff appealed to the District Judge who granted the injunction prayed for :—*Held*, that no appeal lay from the Subordinate Court, and that the District Judge had purported to exercise a jurisdiction not vested in him by law.

Luis v. *Luis* 186

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29. ——————, s. 521—*Arbitration—Misconduct—Award set aside :*

Where a suit was referred to arbitration, and objection was taken to the award on the ground that one of the arbitrators had not attended a meeting when witnesses were examined by the other arbitrators :—*Held*, that the award was invalid by reason of misconduct on the part of the arbitrators within the meaning of s. 521 (*a*) of the Code of Civil Procedure.

Thammiraju v. *Bapiraju* 113

30. ——————, s. 525—*Loss of award, procedure on :*

When an award has been lost, a Court acting under s. 525 of the Code of Civil Procedure, cannot take secondary evidence of its provisions and pass a decree accordingly.

Gopi Reddi v. *Mahanandi Reddi* 381

31. ——————, s. 539—*Interest necessary to support a suit under—Suit to remove a trustee :*

The plaintiffs, having an interest as the managers of a temple in seeing to the due performance of the religious part of the administration of a certain charity endowed for the sustenance of Brahmans and connected with the temple, and being further interested in its administration as Brahmans entitled under certain circumstances to share in the benefits of the charity, sued under s. 539 of the Code of Civil Procedure to remove defendant from the trusteeship of the charity on the ground of fraudulent mismanagement :—*Held*, that the plaintiffs' interest did not support the suit. *Quære.*—Whether a suit for the removal of a trustee will lie under the above section.

Narasimha v. *Ayyan* 157

32. ——————, s. 586 *applies to orders in execution of decrees in Small Cause Suits :*

No second appeal lies from an order passed in execution of a decree in a suit of the nature cognizable by a Small Cause Court where the subject-matter of the suit does not exceed Rs. 500.

Aithala v. *Subbanna* 116

33. ——————, s. 586—*Mofussil Small Cause Court Act* (*XI of* 1865), *s.* 6—*Suit against sons of Hindu debtor, on a bond executed by father, not cognizable by Small Cause Court—Hindu law—Liability of son for debt of living father :*

In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's sons defendants along with their father, and a decree was passed against the father and sons jointly for payment of the debt :—*Held*, by the Full Bench that the suit as against the sons was not a suit of the nature cognizable in Court of Small Causes within the meaning of s. 586 of the Code of Civil Procedure :—*Held*, further, by the Divisional Bench that the decree against the sons was bad.

Narasinga v. *Subba* 139

34. ——————, s. 586—*Provincial Small Cause Court Act, sch. II, art.* 41—*Suit for contribution—Joint property :*

Lands of which part belonged to the plaintiffs and part to the defendant were comprised in a patta which ran in the names of the plaintiffs and another. The defendant's share of the assessment fe. ıto arrear and was collected from the plaintiffs who now sued to recover Rs. 200 being the amount so paid together with interest :—*Held*, the suit was of a nature cognizable by a Court of Small Causes, and so no second appeal lay—*Krishno Kamini Chowdhrani* v. *Gopi Mohun Ghose Hazra* (I.L.R., 15 Cal., 652) followed.

Srinivasa v. *Sivakolundu* 349

35. ——————, s. 588 (2)—*Appeal against order that a plaintiff be made defendant :*

An appeal lies under Civil Procedure Code, s. 588 (2), against an order under s. 32 that a plaintiff be made defendant.

Lakshmana v. *Paramasiva* 489

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36. ——————, ss. 588, 629—*Review of judgment—No second appeal against an order under s.* 629 :

When a Munsif set aside on review an order rejecting an objection to the execution of a certain decree, and the District Court on appeal refused to interfere :—*Held*, that no second appeal lay to the High Court.

Papayya v. *Chelamayya* 125

37. ——————, s. 589—*Civil Procedure Code Amendment Acts—Act VII of* 1888, *s.* 56—*Act X of* 1888, *s.* 3—*Appeal against order of a Subordinate Court on a petition of insolvency :*

The judgment-debtor having been arrested in execution of a decree passed by the Small Cause Court at Madras, which was transferred for execution to the Subordinate Court of South Malabar, applied to the District Court to be declared an insolvent. The District Court transferred the application for disposal to the Subordinate Court, and the application was granted on 25th July 1888. On 5th November 1888 one of the opposing creditors appealed to the High Court :—*Held*, that the appeal did not lie.

Sitharama v. *Vythilinga* 472

38. ——————, s. 622—*Act XIX of* 1841, *ss.* 2, 3, 5, 15—*Regulation V of* 1804 (*Madras*) :

On a petition presented by the Agent of the Court of Wards a District Court made an order which purported to have been made under Act XIX of 1841, s. 5. The conditions prescribed by ss. 3 and 4 were not shown to exist :—*Held*, the order of the District Court was illegal, and was subject to revision under s. 622 of the Code of Civil Procedure.

Papamma v. *The Collector of Godávari* 341

39. ——————, s. 624—*Who may review judgment—Grant of application for review :*

An application for review of judgment was presented on other grounds than those specified in s. 624 to a District Munsif who had delivered the judgment, and he thereupon ordered the decree to be produced. The District Munsif having resigned, his successor heard and determined the application :—*Held*, it was not competent to the District Munsif who had not delivered the original judgment to entertain the application for review.

Cheru Kurup v. *Cheru Kanda Kurup* 509

40. ——————, s. 629—*Review of judgment—No second appeal against an order under s.* 629 :

When a Munsif set aside on review an order rejecting an objection to the execution of a certain decree, and the District Court on appeal refused to interfere :—*Held*, that no second appeal lay to the High Court.

Papayya v. *Chelamayya* 125

CONCURRENCE OF LOWER COURTS IN FINDINGS UPON QUESTIONS OF FACT—*Agreement for division of family property in equal shares—Malabar custom :*

Two Courts in concurrence found that there had been an agreement between two parties, interested in a family fund, that it should be divided into equal fourth parts among the four branches of the family, but that an unequal division, made under a decree, had resulted from unfair dealing. To contest, upon this appeal, those findings of fact, nothing was stated to make it appear to the committee that, if they went through the whole of the evidence, they would differ from the Courts below on anything but questions of pure fact. Accordingly, their Lordships were of opinion that the case fell within the rule which makes appellate tribunals reluctant to interfere, and in most cases makes them refuse to interfere, with concurrent findings of the Courts below.

Krishnan v. *Sridevi* 512

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CONTRACT ACT, ss. 63, 74—*Penalty—Stipulation for enhanced interest—Interest on decree amount up to date of payment—Remission of part performance of contract—Sum accepted on account of interest :*

A hypothecation bond provided for payment of interest on the principal sum at the rate of 9 *per cent.*, and contained a further provision, that on default being made in payment of interest accruing due, interest should be paid from the date of the bond at the rate of 15 per cent. Default was made when the first and second payments of interest became due. After the second payment had become due, the creditor accepted payment on account of interest of a sum a little more than the arrears calculated at 9 per cent. In a suit by the creditor :—*Held*, (1) that the plaintiff had not waived any right under the bond by accepting the payment on account of interest ; (2) that the provision for enhanced interest calculated from the date of the bond on default, was of the nature of a penalty under s. 74 of the Contract Act ; (3) that the plaintiff was entitled to interest on decree amount from date of decree to date of payment at 6 per cent.—*Balkishen Das* v. *Run Bahadur Singh* (I.L.R., 10 Cal., 305) discussed and distinguished ; *Baij Nath Singh* v. *Shah Ali Hosain* (I.L.R., 14 Cal., 248) dissented from.

Nanjappa v. *Nanjappa* 161

COURT FEES ACT—ACT VII OF 1870, s. 7, cl. v (c) (e)—*Paramba in Malabar, valuation of suit for :*

On its appearing that a paramba in Malabar is not subject to land-tax, but that a tax is levied on trees of certain kinds which may grow on it :—*Held*, that a paramba must be regarded for the purposes of the Court Fees Act as a garden or as land which pays no revenue, according to the circumstances of each case.

Audathodan Moidin v. *Pullambath Mamally* 301

2. ——————, **s. 12, sch. ii, art. 17, iii**—*Civil Procedure Code, s.* 13—Res judicata—*Competent Court—Pecuniary valuation of suit—Suit for a declaratory decree :*

A suit for two declarations filed in a Subordinate Court was valued by the plaintiffs at a sum in excess of the pecuniary jurisdiction of a District Munsif. It was pleaded that the matter in dispute was *res judicata* by reason of decrees passed in District Munsifs' Courts. No objection was taken in the Subordinate Court to the valuation of the suit :—*Held*, that the plea of *res judicata* failed. *Per* Muttusami Ayyar, J.—For the purposes of jurisdiction the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one for possession of the property regarding which the plaintiff seeks to have his title declared.

Ganapati v. *Chathu* 223

CRIMINAL PROCEDURE CODE, s. 35—*Penal Code, ss.* 71, 72—*Separate convictions for different offences in the same transaction :*

An accused person was convicted under s. 457 of the Penal Code of house-breaking by night in order to commit an offence (mischief and assault) and also under ss. 426 and 352 for the offences of mischief and assault and punished separately for each offence. These offences formed parts of one transaction :—*Held*, that the sentences were legal.

Queen-Empress v. *Nirichan* 36

2. ——————, **s. 45**—*Duty to report sudden death—Owner of house distinguished from owner of land :*

Under s. 45 of the Code of Criminal Procedure, every owner or occupier of land is bound to report the occurrence therein of any sudden death. The head of a Nayar family was convicted and fined under s. 176 of the Penal Code for not reporting a sudden death in the family house :—*Held*, following former decisions of the Court, that the conviction was illegal, because s. 45 of the Code of Criminal Procedure does not apply to the owner of a house.

Queen-Empress v. *Achutha* 92

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3. ——————, **ss. 133, 134, 135, 136**—*Penal Code, s.* 188—*Service of notice of orders under s.* 133 :

A Magistrate made an order under s. 133 of the Code of Criminal Procedure requiring N. to fence a certain well in a public street or to appear before him and move to have the order set aside ; a copy of this order was affixed to the house of N., but he did not appear. The Magistrate then adopted the procedure prescribed by ss. 136, 140, and made an order requiring N. to fence the well by a certain date. N., who was personally served with notice of the above order did not comply with it. The Magistrate then sanctioned the prosecution of N. under s. 188 of the Penal Code. N. appeared and produced evidence to prove that he was not liable to fence the well :—*Held*, that the accused was guilty of the offence of disobedience to an order duly promulgated by a public servant and was not entitled to go behind the order and show that it was one which ought not to have been made. The mode of service of notice of an order under s. 133 considered.

Queen-Empress v. *Narayana* 475

4. ——————, **s. 145**—*Dispute as to right to collect rents :*

A dispute between two persons as to the right to collect rent from the tenants of an estate is cognizable under s. 145 of the Code of Criminal Procedure.

Ramasami v. *Danakoti Ammal* 88

5. ——————, **s. 195**—*Sanction does not lapse with the death of grantee :*

A civil court granted sanction under s. 195 of the Code of Criminal Procedure to the defendant in a suit to prosecute certain witnesses for perjury. The defendant died without having preferred a complaint. His brother, thereupon, preferred a complaint and the Magistrate dismissed it under s. 253 of the Code of Criminal Procedure, on the ground that the sanction died with the defendant. The Sessions Judge held that the sanction was alive and directed the District Magistrate to make further inquiry under s. 437 :—*Held*, that the Sessions Judge was right.

Thathayya, in re 47

6. ——————, **s. 195**—*Sanction to prosecute—Registration Act—Act III of* 1877, *ss.* 34, 35, 41—*Forged document—Registered by Sub-Registrar :*

A mortgagor was charged with making a fraudulent alteration in his mortgage-deed which was then registered by a Sub-Registrar :—*Held*, that the sanction of the Sub-Registrar was not necessary for a prosecution on a charge of forgery—*Venkatachala* in re (I.L.R., 10 Mad. 154), *Queen-Empress* v. *Subba* (I.L.R., 11 Mad., 3) explained.

Queen-Empress v. *Sobhanadri* 201

7. ——————, **ss. 234, 537**—*Penal Code, ss.* 372, 373—*Obtaining a minor for prostitution—Dancing girl caste—Adoption—Misjoinder of charges—Immaterial irregularity :*

A woman, being a member of the dancing girl caste, obtained possession of a minor girl and employed her for the purpose of prostitution ; she subsequently obtained in adoption another minor girl from her parents, who belonged to the same caste. She and the parents of the second girl were charged together under ss. 372, 373 of the Penal Code. The charges related to both girls :—*Held*, (1) that the two charges should not have been tried together, but the irregularity committed in so trying them had caused no failure of justice ; (2) that ss. 372, 373 of the Penal Code may be applicable in a case where the minor concerned is a member of the dancing girl caste. *Per* Muttusami Ayyar, J.—It would be no offence if the intention was that the girl should be brought up as a daughter, and that when she attains her age she should be allowed to elect either to marry or follow the profession of her prostitute mother.

Queen-Empress v. *Ramanna* 273

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8. ——————————, s. 288—*Evidence—Confession retracted—Corroboration, deposition of witnesses before Magistrates read under, insufficient :*

Where a prisoner was convicted of murder on a confession, retracted at the trial, corroborated by depositions read under s. 288 of the Code of Criminal Procedure, and also retracted at the trial :—Held, that the prisoner should not have been convicted on such evidence.

Queen-Empress v. *Bharmappa* 123

9. ——————————, s. 297—*Evidence of accomplice—Corroboration—Misdirection to Jury :*

A Judge should caution a Jury not to accept the evidence of an approver unless it is corroborated : the omission to do so amounts to misdirection.

Queen-Empress v. *Arumuga* 196

10. ——————————, ss. 342, 428, 540—*Penal Code, ss.* 181, 182—*Examination on affirmation of one preferring a criminal appeal—Verification of petition of appeal :*

In a petition of appeal from a conviction, the appellant falsely stated that the convicting Magistrate declined to summon his witnesses. The Magistrate to whom the appeal was preferred called upon the appellant to verify the allegations in the petition of appeal on solemn affirmation, and he did so :—*Held*, that the appellant had not committed an offence under s. 181 or 182 of the Penal Code.

Queen-Empress v. *Subbayya* 451

11. ——————————, s. 399—*Reformatory Schools Act*, 1876, *ss.* 2, 7 :

The Reformatory Schools Act, 1876, provides only for male juvenile offenders being sent to reformatory schools by magistrates of the first class, and s. 399 of the Code of Criminal Procedure, 1882, so far as it authorizes a Magistrate not of the first class to direct that a male juvenile offender be sent to a reformatory is repealed :—*Held*, therefore, when a Second-class Magistrate directed a boy to be sent to a reformatory under s 399 of the Code of Criminal Procedure that the order was illegal.

Queen-Empress v. *Madasami* 94

12. ——————————, s. 494—*Irregular procedure—Discharge of prisoner committed to Sessions—New trial—Conviction quashed :*

A prisoner committed to sessions on a charge cannot be discharged by the Sessions Court under s. 494 of the Code of Criminal Procedure, but must be convicted or acquitted. Where a prisoner was erroneously discharged by a Sessions Court under s. 494 (*a*) :—*Held*, that as the prisoner was entitled to be acquitted, a conviction obtained in a second trial for the same offence was bad in law.

Queen-Empress v. *Sivarama* 35

13. ——————————, s. 545—*Death caused by rash and negligent act—Compensation to widow of deceased :*

An order that the amount of a fine imposed on one convicted of causing death by a rash and negligent act be paid as compensation to the widow of the deceased is illegal.

Lutchmaka in re 352

DANCING GIRL CASTE :

See Hindu Law, 3.

DECLARATORY DECREE :

See Execution of Decree.

DEFAMATION—*Illegal declaration that one is out-casted—Observations on the use of books of history to prove local custom, and on the position as heads of their caste of the representatives of the ancient sovereigns of the West Coast :*

According to the usage of certain Nambudris, a caste inquiry is held when a Nambudri woman is suspected of adultery, and if she is found guilty, she and her paramour are put out of caste. An inquiry was held into the conduct of a certain woman so suspected; she confessed that the plaintiff had had illicit intercourse with her, and thereupon they were both declared outcastes, the plaintiff not having been charged nor having had an opportunity to cross-examine the woman or to enter on his defence and otherwise to vindicate his character. In a suit for damages for defamation by the plaintiff against those who had declared him an outcaste :—*Held*, the declaration that the plaintiff was an outcaste was illegal, and it having been found that the defendants had not acted *bonâ fide* in making that declaration, the plaintiff was entitled to recover damages. Observations on (1) the use of books of history to prove local custom, and (2) on the position as heads of their caste of the representatives of the ancient sovereigns of the West Coast.

Vallabha v. *Madusudanan* 495

2. ——————— *Privilege—Petition to Revenue officer—Presumptions as to malice :*

Certain raiyats in a zamindari village addressed a petition to the Tahsildar praying that the Village Munsif might be retained in office notwithstanding the Zamindar's application for his removal. The petition imputed criminal acts to the Zamindar, who now sued the petitioners for damages on the ground that the petition contained a false and malicious libel. It was found that in fact the communication was made *bonâ fide*, and that there was some ground for some of the imputations :—*Held*, the petition was a privileged communication and the alleged libel was not actionable. The question when malice may be presumed, discussed.

Venkata Narasimha v. *Kotayya* 374

ESTOPPEL :

See Landlord and Tenant, 2 and 3.

EVIDENCE ACT, ss. 13, 42—*Relevancy of judgments in suits in which right asserted to collect dues for a temple :*

In a suit brought by the trustees of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple :—*Held*, that judgments in other suits against other persons in which claims under the same right had been decreed in favor of the trustees of the temple were relevant under s. 13 of the Evidence Act as being evidence of instances in which the right claimed had been asserted :—*Held*, also that the said judgments were relevant under s. 42 of the said Act as relating to matters of a public nature.

Ramasami v. *Appavu* 9

2. ——————, ss. 26, 27—*Confessional statements made in the custody of police—Test of admissibility :*

The test of the admissibility under s. 27 of the Evidence Act of information received from an accused person in the custody of a police officer, whether amounting to a confession or not, is :—"was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact?"

Queen-Empress v. *Commer Sahib* 153

3. ——————, s. 44—*Civil Procedure Code, ss.* 43, 244—*Separate suit on disallowance of objection to execution—Competent Court :*

In execution of a decree the defendant, who was sued as the representative of her deceased brother, objected under s. 244 of the Code of Civil Procedure to the attachment of certain lands to which she set up independent title. The objection was disallowed and the land was sold. She then sued the execution purchaser to set aside the Court-sale and obtained a decree against which no appeal was preferred. She now sued for possession :—*Held*, that the suit lay notwithstanding the order under s. 244. *Per cur.*—The words "not competent" in s. 44 of the Evidence Act refer to a Court acting without jurisdiction.

Ketlilamma v. *Kelappan* 228

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4. ————, s. 116—*Estoppel—Landlord and tenant—Kumaki land—Unassessed waste reclaimed by plaintiff—Patta granted to defendant:*

The plaintiff, who was the holder of a *warg* in Canara, demised adjacent waste land to one who brought it into cultivation and remained in occupation for two years. The land was not assessed to revenue in the name of either of these persons. At the end of two years the tenant let into occupation a sub-tenant who subsequently assigned his right to the defendant, the holder of a neighbouring *warg*. The defendant obtained a *patta* for the land from the revenue authorities. In a suit by plaintiff to eject the defendant:—*Held*, (1) that the defendant was not estopped from setting up a title adverse to the plaintiff and that his possession became adverse when the *patta* was granted to him; (2) that the plaintiff was not entitled to eject the defendant.

Subbaraya v. *Krishnappa* 422

EXECUTION OF DECREE DETERMINING RIGHTS OF RIVAL RELIGIOUS SECTS—*Decree whether executory or declaratory—Limitation—How far a sect bound by decree against some of its members:*

In a suit determined in 1840, in which various members of the Vadagalai sect residing in a certain village were plaintiffs and various members of the Tengalai sect residing in the same village were defendants, it was held that an image of a priest revered by the latter sect was not entitled to a place in a certain temple of the village, or to public worship in a certain street, or to procession in the streets of the village; and it was directed that, if the defendants continued to make the image an object of public worship, it should be removed. In 1888 various members of the Vadagalai sect, asserting that the members of the Tengalai sect had acted in contravention of the decree in the above suit, filed an execution-petition therein, praying that various members of the Tengalai sect be arrested, and "that the image of their priest, which they attempt to worship publicly, be removed until they obey the terms of the decree." It appeared that, in 1868, the District Magistrate had granted an application to restrain the Tengalais from acting contrary to the above decree. The execution-petition was dismissed by the District Court:—*Held*, the petition was rightly dismissed, since the execution of the decree was barred by limitation, and the decree, if it was capable of execution at all, could not be executed against the parties to the present petition.

Sadagopachari v. *Krishnamachari* 356

EXECUTION SALE:

See HINDU LAW, 4.

FISHERY—*Tidal river—Customary right:*

Plaintiffs claimed a right to catch fish in a tidal river at a certain place by putting up stake nets across the river. This right was alleged to be based on custom which was not denied by defendants and user for thirty years was proved. The claim was decreed:—*Held*, that plaintiffs were not bound to prove sixty years' exclusive user to support their claim.

Narasayya v. *Sami* 43

FOREIGN JURISDICTION ACT, 1879 39

FOREST ACT—ACT V OF 1882 (MADRAS), ss. 4, 7, 16, 21:

A claim put forward to part of certain land notified for reservation under the Madras Forest Act originally rejected, was held to be valid by the District Court on appeal. The High Court set aside the decision of the District Court and directed that the appeal be reheard. Pending the rehearing, a lessee of the claimant felled trees on the land and was charged under s. 21 (*a*) with the offence of making a fresh clearing prohibited by s. 7 of the Act. The Magistrate acquitted him on the ground that there was no order in writing served on him by the Forest Department prohibiting him from felling trees pending the rehearing:—*Held*, that the acquittal was wrong.

Queen-Empress v. *Narasimmayya* 338

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2. ————, s. 6—*Tree patta—Occupier of land:*

The holder of a tree *patta* is a *known occupier of land* within the meaning of s. 6 of the Madras Forest Act.

Reference under Madras Forest Act s. 39 203

3. ————, ss. 6, 10, 16, 21—*Tree patta—Trespass:*

The holder of a *patta* of certain trees on land which had been declared a reserved forest was convicted of trespass under the Madras Forest Act on proof that he continued to gather the produce of the trees:—*Held*, that the conviction was bad for want of proof, that the petitioner's claim had been duly disposed of or that he had not preferred his claim within the period required by law.

Queen-Empress v. *Rami Reddi* 226

4. ————, s. 10—*Procedure—Remedy by ordinary suit barred:*

Where by an act of legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the ordinary jurisdiction of civil courts is ousted and in the case of injury the party cannot proceed by action. Plaintiff sued in a Munsif's Court to cancel the decision of Forest officer confirmed by a District Judge under s. 10 of the Madras Forest Act, 1882, and to recover certain land, a claim to which had been rejected under the said section:—*Held*, that the Munsif had no jurisdiction to entertain the suit.

Ramachandra v. *The Secretary of State* 105

HINDU LAW—*Civil Procedure Code, s. 43—Maintenance—Suit to declare maintenance fixed by a decree, a charge on land:*

A Hindu woman having obtained a decree for maintenance against her husband, now alleged that he had alienated part of his property with a view to defeat her claim for maintenance, and sued him for a declaration that certain land, which he had not alienated was liable for her maintenance:—*Held*, that no cause of action was shown.

Saminatha v. *Rangathammal* 285

2. ————*Construction of settlement—Successive interests—Contingent gift to a class—Member of the class in existence on failure of prior interest—Rule in the Tagore case:*

A *karar* executed to the father of Sitarama, a minor grandson of the executant, after reciting that the executant had appointed Sitarama to perpetuate his family and had handed over certain property to the father, provided that the property should be delivered to Sitarama on his attaining majority and proceeded as follows:—"If the said Sitarama shall have "descendants, neither your male descendants nor any one else shall have any "interest in any of the property herein-mentioned. If the said Sitarama "happen to be without descendants, the male offspring of my daughter, "Kaveramma, your wife, shall enjoy the property equally, but no others "shall have any interest therein; such is the *swatantra karar* executed with "my free will and pleasure." Sitarama attained his majority but died without issue. His elder brother sued for possession of the property under the above clause:—*Held*, that since the plaintiff was a person capable of taking subject to the life interest, at the time when the gift was made, he was entitled to succeed. *Semble.*—If the gift to the plaintiff had failed the property would have reverted to the heirs of the settlor on Sitarama's death without issue—*Ram Lal Sett* v. *Kani Lal Sett* (I.L.R., 12 Cal., 663) followed.

Manjamma v. *Padmanabhayya* 393

3. ————*Dancing girl caste—Adoption—Plurality of adoptions—Immoral or illegal purpose of adoption:*

As a matter of private law, the class of dancing women being recognized by Hindu law as a separate class having a legal status, the usage of that class in the absence of positive legislation to the contrary regulates rights of status

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and of inheritance, adoption and survivorship. A dancing woman adopted two daughters, of whom the latter was adopted in the year 1854. It was found that the custom obtaining among dancing women in Southern India permits plurality of adoptions :—*Held, in second appeal*, that the daughter subsequently adopted succeeded to the adoptive mother in preference to the son of the daughter previously adopted.

Muttukannu v. *Paramasami* 214

4. ——— *Execution sale—Ancestral zamindari sold in execution of decree for money against the father, including the son's right of succession—Debt not immoral :*

A sale in execution of a decree against a zamindar, for his debt, purported to comprise the whole estate in his zamindari. In a suit brought by his son against the purchaser, making the father also a party defendant, to obtain a declaration that the sale did not operate as against the son as heir, not affecting his interest in the estate, the evidence did not establish that the father's debt had been incurred by him for any immoral or illegal purpose :—*Held*, that the impeachment of the debt failing, the suit failed ; and that no partial interest, but the whole estate, had passed by the sale, the debt having been one which the son was bound to pay—*Hardi Narain Sahu* v. *Ruder Perkash Misser*, I.L.R., 10 Cal., 626 (where the sale was only of whatever right, title, and interest the father had in property), distinguished.

Minakshi Nayudu v. *Immudi Kanaka Ramaya Goundan* 142

5. ——— *Gandharva marriage without nuptial rites invalid—Mitakshara, ch. I, s. 12—Illegitimate son—Status of illegitimate son of Kshatriya by Sudra woman :*

In order to constitute a valid marriage in Gandharva form, nuptial rites are essential. Although the illegitimate children of members of the regenerate classes are excluded from inheritance by the Mitakshara, the absence of legal marriage is no bar to the determination of their caste with reference to the law applied to Anulomajas (children born of mixed marriages). The illegitimate son of a Kshatriya by a Sudra woman is not a Sudra but of a higher caste called Ugra.

Brindavana v. *Radhamani* 72

6. ——— *Inheritance—Bandhu—Paternal great aunt's grandson :*

According to the Hindu Law of Succession in force in the Madras Presidency, the grandson of a paternal great aunt of the deceased inherits to him as a bandhu.

Sethurama v. *Ponnammal* 155

7. ——— *Inheritance—Illatam—Burden of proof :*

N, a Hindu, who had admittedly been taken as *illatam* into the family of his father-in-law died, leaving property which he had acquired by virtue of his *illatam* marriage. He was succeeded by his son, who died without issue, leaving only a sister surviving him. In a suit by the brother of N, who was the managing member of his family, to recover the property from the sister of the last holder :—*Held*, that the plaintiff was *primâ facie* entitled to recover, notwithstanding the admission, and that it was for the defendant to establish any special circumstances to rebut his claim.

Ramakristna v. *Subbakka* 442

8. ——— *Inheritance—Rule of inheritance affected by manner of life—Maraver prostitutes—Act XXI of* 1850 :

A married Maraver woman deserted her husband and lived in adultery with another man, to whom she bore four children. Of these children, the two daughters associated together leading the life of prostitutes, and the two sons separated themselves from their sisters and observed caste usage. The elder daughter died leaving property in land :—*Held*, that the sister succeeded to the deceased in preference to the brother.

Sivasangu v. *Minal* 277

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9. ——— *Joint family—Purchaser from one coparcener—Adverse possession—Limitation :*

Plaintiffs being members of a joint Hindu family alleging division, and a sale to them by other members of their share in the family property more than 12 years before suit, sued to eject a more recent purchaser. The plaintiffs failed to prove division as alleged. One of the members of the family who was in possession of the property to which the sale-deed related did not join in executing it :—*Held*, (1) that the plaintiffs having failed to prove division as alleged were not entitled in second appeal to have their suit treated as a suit for partition ; (2) that the suit was barred by limitation, since the proposition that the possession of one coparcener is the possession of all for purposes of limitation has no application as between a purchaser from one of the coparceners and the other members of the family—*Ram Lakhi* v. *Durga Charan Sen* (I.L.R., 11 Cal., 683) followed.

Muttusami v. *Ramakrishna* 292

10. ——— *Joint family—Civil Procedure Code, s. 586—Mofussil Small Cause Court Act, s. 6—Suit against sons of Hindu debtor, on a bond executed by father, not cognizable by Small Cause Court—Hindu law—Liability of son for debt of living father :*

In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's sons defendants along with their father, and a decree was passed against the father and sons jointly for payment of the debt :—*Held*, by the Full Bench that the suit as against the sons was not a suit of the nature cognizable in a Court of Small Causes within the meaning of s. 586 of the Code of Civil Procedure :—*Held*, further, by the Divisional Bench that the decree against the sons was bad.

Narasinga v. *Subba* 139

11. ——— *Land dedicated to family idol—Land excluded from partition of family property and declared inalienable—Subsequent purchase from Escheat Department of Government—Sale in execution :*

By a partition deed by the six members of a Hindu family it was provided that part of the land of the family should be set apart for the maintenance of the family idol and should be inalienable and the rest of the land was divided equally. Subsequently the Government claimed the dedicated land as an escheat, and sold it to the members of the family jointly, of whom one built a house on part of it—less than one-sixth—with the consent of the others. The house and its site was sold in execution of a decree against the builder :—*Held*, that the other members of the family were not entitled to have the house removed or the sale cancelled.

Mallan v. *Purusho ama* 287

12. ——— *Maintenance—Limitation—Limitation Act XIV of* 1859, *s.* 1, *cl.* 13—*Refusal of person liable to maintain—Cause of action :*

In a suit for maintenance brought in 1887 by a Hindu widow against the undivided family of her deceased husband who had died about 24 years before suit, it appeared that her maintenance had not been made a charge on specific property :—*Held*, that time began to run against the plaintiff's claim under the Limitation Act of 1859, only from the date of refusal on the defendants' part to maintain her—*Narayan Rao Ramchandra Pant* v. *Ramabai* (I.L.R., 3 Bom., 415) followed.

Ramanamma v. *Sambayya* 347

13. ——— *Money decree against father—Attachment of ancestral estate :*

In execution of a money decree ancestral property of the joint family of the judgment-debtor was attached. His sons sued to release their interest from attachment, alleging that the judgment debt had been incurred for immoral purposes, which was denied by the decree-holder. It was held by the lower Courts that nothing more than the father's share was liable to be attached, as the sons were not parties to the decree :—*Held*, that the nature of the debt should be determined, since the creditor's power to attach and

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sell depends on the father's power to sell, which again depends on the nature of the debt—*Mussamut Nanomi Babuasin* v. *Modun Mohun* (L.R., 13 I.A., 1; s.c. I.L.R., 13 Cal., 21) discussed and followed.

Ramanadan v. *Rajagopala* 309

14. ———— *Money decree against managing member of joint family not impleaded as such—Effect of sale in execution of such decree—Transfer of Property Act, s. 99—Sale of mortgage property in execution of decree on a money bond for interest due on the mortgage:*

The managing member of a joint Hindu family executed in 1878 a mortgage on certain lands, the property of the family, to secure a debt incurred by him for family purposes, and in 1881 he together with his brother executed to the mortgagee a money bond for the interest then due on the mortgage. In 1882 the mortgagee brought a suit on the money bond and having obtained a personal decree against the two brothers merely, brought to sale in execution part of the mortgaged property which was purchased by a third person:—*Held*, that the sale did not convey the interest of another undivided brother who was not a party to the decree:—*Held, further* per *Kernan, J.*, that the sale in execution was invalid under Transfer of Property Act, s. 99.

Sathuvayyan v. *Muthusami* 325

15. ———— *Widow—Notice by possession of, of her right to maintenance—Sale of family property to discharge previous mortgage:*

Immovable property of a joint Hindu family was sold by a member of the family and his two sons to the plaintiff, and the purchase-money was expended in redeeming a mortgage. The character of the mortgage debt was not shown. In a suit by the plaintiff for possession it appeared that the property in question had been in the exclusive possession of another member of the family, and after his death in that of his widow, for more than 26 years and that neither of them had concurred in the sale to the plaintiff; it was also found that the widow was entitled to possession on account of maintenance:—*Held*, that the separate possession of the widow was notice to the plaintiff of her interest in the land, and that he was not entitled to defeat it.

Imam v. *Balamma* 334

16. ———— *Widow—right of, to reside in the family dwelling-house—Sale of dwelling-house in execution of a decree obtained against the managing members of family on a debt incurred for family purposes:*

A house, being ancestral property of a Hindu family, was sold in execution of a decree by which the decree-amount was constituted a charge on such property. The debt sued on had been incurred for the benefit of the family by the coparceners for the time being, but since the death of such coparceners' father:—*Held*, the widow of the latter who resided in the said house during her husband's lifetime was not entitled as against a purchaser for value in good faith under such decree (but with notice that she resided and during her husband's life had resided in that house, and still claimed to reside there) to continue to reside for life in such portion of the house sold as she resided in subsequent to her husband's death—*Venkatammal* v. *Andyappa* (I.L.R., 6 Mad., 130) distinguished.

Ramanadan v. *Rangammal* 260

17. ———— *Sudras—Illegitimate son—Suit for partition:*

Among Sudras an illegitimate son is entitled to maintain a suit for partition of the family property against his father's legitimate sons: and if his interest is endangered by reason of the property being left under the management of the latter, partition can be claimed during his minority.

Thangam Pillai v. *Suppa Pillai* 401

18. ———— *Will—Gift to a class—Vested and contingent interest:*

A will, made by a Hindu, contained the following clause: "I bequeath to my elder daughter Rs. 25,000, subject to the condition that she shall

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invest the same in lands . . shall enjoy the produce . . and shall transmit the *corpus* intact to her male descendants." Within a month after the testator's death his eldest daughter was delivered of a son, who died in a few months. She died subsequently, leaving the plaintiff, her husband, but no male issue her surviving. The plaintiff sued as heir of his son to recover the amount of the above bequest:—*Held*, that as the daughter's son never acquired a vested interest in the bequest, the plaintiff's suit must be dismissed.

Srinivasa v. *Dandayudapani* 411

19. ———— *Will of a Hindu in favor of his wife made on his taking a son in adoption—Adoption made on the understanding that the dispositions of the will be observed:*

A Hindu, on taking a son in adoption, executed a "settlement as to what should be done by my adopted son and my wife after my lifetime," providing that on an event, which happened, the wife should enjoy certain land for life in lieu of maintenance. In a suit by the widow of the executant against the adoptive son for possession of the land:—*Held*, that the instrument was a will. On its appearing that the defendant's natural father, when he gave him in adoption, tacitly submitted to the arrangement contained in it:—*Held*, that the adoptive son was bound by its provisions.

Lakshmi v. *Subramanya* 490

IMPROVEMENTS:

See LANDLORD AND TENANT, 3.

JURISDICTION—*Suit to cancel patta of Government waste issued by Collector—Power of Collector to cancel patta granted by him—Standing Order:*

The plaintiff having obtained from the Revenue officers of the district a patta of Government waste, sued for the cancellation of a patta for the same land subsequently granted to other persons by the Collector who considered that the issue of the plaintiff's patta was not in accordance with the darkhast rules:—*Held*, (1) it was not competent to the Collector to issue the second patta in supersession of that issued to plaintiff; (2) it was competent to a Civil Court to pass a decree declaring the second patta null and void, and the plaintiff was entitled to such a decree—*Kullappa Naik* v. *Ramanuja Chariyar* (4 M.H.C.R., 429) followed.

Collector of Salem v. *Rangappa* 404

2. ———— *Valuation of suit for purposes of—Civil Procedure Code, s. 13—Res judicata—Competent Court—Pecuniary valuation of suit—Court Fees Act, s. 12, sch. II, art. 17, iii—Suit for declaratory decree:*

A suit for two declarations filed in a Subordinate Court was valued by the plaintiffs at a sum in excess of the pecuniary jurisdiction of a District Munsif. It was pleaded that the matter in dispute was *res judicata* by reason of decrees passed in District Munsifs' Courts. No objection was taken in the Subordinate Court to the valuation of the suit:—*Held*, that the plea of *res judicata* failed. *Per* Muttusami Ayyar, J.—For the purposes of jurisdiction the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one of possession of the property regarding which the plaintiff seeks to have his title declared.

Ganapati v. *Chathu* 223

3. ———— *Withdrawal of part of claim—Canarese Navayats—Common management of family property—Muhammadan law—Sale of an undivided share—Limitation—Burden of proving validity of sale by a gosha woman:*

Suit for partition and possession of an undivided share of property sold to plaintiff by an aged gosha lady of the class of Canarese Muhammadans called Navayats. The property sold was the vendor's share as heiress of her father, brother and sister, who died in 1856, 1866 and 1871, respectively; but it appeared that the property of the family had been in the possession of one managing member since 1856. The plaintiff, during the suit, withdrew his claim against that part of the immovable property in suit which was within the local limits of the jurisdiction of the Court, having compromised with the

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defendants who had it in their possession, and pursued his claim against the other immovable property and obtained a decree. On appeal:—*Held*, (1) that the suit was not barred by limitation; (2) that the withdrawal of the claim with regard to the property situated within the local limits of the jurisdiction of the Court (the compromise not having been shown to be otherwise than *bonâ fide*) did not operate to take away the jurisdiction of the Court to adjudicate on the plaintiff's suit; (3) that the plaintiff having discharged the burden of proving that the conveyance to him was voluntarily executed and that the transaction evidenced by it was real and *bonâ fide*, the conveyance was operative.

Khatija v. *Ismail* 380

4. ——— **OF CIVIL COURTS IN REVENUE MATTERS**—*Act VII of* 1865 (*Madras*), *s.* 1—*Water-cess—Overflow from Government works—Water supplied or used for purposes of irrigation:*

Surplus water from Government irrigation works flowed on to land of the plaintiffs which they were in the habit of cultivating with dry crops and stagnated there rendering such cultivation impossible. The plaintiffs did not want the water to flow on to their land, but being unable to exclude it, planted paddy as the best crop to cultivate under the above circumstances. Water-cess was levied on the plaintiffs under color of Act VII of 1865:—*Held*, the water was not supplied or used for purposes of irrigation within the meaning of Act VII of 1865, s. 1, and the plaintiffs were not liable to pay the water-cess.

Venkatappayya v. *The Collector of Kistna* 407

5. ——— **OF DISTRICT COURTS**—*Karnam—Regulation XXV of* 1802 (*Madras*), *s.* 11—*Regulation XXIX of* 1802 (*Madras*), *ss.* 5, 7, 10, 16, 18—*Suit for dismissal of a zamindari karnam—Jurisdiction:*

A suit by a zamindar for the dismissal of zamindari karnam cannot be entertained by a District Munsif. The Subordinate Court and the District Court, where there is no Subordinate Court, is the tribunal that has taken the place of the Court of Adawlut of 1802.

Venkatanarasimha v. *Suryanarayana* 188

6. ——— **OF HIGH COURT**—*Foreign Jurisdiction Act*, 1879, *ch. II—European British subjects in Bangalore—Justice of the Peace for Mysore:*

The Civil and Military Station of Bangalore is not British territory, but a part of the Mysore State, and the Code of Criminal Procedure is in force therein by reason of declarations made by the Governor-General in Council in exercise of powers conferred by the Foreign Jurisdiction and Extradition Act, 1879. Justices of the Peace for the State of Mysore are also Justices of the Peace for Bangalore, and both the Civil and Sessions Judge and the District Magistrate of Bangalore being such Justices of the Peace, are, by virtue of s. 6 of the said Act, subordinate to the High Court at Madras.

Hayes, in re 39

KARNAM—*Civil Procedure Code, s.* 13—Res judicata—*Decree in suit by a karnam binds his successor:*

The karnam in a certain mitta sued to recover certain land as part of the *mirasi* property attached to his office. It appeared that the plaintiff's father and predecessor in office had sued by virtue of his office to recover the same land and that his suit had been dismissed:—*Held*, that the plaintiff's claim was *res judicata*.

Venkayya v. *Suramma* 235

2. ——— *Regulation XXV of* 1802 (*Madras*), *s.* 11—*Regulation XXIX of* 1802 (*Madras*), *ss.* 5, 7, 10, 16, 18—*Suit for dismissal of a zamindari karnam—Jurisdiction:*

A suit by a zamindar for the dismissal of zamindari karnam cannot be entertained by a District Munsif. The Subordinate Court, and the District Court where there is no Subordinate Court, is the tribunal that has taken the place of the Court of Adawlut of 1802.

Venkatanarasimha v. *Suryanarayana* 188

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LANDLORD AND TENANT—*Ejectment—Permanent tenancy pleaded—Notice to quit:*

Suit to eject defendants from certain land held by them from the plaintiff under a *chalgeni* (yearly) demise of 1869. The defendants pleaded that they were *kattugudi* (permanent) tenants of the land in question; they had set up their title as *kattugudi* tenants previous to the *chalgeni* demise, but it did not appear that they had re-asserted it up to date of suit:—*Held*, that the issue whether the plaintiff had given a notice to quit, reasonable and in accordance with local usage, should be tried—*Baba* v. *Vishvanath Joshi* (I.L.R., 8 Bom., 228) considered.

Subba v. *Nagappa* 353

2. ——— *Evidence Act—Act I of* 1872, *s.* 116—*Estoppel—Kumaki land—Unassessed waste reclaimed by plaintiff—Patta granted to defendant:*

The plaintiff, who was the holder of a *warg* in Canara, demised adjacent waste land to one who brought it into cultivation and remained in occupation for two years. The land was not assessed to revenue in the name of either of these persons. At the end of two years the tenant let into occupation a sub-tenant who subsequently assigned his right to the defendant, the holder of a neighbouring *warg*. The defendant obtained a patta for the land from the revenue authorities. In a suit by plaintiff to eject the defendant:—*Held*, (1) that the defendant was not estopped from setting up a title adverse to the plaintiff and that his possession became adverse when the *patta* was granted to him; (2) that the plaintiff was not entitled to eject the defendant.

Subbaraya v. *Krishnappa* 422

3. ——— *Malabar kanam—Change in character of land—Passive acquiescence of landlord—Estoppel—Compensation for improvements by tenant:*

Land was demised on kanam for wet cultivation. The demisee changed the character of the holding, by making various improvements which were held to be inconsistent with the purpose for which the land was demised. On a finding that the landlord had stood by while the character of the holding was being changed and had thereby caused a belief that the change had his approval:—*Held*, on second appeal, that the demisee was entitled to compensation for his improvements on redemption of the kanam—*Ramsden* v. *Dyson* (L.R., 1 H L., 129) followed.

Kunhammed v. *Narayanan Mussad* 320

LIEN ON LAND CREATED BY AGREEMENT—*Sale to stranger without notice—Purchaser bound:*

D. mortgaged certain land to S. to secure re-payment of a loan, and covenanted that in a certain event S. might realize the money from the house of D. D. sold this house to C., who purchased without notice of the covenant:—*Held*, that C. could not resist the claim of S. to have the house sold under the covenant.

Cooling v. *Saravana* 69

LIMITATION—*Hindu law—Joint family—Purchaser from one coparcener—Adverse possession:*

Plaintiffs being members of a joint Hindu family alleging division, and a sale to them by other members of their share in the family property more than 12 years before suit, sued to eject a more recent purchaser. The plaintiffs failed to prove division as alleged. One of the members of the family who was in possession of the property to which the sale-deed related did not join in executing it:—*Held*, (1) that the plaintiffs having failed to prove division as alleged were not entitled in second appeal to have their suit treated as a suit for partition; (2) that the suit was barred by limitation, since the proposition that the possession of one coparcener is the possession of all for purposes of limitation has no application as between a purchaser from one of the coparceners and the other members of the family—*Ram Lakhi* v. *Durga Charan Sen* (I.L.R., 11 Cal., 683) followed.

Muttusami v. *Ramakrishna* 292

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2. ——— *Sale of undivided share—Burden of proving validity of sale by a gosha woman :*

Suit for partition and possession of an undivided share of property sold to plaintiff by an aged gosha lady of the class of Canarese Muhammadans called Navayats. The property sold was the vendor's share as heiress of her father, brother and sister, who died in 1856, 1866 and 1871, respectively; but it appeared that the property of the family had been in the possession of one managing member since 1856. The plaintiff, during the suit, withdrew his claim against that part of the immovable property in suit which was within the local limits of the jurisdiction of the Court, having compromised with the defendants who had it in their possession, and pursued his claim against the other immovable property and obtained a decree. On appeal :—*Held*, (1) that the suit was not barred by limitation; (2) that the withdrawal of the claim with regard to the property situated within the local limits of the jurisdiction of the Court (the compromise not having been shown to be otherwise than *bonâ fide*) did not operate to take away the jurisdiction of the Court to adjudicate on the plaintiff's suit; (3) that the plaintiff having discharged the burden of proving that the conveyance to him was voluntarily executed and that the transaction evidenced by it was real and *bonâ fide*, the conveyance was operative.

Khatija v. *Ismail* 380

LIMITATION ACT XIV OF 1859, s. 1, cl. 13—*Maintenance—Limitation—Refusal of person liable to maintain—Cause of action :*

In a suit for maintenance brought in 1887 by a Hindu widow against the undivided family of her deceased husband who had died about 24 years before suit, it appeared that her maintenance had not been made a charge on specific property :—*Held*, that time began to run against the plaintiff's claim under the Limitation Act of 1859, only from the date of refusal on the defendant's part to maintain her—*Narayan Rao Ramchandra Pant* v. *Ramabai* (I.L.R., 3 Bom., 415) followed.

Ramanamma v. *Sambayya* 347

2. ——— *Partition suit for share of joint family estate—Failure to prove participation in the family coparcenary within the period :*

In a suit brought in 1881 for a share of joint family estate, the question whether the plaintiff's right to sue was barred by limitation under Act XIV of 1859, s. 1, cl. 13, depended on whether there had been any participation of profits between the plaintiff's father and the defendants, who with him were co-descendants from a common ancestor, after 1837 down to which year the family was certainly joint. If in 1871 the period of limitation had expired, the Act IX of that year and the later Acts need not be referred to; for, if they altered the law, they would not revive the right of suit. Upon the evidence it was found that whatever might have been the father's intention when he settled in another village in 1837, the effect of what had been since done, or omitted, on both sides, was that in due time the right of suit had become barred under the first Limitation Act.

Appasami Odayar v. *Subramanya Odayar* 26

3. ——— — **IX of 1871, sch. II, art. 15** :

See CIVIL PROCEDURE CODE, 1859, s. 46.

4. ——— **XV of 1877, ss. 4, 6, 14**—*Proceedings* bonâ fide *prosecuted in a Court without jurisdiction—Rent Recovery Act (Madras)—Act VIII of* 1865, *s.* 78—*Rent claimed by landlord not having tendered legal patta :*

A landlord not having tendered a legal patta to his tenant made a demand on him as for rent, and on his refusal to pay, attached his holding. The tenant, to release the attachment, paid the sum demanded under protest on 23rd September 1885. On 22nd March 1886 the tenant filed a suit on the small cause side of the District Munsif's Court to recover the amount so paid: that suit was dismissed for want of jurisdiction on 2nd September 1886. On the last-mentioned date the tenant filed the present suit on the same cause of action :—*Held*, (1) the suit was not barred by limitation under the six months' rule in s. 78 of the Rent Recovery Act by reason of the provisions of s. 14 of the Limitation Act, 1877; (2) the landlord not having tendered a legal patta was not in a condition to establish any right to recover rent directly or by way of set off.

Kullayappa v. *Lakshmipathi* 467

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5. ——— **s. 6, sch. II, arts. 12, 95**—*Revenue Recovery Act (Madras)—Madras Act II of* 1864, *s.* 59—*Suit to set aside a sale for arrears of revenue—Fraud—Limitation :*

Suit, in July 1885, to set aside a sale of land of the plaintiff, sold in July 1884 as if for arrears of revenue under Act II of 1864 (Madras), on the ground that the sale had been brought about by fraud and collusion between the purchaser and the village officers; the plaintiff had knowledge of the alleged fraud more than six months before suit :—*Held*, that the law of limitation applicable to the case was s. 59 of Act II of 1864, and not art. 95 of the Limitation Act, and that the suit was therefore barred—*Venkatapathi* v. *Subramanya* (I.L.R., 9 Mad., 457) explained, *Baij Nath Sahu* v. *Lala Sital Prasad* (2 B.L.R., Full Bench, 1), and *Lala Mobaruk Lal* v. *The Secretary of State for India* (I.L.R., 11 Cal., 200) considered.

Venkata v. *Chengadu* 168

6. ——— **ss. 6, 14**—*Boundary Act*, 1860, *ss.* 21, 25, 28—*Appeal from decision of Boundary officer—Limitation—Award by Arbitrators—Irregular procedure :*

The appeal allowed by s. 28 of the Madras Boundary Act, XXVIII of 1860, is one from a decision recorded in the presence of the parties and duly intimated to them as required by s. 25 of the said Act. In 1883 a plaint, by way of appeal from a decision purporting to be passed under s. 25 of the Boundary Act, was presented to the Court of a District Munsif and returned on the ground that the subject-matter of the suit was beyond the jurisdiction of the said Court. The plaint was then filed in the District Court more than two months after the date, when the decision of the Boundary Settlement officer was communicated to the parties :—*Held*, that s. 14 of the Limitation Act, 1877, applied, and that the suit was not barred by limitation. The true construction of s. 6 of the Limitation Act, 1877, is that, save as to the period of limitation, the other provisions of the Act are applicable to cases governed by special and local laws of limitation. The omission by the Collector to pass a decision in accordance with an arbitrator's award and to furnish a copy to the parties as required by s. 21 of the Boundary Act is fatal to the award. The power given by s. 21 being a judicial power, a Collector must exercise his independent judgment and should not refer the award for acceptance to the Board of Revenue and Government, nor should he adjudicate when, as Agent to the Court of Wards, he represents one of the rival claimants.

Seshama v. *Sankara* 1

7. ——— **s. 14, exp. 1, sch. II, art. 11**—*Malabar Law—Decree against karnavan—Representative of tarwad :*

The karnavan and an anandravan of a Malabar tarwad were authorized by a karar to manage the affairs of the tarwad. A decree was obtained against them, and land belonging to the tarwad was attached and sold in execution. The plaint did not describe the defendants otherwise than by their individual names, but the plaintiff's claim was, *inter alia*, in respect of the breach of a contract by the defendants to put him into possession of certain land which was expressed to be "the jenm of the defendants' tarwad." It was found in the present suit that the amount decreed in the prior suit constituted a debt due by the tarwad :—*Held*, the decree and the execution sale did not bind the tarwad—*Daulat Ram* v. *Mehr Chand* (I.L.R., 15 Cal., 70) distinguished. This suit was brought on 8th August 1884 to declare that the sale in execution was not binding on the tarwad. The present plaintiffs being members of the tarwad intervened in execution of the decree, but their claim was dismissed on 5th September 1882. On the 27th September 1882 they filed a suit in the Court of the District Munsif, praying for the relief now sought. The District Munsif dismissed the suit on the ground that he had no jurisdiction. On appeal the District Judge made an order directing him

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to dispose of it, which he accordingly did, and he passed a decree against which an appeal was pending on 17th August 1883. But on the last-mentioned date the High Court set aside the order of the District Judge and directed him to ascertain the market-value of the land and make a fresh order, and the inquiry, directed by the High Court, did not terminate until 30th October 1883, when another order was made by the District Judge by which the original decision of the District Munsif was confirmed :—*Held*, that the prior suit terminated only on the 30th October 1883, and that the present suit was not barred, under Limitation Act, 1877, sch. II, art. 11.

Sankaran v. *Parvathi* 434

8. ——————, **sch. II, arts. 11, 13** :

See CIVIL PROCEDURE CODE, 1859, s. 46.

9. ——————, **sch. II, art. 75**—*Bond payable by instalments—Default in payment of an instalment—Waiver of a condition of forfeiture on default in payment of one instalment—Acceptance of an instalment overdue* :

A bond, payable by instalments, provided that if default was made in paying one instalment the whole debt should become due. The amount of the third instalment was paid five days after it became due. The Lower Court found that this payment was accepted by the obligee as a payment made on account or in satisfaction of the third instalment, and not as a mere part payment on reduction of the whole debt, and that the circumstances indicated an intention to waive the forfeiture though there was no express waiver :—*Held*, that the acceptance of the amount of the third instalment constituted a waiver within the meaning of art. 75 of sch. II of the Limitation Act, 1887.

Nagappa v. *Ismail* 192

10. ——————, **sch. II, arts. 120, 123**—*Executor* de son tort—*Suit for a share of Government promissory notes by an heir against one falsely professing to hold them under a will* :

Suit in 1887 by a daughter to recover her share of Government promissory notes, being stridhanam of her mother who died in 1880. The property in question had been in the possession of a son of the deceased since her death. He claimed the property under a will, but the will was set aside by the Court as false in 1884 :—*Held*, that Limitation Act, sch. II, art. 123, is applicable only to cases in which the defendant lawfully represents the estate of the deceased, and that the suit was accordingly barred by limitation.

Sithamma v. *Narayana* 487

11. ——————, **sch. II, art. 134**—*Suit to redeem by assignee of equity of redemption—Title purchased at execution sale* :

Suit, in 1885, by the assignee of the equity of redemption to redeem a mortgage of 1826. The mortgagees were put into possession under the mortgage and no interest was paid. In 1855, the mortgage premises were sold at a Court-sale in execution of a decree against the mortgagees as if they formed part of their family property, and the defendant derived title from the execution purchaser who had dealt with it as absolute owner :—*Held*, that the suit was barred under Limitation Act, 1877, sch. II, art. 134.

Muthu v. *Kambalinga* 316

12. ——————, **sch. II, art. 179**—*Appeal against part of decree—Execution against judgment-debtors whose interests were not sought to be affected by the appeal* :

In a suit for land against several defendants, plaintiff obtained, on 14th June 1884, a decree against the shares of defendants Nos. 3 and 4, the shares of defendants Nos. 5 and 9 being exonerated. The decree-holder appealed against that portion of the decree which exonerated the shares of defendants Nos. 5 and 9, defendants Nos. 3 and 4 being brought on to the record of the appeal as respondents. The appeal having been dismissed, the decree-holder applied on 20th October 1887 for execution against the shares of defendants Nos. 3 and 4 :—*Held*, the application for execution was barred by Limitation Act, 1877, sch. II, art. 179.

Muthu v. *Chellappa* 479

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LIS PENDENS :

See TRANSFER OF PROPERTY ACT, 1 AND 2.

MALABAR LAW—*Civil Procedure Code, s. 45—Suit for declaration—Multifariousness—Suit by junior members of tarwad* :

Suit by some of the junior members of a Malabar tarwad against the karnavan and the other members of the tarwad, and certain persons to whom some of the tarwad property had been alienated by the karnavan, for a declaration that the alienations were not binding on the tarwad :—*Held*, that the suit was not bad for multifariousness—*Vasudeva Shanbhaga* v. *Kuleadi Narnapai* (7 M.H.C.R., 290) followed.

Abdul v. *Ayaga* 234

2. ——————*Decree against karnavan—Representative of tarwad—Limitation Act*, 1877, *s.* 14, *exp.* 1, *sch. II, art.* 11 :

The karnavan and an anandravan of a Malabar tarwad were authorized by a karar to manage the affairs of the tarwad. A decree was obtained against them, and land belonging to the tarwad was attached and sold in execution. The plaint did not describe the defendants otherwise than by their individual names ; but the plaintiff's claim was, *inter alia*, in respect of the breach of a contract by the defendants to put him into possession of certain land which was expressed to be "the jenm of the defendants' tarwad." It was found in the present suit that the amount decreed in the prior suit constituted a debt due by the tarwad :—*Held*, the decree and the execution sale did not bind the tarwad—*Daulat Ram* v. *Mehr Chand* (I.L.R., 15 Cal., 70) distinguished. This suit was brought on 8th August 1884 to declare that the sale in execution was not binding on the tarwad. The present plaintiffs being members of the tarwad intervened in execution of the decree, but their claim was dismissed on 5th September 1882. On the 27th September 1882 they filed a suit in the Court of the District Munsif, praying for the relief now sought. The District Munsif dismissed the suit on the ground that he had no jurisdiction. On appeal the District Judge made an order directing him to dispose of it, which he accordingly did, and he passed a decree against which an appeal was pending on 17th August 1883. But on the last-mentioned date the High Court set aside the order of the District Judge and directed him to ascertain the market-value of the land and make a fresh order, and the enquiry, directed by the High Court, did not terminate until 30th October 1883, when another order was made by the District Judge by which the original decision of the District Munsif was confirmed :—*Held*, that the prior suit terminated only on the 30th October 1883, and that the present suit was not barred under Limitation Act, 1877, sch. II, art. 11.

Sankaran v. *Parvathi* 434

3. ——————*Karnavan, blindness a disqualification for the office of* :

Suit to remove the defendant from the office of karnavan of a Malabar tarwad. The defendant had become blind after occupying the office of karnavan for some years :—*Held*, that the defendant was not a fit person to be the karnavan of a tarwad and should be removed from his office.

Kanaran v. *Kunjan* 307

4. ——————*Karnavan, insufficient maintenance of junior members by—Suit by junior members living in a tarwad house apart from the karnavan* :

Suit by twelve junior members of a Malabar tarwad against the karnavan for arrears of maintenance. The plaintiffs lived in a tarwad house apart from the karnavan, who did not allege that this arrangement was contrary to his wishes, but pleaded that he provided for them adequately :—*Held*, that the plaintiffs were entitled to a decree for a reasonable amount by way of maintenance, in computing which allowance should be made for the income of the tarwad property in their possession—*Nallakandiyil Parvadi* v. *Chathu Nambiar* (I.L.R., 4 Mad., 169) followed.

Chekkutti v. *Pakki* 305

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5. ——— *Powers of karnavan—Delegation of powers of karnavan to his son,* ultra vires :

The karnavan of a Malabar tarwad having been sentenced to a term of imprisonment delegated to his son all his powers as karnavan pending the expiry of his sentence :—*Held,* that the delegation was *ultra vires* and void.

Chappan Nayar v. *Assen Kutti* 219

6. ——— ——— *Will—Testamentary dispositions of tarwad property by last surviving member of tarwad, valid :*

The last surviving member of a Malabar tarwad can make a valid testamentary disposition of the tarwad property.

Alami v. *Komu* 126

7. ——— *Kanam—Change in character of land—Passive acquiescence of landlord—Estoppel—Compensation for improvements by tenant :*

Land was demised on kanam for wet cultivation. The demisee changed the character of the holding, by making various improvement which were held to be inconsistent with the purpose for which the land was demised. On a finding that the landlord had stood by while the character of the holding was being changed and had thereby caused a belief that the change had his approval :—*Held,* on second appeal, that the demisee was entitled to compensation for his improvements on redemption of the kanam.—*Ramsden* v. *Dyson* (L.R., 1 H. L., 129) followed.

Kunhammed v. *Narayanan Mussad* 320

MOFUSSIL SMALL CAUSE COURT ACT, s. 6—*Civil Procedure Code,* s. 586—*Suit against sons of Hindu debtor, on a bond executed by father, not cognizable by Small Cause Court—Hindu law—Liability of son for debt of living father :*

In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's sons defendants along with their father, and a decree was passed against the father and sons jointly for payment of the debt :—*Held,* by the Full Bench that the suit as against the sons was not a suit of the nature cognizable in Court of Small Causes within the meaning of s. 586 of the Code of Civil Procedure :—*Held,* further, by the Divisional Bench that the decree against the sons was bad.

Narasinga v. *Subba* 139

MORTGAGE :

See TRANSFER OF PROPERTY ACT, 3, 4 & 5.

MUHAMMADAN LAW—*Canarese Navayats—Jurisdiction—Withdrawal of part of claim—Common management of family property—Sale of an undivided share—Limitation—Burden of proving validity of sale by a gosha woman :*

Suit for partition and possession of an undivided share of property sold to plaintiff by an aged gosha lady of the class of Canarese Muhammadans called Navayats. The property sold was the vendor's share as heiress of her father, brother and sister, who died in 1856, 1866 and 1871, respectively; but it appeared that the property of the family had been in the possession of one managing member since 1856. The plaintiff, during the suit, withdrew his claim against that part of the immovable property in suit which was within the local limits of the jurisdiction of the Court, having compromised with the defendants who had it in their possession, and pursued his claim against the other immovable property and obtained a decree. On appeal :—*Held,* (1) that the suit was not barred by limitation ; (2) that the withdrawal of the claim with regard to the property situated within the local limits of the jurisdiction of the Court (the compromise not having been shown to be otherwise than *bonâ fide*) did not operate to take away the jurisdiction of the Court to adjudicate on the plaintiff's suit; (3) that the plaintiff having discharged the burden of proving that the conveyance to him was voluntarily executed and that the transaction evidenced by it was real and *bonâ fide,* the conveyance was operative.

Khatija v. *Ismail* 380

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2. ——— *Divorce :*

Under Muhammadan law no special expressions are necessary to constitute a valid divorce, nor, except when the repudiation is final, need the words be repeated thrice. If the divorce pronounced is liable to be, but is not, revoked within the period of iddut, it becomes final.

Ibrahim v. *Syed Bibi* 63

NOTICE, bonâ fide *purchase without—Lien on land created by agreement—Sale to stranger—Purchaser bound :*

D. mortgaged certain land to S. to secure repayment of a loan, and covenanted that in a certain event S. might realize the money from the house of D. D. sold his house to C., who purchased without notice of the covenant :—*Held,* that C. could not resist the claim of S. to have the house sold under the covenant.

Cooling v. *Saravana* 69

2. ——— *Registration Act—Act III of* 1877, *s.* 17 (*c*)—*Unregistered agreement by mortgagor to sell to mortgagee—Subsequent assignment of equity of redemption to third person for value, but with notice of agreement :*

In a suit for redemption filed by an assignee for value of the equity of redemption against a mortgagee in possession, it was found that the mortgagor had agreed with the defendant to sell the mortgage premises to him, that part of the purchase-money had been acknowledged as paid, and that the balance had been tendered in pursuance of the agreement. It was further found that the plaintiff had taken his assignment with notice of the above agreement and tender. The agreement was in writing, but not registered :—*Held,* that though the agreement was not admissible in evidence as creating an interest in land, still it might be used for the purpose of obtaining specific performance, and the plaintiff having purchased the equity of redemption with notice as above was not entitled to redeem. *Per cur.*—The plaintiff having knowledge of the agreement was put upon inquiry to ascertain whether the tender had been made and whether there was any objection to his purchase on that ground.

Adakkalam v. *Theethan* 505

And see TRANSFER OF PROPERTY ACT, 4 and 5.

3. ——— **TO QUIT :**

See LANDLORD AND TENANT, 1.

OATHS ACT—ACT X OF 1873, s. 9—*Civil Procedure Code,* s. 462—*Consent by guardian of a minor defendant to accept the oath of the plaintiff :*

It was agreed by the defendants who were majors and by the father and guardian of a minor defendant on his behalf, that one of the issues in a suit should be determined under Oaths Act, s. 9, by the oath of the plaintiff. The oath was taken and a decree was passed accordingly :—*Held,* that the minor defendant was bound by the consent of his guardian since there was no evidence of fraud or gross negligence on the part of the latter, although the Court had not sanctioned the agreement under s. 462, Civil Procedure Code.

Chengalreddi v. *Venkatareddi* 483

OFFICIAL TRUSTEES' ACT—*Civil Procedure Code,* ss. 2, 268, 272—*Official Trustees' Act* (*XVII of* 1864)—*Public officer—Attachment by notice :*

A decree against a married woman provided that the amount due under it should be payable out of the separate estate of the judgment-debtor. The judgment-debtor was entitled to a life-interest in certain trust funds under a settlement of which the Official Trustee was the trustee. The decree-holder proceeded to execute his decree against the life-interest of the judgment-debtor by notice to the Official Trustee under s. 272 of the Code of Civil Procedure, but there were no funds in the hands of the Official Trustee which would have been attachable under s. 268. The decree-holder now applied that the life-interest might be sold :—*Held,* that the interest of the judgment-debtor was not validly attached. *Semble.*—The Official Trustee is a public officer within the meaning of s. 2 of the Civil Procedure Code.

Abdul Lateef v. *Doutre* 250

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PARENT AND CHILD—*Interference with natural rights for the benefit of the child—Equity and good conscience :*

Plaintiff, a Brahman widow, sued to recover her illegitimate infant child from defendant, to whom she had entrusted it since its birth for nurture :—*Held*, that it being proved that the plaintiff was leading an immoral life, the suit was rightly dismissed.

Venkamma v. *Savitramma* 67

PARTIES—*Execution of decree determining rights of rival religious sects—Decree, whether executory or declaratory—Limitation—How far a sect bound by decree against some of its members :*

In a suit determined in 1840, in which various members of the Vadagalai sect residing in a certain village were plaintiffs and various members of the Tengalai sect residing in the same village were defendants, it was held that an image of a priest revered by the latter sect was not entitled to a place in a certain temple of the village, or to public worship in a certain street, or to procession in the streets of the village; and it was directed that, if the defendants continued to make the image an object of public worship, it should be removed. In 1888 various members of the Vadagalai sect, asserting that the members of the Tengalai sect had acted in contravention of the decree in the above suit, filed an execution-petition therein, praying that various members of the Tangalai sect be arrested, and "that the image of their priest, which they attempt to worship publicly, be removed until they obey the terms of the decree." It appeared that, in 1868, the District Magistrate had granted an application to restrain the Tengalais from acting contrary to the above decree. The execution-petition was dismissed by the District Court :—*Held*, the petition was rightly dismissed, since the execution of the decree was barred by limitation, and the decree, if it was capable of execution at all, could not be executed against the parties to the present petition.

Sadagopachari v. *Krishnamachari* 356

PENAL CODE, ss. 71, 72 36

2. ————, s. 84—*Plea of insanity in criminal cases—Legal test of responsibility in cases of alleged unsoundness of mind :*

The accused stabbed a child (his brother's wife) with a sword and killed her. He was charged with murder, and plea of insanity was set up at the trial. No motive could be assigned for his attack on the child, in which he persisted in the presence of other persons: and it appeared that he had been in the habit of treating the child kindly and affectionately. He was suffering from fever and want of food at the time, and the medical evidence showed it was possible that the act was committed under a sudden attack of homicidal mania. It was in evidence that he had abused some of his relations a short time before,—the abuse being probably due to irritability of mind caused by fever. He confessed the crime to the Village Magistrate and answered questions put to him rationally, but before the committing Magistrate and the Sessions Judge he denied that he had killed the child. He was convicted of murder :—*Held*, that as the accused was not proved to have been by reason of unsoundness of mind incapable of knowing the nature of his act or that he was doing what was wrong or contrary to law, the conviction was right—*Queen-Empress* v. *Lakshman Dagdu* (I.L.R., 10 Bom., 512) approved.

Queen-Empress v. *Venkatasami* 459

3. ————, ss. 95, 477—*Destruction of a valuable security—Unstamped document purporting to be a valuable security—Act causing slight harm :*

A., having had certain transactions with B., wrote out a rough account showing his indebtedness to B. and signed the total. The paper was not stamped. B. afterwards presented it to A. and demanded payment of the total amount. A paid part only and after an altercation tore up the paper :—*Held*, that the act of tearing up the paper constituted the offence of destroying a valuable security, and the harm caused was such that a person of ordinary sense and temper would complain of it.

Queen-Empress v. *Ramasami* 143

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4. ————, s. 154—*Disobedience to lawful order of public officer—Summons by Revenue officer to give evidence in pauperism inquiry—Act III of* 1869 (*Madras*)—*Standing Order of Board of Revenue* (*Madras*), *No.* 48*a.* :

The accused, who were parties to a petition pending in a District Court, were summoned by a tahsildar to give evidence on an inquiry by him as to whether or not the petitioner was a pauper; they omitted to attend on the summons, and were charged in respect of such non-attendance under s. 174 of the Indian Penal Code and were convicted :—*Held*, the conviction was bad, the tahsildar not being authorized to issue the summons under Act III of 1869 (Madras).

Queen-Empress v. *Varathappa Chetti* 297

5. ————, ss. 181, 182—*Examination on affirmation of one preferring a criminal appeal—Verification of petition of appeal—Criminal Procedure Code, ss.* 342, 428, 540 ;

In a petition of appeal from a conviction, the appellant falsely stated that the convicting Magistrate declined to summon his witnesses. The Magistrate to whom the appeal was preferred called upon the appellant to verify the allegations in the petition of appeal on solemn affirmation, and he did so :—*Held*, that the appellant had not committed an offence under s. 181 or 182 of the Penal Code.

Queen-Empress v. *Subbayya* 451

6. ————, s. 188—*Criminal Procedure Code, ss.* 133, 134, 135, 136—*Service of notice of orders under s.* 133 :

A Magistrate made an order under s. 133 of the Code of Criminal Procedure requiring N. to fence a certain well in a public street or to appear before him and move to have the order set aside; a copy of this order was affixed to the house of N., but he did not appear. The Magistrate then adopted the procedure prescribed by ss. 136, 140, and made an order requiring N. to fence the well by a certain date. N. who was personally served with notice of the above order did not comply with it. The Magistrate then sanctioned the prosecution of N. under s. 188 of the Penal Code. N. appeared and produced evidence to prove that he was not liable to fence the well :—*Held*, that the accused was guilty of the offence of disobedience to an order duly promulgated by a public servant and was not entitled to go behind the order and show that it was one which ought not to have been made. The mode of service of notice of an order under s. 133 considered.

Queen-Empress v. *Narayana* 475

7. ————, s. 304*a*—*Causing death by a criminal act :*

Where death is caused by an act being in its nature criminal, s. 304*a* of the Indian Penal Code has no application.

Queen-Empress v. *Damodaran* 56

8. ————, ss. 372, 373—*Code of Criminal Procedure, ss.* 234 *and* 537—*Obtaining a minor for prostitution—Dancing girl caste—Adoption—Misjoinder of charges—Immaterial irregularity :*

A woman, being a member of the dancing girl caste, obtained possession of a minor girl and employed her for the purpose of prostitution; she subsequently obtained in adoption another minor girl from her parents, who belonged to the same caste. She and the parents of the second girl were charged together under ss. 372, 373 of the Penal Code. The charges related to both girls :—*Held*, (1) that the two charges should not have been tried together, but the irregularity committed in so trying them had caused no failure of justice; (2) that ss. 372, 373, of the Penal Code may be applicable in a case where the minor concerned is a member of the dancing girl caste. *Per* Muttusami Ayyar, J.—It would be no offence if the intention was that the girl should be brought up as a daughter, and that when she attains her age she should be allowed to elect either to marry or follow the profession of her prostitute mother.

Queen-Empress v. *Ramanna* 273

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9. ————, s. 403—*Criminal misappropriation—Intention, proof :*

R. was a Government servant, whose duty it was to receive certain monies and to pay them into the treasury on receipt. He admitted that he had retained two sums of money in his possession for several months when fearing detection he paid them into the treasury making a false entry at the time in his books with a view to avert suspicion. His explanation as to his reason for retaining the money was not credited by the Magistrate who convicted him of criminal misappropriation under s. 403 of the Indian Penal Code :—*Held*, that the conviction was right.

Queen-Empress v. *Ramakrishna* 49

10. ————, ss. 415, 419, 463—*Cheating by personation—Forgery :*

A. falsely represented himself to be B. at a university examination, got a hall ticket under B.'s name, and headed and signed answer papers to questions with B.'s name :—*Held*, that A. committed the offences of forgery and cheating by personation.

Queen-Empress v. *Appasami* 151

11. ————, ss 417, 463, 464, 465, 511—*Forgery—False document—Fraudulent entry in a book of account :*

Prisoner was requested to make an entry in a book of account belonging to the complainant to the effect that he was indebted to the complainant in a certain sum found due on a settlement of accounts : instead of making this entry as requested, prisoner entered in a language not known to complainant that this sum had been paid to complainant. He was convicted of forgery under s. 465 of the Penal Code :—*Held*, that the offence was not forgery but an attempt to cheat.

Queen-Empress v. *Kunju Nayar* 114

12. ————, ss. 426, 477—*Destruction of promissory note—Offence not triable by Magistrate but by Sessions Court only :*

P.M. was convicted by a Magistrate under s. 426 of the Indian Penal Code on a charge of mischief by tearing up a promissory note for Rs. 20 :—*Held*, that the offence charged fell under s. 477 of the Penal Code and was therefore triable by a Sessions Court only.

Madurai, in re 54

PENSIONS ACT, 1871, s. 4—*Grant of villages enabling grantee to receive the land revenue :*

Suit to recover a moiety of two villages granted as a jaghir :—*Held*, that as the original grant was not of the freehold or full ownership in the soil, the suit was barred by s. 4 of the Pensions Act, 1871.

Rama v. *Subba* 98

PRACTICE—*Transfer of Property Act, s. 81—Marshalling—Creditors of coparcenary and separate creditors—Act XXVII of 1860—Adoptive son of deceased creditor—Parties to cross appeals :*

Suit by the adopted son of the obligee (deceased) of a hypothecation bond to recover principal and interest due on the bond against the land comprised in the hypothecation. Defendant No. 1, the obligor of the bond, had executed it as manager of a joint Hindu family, of which defendant No. 2 was a member, and for the rightful purposes of the family. The family subsequently became divided, and the hypothecated property was divided between defendants Nos. 1 and 2. Defendant No. 1 afterwards hypothecated part of his share for a private debt to defendant No. 3, who having sued on his hypothecation and brought the land to sale in execution became the purchaser. The District Munsif passed a decree for the plaintiff, against which defendants Nos. 2 and 3 preferred separate appeals, the plaintiff being the sole respondent to each appeal. The District Judge on appeal passed a decree directing that the plaintiff should first proceed against all the property which was not subject to the hypothecation to defendant No. 3 including the share of defendant No. 2. Defendant No. 2 preferred a second appeal joining all the other parties :—(1) *Held*, that the plaintiff was under no obligation to obtain a certificate

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under Act XXVII of 1860 for the purpose of maintaining the suit ; (2) that as the plaintiff and defendant No. 3 were not creditors of the same person having demands against the property of that person, no case for marshalling arose, and consequently that the direction of the District Judge was wrong. *Per cur.*—Though both defendants Nos. 2 and 3 preferred separate appeals from the original decree, they only made the plaintiff respondent, and defendant No. 3 omitted to make the appellant before us (defendant No. 2) a party to his appeal, but the relief prayed for in each appeal was that the original decree might be set aside so far as it was in plaintiff's favor and against each appellant . . . . . Having regard to the relief claimed . . . . . we see no reason to hold that the appellant before us was a necessary party to the appeal preferred by defendant No. 3.

Gopala v. *Saminathayyan* 255

PROVINCIAL SMALL CAUSE COURT ACT, sch. II, art. 41—*Civil Procedure Code, s. 586—Suit for contribution—Joint property :*

Lands of which part belonged to the plaintiffs and part to the defendant were comprised in a patta which ran in the names of the plaintiffs and another. The defendant's share of the assessment fell into arrear and was collected from the plaintiffs who now sued to recover Rs. 200 being the amount so paid together with interest :—*Held*, the suit was of a nature cognizable by a Court of Small Causes, and so no second appeal lay—*Krishno Kamini Chowdhrani* v. *Gopi Mohun Ghose Hazra* (I.L.R., 15 Cal., 652) followed.

Srinivasa v. *Sivakolundu* 349

REFORMATORY SCHOOLS ACT, 1876, ss. 2, 7 94

REGISTRATION ACT—ACT III OF 1877, s. 17 (*c*)—*Unregistered agreement by mortgagor to sell to mortgagee—Subsequent assignment of equity of redemption to third person for value, but with notice of agreement :*

In a suit for redemption filed by an assignee for value of the equity of redemption against a mortgagee in possession, it was found that the mortgagor had agreed with the defendant to sell the mortgage premises to him, that part of the purchase-money had been acknowledged as paid and that the balance had been tendered in pursuance of the agreement. It was further found that the plaintiff had taken his assignment with notice of the above agreement and tender. The agreement was in writing, but not registered :—*Held*, that though the agreement was not admissible in evidence as creating an interest in land, still it might be used for the purpose of obtaining specific performance, and the plaintiff having purchased the equity of redemption with notice as above was not entitled to redeem. *Per cur.*—The plaintiff having knowledge of the agreement was put upon inquiry to ascertain whether the tender had been made and whether there was any objection to his purchase on that ground.

Adakkalam v. *Theethan* 505

2. ————————————, s. 78—*Priority of mortgages—Gross negligence—Transfer of Property Act.*

A mortgagee at the request of the mortgagors returned to them their certificate of title to the mortgage premises to enable them to raise money to pay off his mortgage. This mortgage was duly registered. The mortgagors, who remained in possession of the mortgage premises throughout, having shown the certificate to a third person whom they informed of the existence of the first mortgage, and borrowed Rs. 400 from him, subsequently informed him that the first mortgage was paid off, delivered the certificate to him, and executed to him a mortgage of the same premises to secure the sum of Rs. 400, and a further sum of Rs. 800 :—*Held*, that though the second mortgagee had been wanting in caution, yet since he had been thrown off his guard by the conduct of the first mortgagee, in returning to the mortgagors their certificate of title, the second mortgagee was entitled to priority in respect of his security over the first mortgagee.

Damodara v. *Somasundara* 429

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3. ——————, **ss. 34, 35, 41**—*Criminal Procedure Code, s.* **195**—*Sanction to prosecute—Forged document—Registered by Sub-Registrar :*

A mortgagor was charged with making a fraudulent alteration in his mortgage-deed which was then registered by a Sub-Registrar :—*Held*, that the sanction of the Sub-Registrar was not necessary for a prosecution on a charge of forgery—*Venkatachala* in re (I.L.R., 10 Mad., 154), *Queen-Empress* v. *Subba* (I.L.R., 11 Mad., 3) explained.

Queen-Empress v. *Sobhanadri* 201

REGULATION XXV OF 1802 (MADRAS), s. 11 :

See KARNAM.

2. ——————— **XXIX OF 1802 (MADRAS), ss. 5, 7, 10, 16, 28 :**

See KARNAM.

3. ——————— **V OF 1804 (MADRAS) :**

See ACT XIX OF 1841.

4. ——————, **s. 20 :**

See REVENUE RECOVERY ACT (MADRAS).

RELIGIOUS ENDOWMENTS ACT—ACT XX OF 1863, ss. 3, 4, 11, 12—*Suit by member of a temple committee, burden of proof—Form of decree :*

Suit by the members of a temple committee appointed under Act XX of 1863 against one claiming to be the hereditary trustee of a Hindu temple for possession of certain temple property, for a declaration of their right to receive certain annual dues and for a perpetual injunction restraining defendant from interfering with those dues :—*Held*, the burden of proving that the temple was of the class mentioned in s. 3 of Act XX of 1863 lay on the plaintiffs. On its appearing that the defendants' ancestor was not the founder of the temple but was appointed trustee by the Government, as also were his successors in the office of trustee, of whom all were not members of his family :—*Held*, (1) the plaintiffs were entitled to a decree declaring the temple in dispute to be of the class mentioned in Act XX of 1863, s. 3, and as such, subject to their jurisdiction ; (2) the plaintiffs were not entitled under Act XX of 1863, ss. 4, 11 and 12, to be put in possession of the property of the temple or in receipt of its income.

Ponduranga v. *Nagappa* 366

RENT RECOVERY ACT (MADRAS)—*Cause of action—Suit to cancel patta :*

Plaintiff sued in a Civil Court to cancel a patta which he alleged was incorrect and fraudulently antedated by the defendant with a view to prevent plaintiff from taking steps to cancel it in a revenue court : a copy of the patta had been affixed to plaintiff's house :—*Held*, that the plaintiff had no cause of action cognizable by a Civil Court.

Nurdin v. *Alavudin* 134

2. ——————— *Suit in Civil Court to enforce exchange of patta and muchalka—Declaratory decree—Civil Procedure Code, s.* 53—*Amendment of plaint :*

A suit in the Court of a District Munsif to enforce acceptance of a patta and execution of a muchalka by defendant in respect of a holding in a village to which plaintiff claimed title, was dismissed as not being maintainable :—*Held*, that the suit should not have been dismissed, but the plaint should have been amended by the addition of a prayer for a declaration of the plaintiff's title : and that the Court then would have had jurisdiction to grant by way of consequential relief the relief originally sought.

Narasimma v. *Suryanarayana* 481

3. ——————, **ss. 7, 9, 39**—*Copy of patta—Tender :*

A landholder tendered to his tenant a notice stating that his patta, of which the particulars were given, had been prepared and calling on him to

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come within a month to the zamin cutcherry to fetch the patta and execute the muchalka :—*Held*, that there was sufficient tender of a patta to support a suit under s. 9 of the Madras Rent Recovery Act.

Maruthappa v. *Krishna* 253

4. ——————, **s. 17**—*Attachment and sale of the tenants' interest in the land for arrears of rent :*

When default has been made in the payment of rent and the saleable interest of the defaulting tenant in the land is attached, the attachment cannot be declared invalid in a summary suit, under s. 17 of the Rent Recovery Act. Under s. 38 of the same Act, a landlord cannot attach the saleable interest of a defaulting tenant in the land, until the expiry of the current revenue year.

Thayamma v. *Kulandavelu* 465

5. ——————, **s. 78**—*Limitation Act—Act XV of* 1877, *ss.* 4, 6, 14—*Proceedings* bonâ fide *prosecuted in a Court without jurisdiction—Rent claimed by landlord not having tendered legal patta :*

A landlord not having tendered a legal patta to his tenant made a demand on him as for rent, and, on his refusal to pay, attached his holding. The tenant, to release the attachment, paid the sum demanded under protest on 23rd September 1885. On 22nd March 1886 the tenant filed a suit on the small cause side of the District Munsif's Court to recover the amount so paid : that suit was dismissed for want of jurisdiction on 2nd September 1886. On the last-mentioned date the tenant filed the present suit on the same cause of action :—*Held*, (1) the suit was not barred by limitation under the six months' rule in s. 78 of the Rent Recovery Act by reason of the provisions of s. 14 of the Limitation Act, 1877 ; (2) the landlord not having tendered a legal patta was not in a condition to establish any right to recover rent directly or by way of set off.

Kullayappa v. *Lakshmipathi* 467

REPRESENTATION :

See PARTIES.

RES JUDICATA :

Certain land was attached and sold in execution of a decree against the dharmakarta of a devasthanam. One claiming to be the lawful successor in office of the judgment-debtor now sued the purchaser for a declaration that the sale was invalid :—*Held*, the suit should not be dismissed on proof that the plaintiff had failed to obtain a declaration of his right to the dharmakartship against another claimant to the office, in a suit to which the present defendant was not a party.

Ramalingam v. *Thirugnana Sammandha* 312

2. ——————— *Civil Procedure Code, s.* 13—*Previous suit dismissed as premature :*

A suit by the assignee of a mortgage bond against the mortgagor was dismissed on the ground that the plaintiff was not entitled to sue for want of notice to the defendant under s. 132 of the Transfer of Property Act. The plaintiff then gave express notice of the assignment to the mortgagor and sued on the bond again :—*Held*, the claim was not *res judicata*, and the second suit was accordingly not precluded by s. 13 of the Code of Civil Procedure.

Ramireddi v. *Subbareddi* 500

REVENUE RECOVERY ACT (MADRAS), ACT II OF 1864, ss. 25, 27—*Regulation V of* 1804, *s.* 20—*Notice on minor defaulter—Irregularity in revenue sale :*

A mitta consisting of an unsurveyed village, of which the plaintiffs (minors) were the registered proprietors of an undivided moiety, was brought to sale for arrears of kist and was purchased for the plaintiffs by their guardian, duly appointed under Regulation V of 1804, s. 20. The sale was subsequently cancelled ; and further arrears having accrued, the mitta was attached again. Before the second attachment took place, the guardian died, and no

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one having been appointed to succeed him, though an application was made to the Court for that purpose, a written demand under Revenue Recovery Act, s. 25, was tendered to the plaintiffs' mother and affixed to the wall of the house on 17th January, and notice under s. 27 was served on 17th February. The sale took place in September and defendant No. 2 became the purchaser. It was admitted that a division of the village was impracticable. In a suit by the plaintiffs by their mother and next friend to set aside the sale:—*Held*, since service of a demand upon the defaulter is an essential preliminary to sale, the sale was invalid so far as the share of the plaintiffs was concerned, and the sale, as a whole, was vitiated by the irregularity.

Mekaperuma v. *The Collector of Salem* 445

2. ——————, **s. 59**—*Limitation Act, s. 6, sch. II, arts.* 12, 95—*Suit to set aside a sale for arrears of revenue—Fraud—Limitation:*

Suit, in July 1886, to set aside a sale of land of the plaintiff, sold in July 1884 as if for arrears of revenue under Act II of 1864 (Madras), on the ground that the sale had been brought about by fraud and collusion between the purchaser and the village officers; the plaintiff had knowledge of the alleged fraud more than six months before suit:—*Held*, that the law of limitation applicable to the case was s. 59 of Act II of 1864 and not s. 95 of the Limitation Act, and that the suit was therefore barred—*Venkatapathi* v. *Subramanya* (I.L.R., 9 Mad., 457) explained; *Baij Nath Sahu* v. *Lala Sital Prasad* (2 B.L.R., Full Bench, 1), and *Lala Mobaruk Lal* v. *The Secretary of State for India* (I.L.R., 11 Cal., 200) considered.

Venkata v. *Chengadu* 168

SPECIFIC RELIEF ACT, s. 12—*Civil Procedure Code, s. 53—Amendment of plaint—Suit to declare alienation by Hindu widow invalid—Death of widow pending appeal by plaintiff—Right of appellant to proceed with appeal—Plaint not to be amended by claim for possession:*

The proviso to s. 42 of the Specific Relief Act that "no Court shall pass a declaratory decree where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so" refers to the position of plaintiff at the date of suit: where a suit was brought for a declaration that certain alienations of land made by a Hindu widow to the defendants were not binding on plaintiff, her reversionary heir, and pending appeal by the plaintiff, the widow died:—*Held*, (1) that the plaintiff was entitled to proceed with his appeal; (2) that plaintiff could not be permitted to amend his plaint and claim possession.

Govinda v. *Perumdevi* 136

STAMP ACT, s. 3 (11)—*Instrument professing to effect a partition* ultra vires *of the executants—Instrument of partition:*

Persons incorrectly purporting to be co-owners of certain property agreed to divide it in severalty by written documents:—*Held*, that the arrangement fell within the definition of "instrument of partition" in the Stamp Act, 1879.

Reference under Stamp Act, s. 46 198

2. ——————, **s. 37 (b), ss. 40, 61, 63**—*Prosecution for attempt to defraud Government by understating the value of property in a partition deed:*

A District Judge impounded a partition deed produced before him and forwarded it to the Collector under s. 35 of the Stamp Act, 1879, being of opinion that the executant of the deed had committed an offence under s. 63. The Collector under s. 69 sanctioned the prosecution of the executant who was convicted by the Magistrate of an offence under s. 63 of the Act. On appeal the Sessions Court acquitted him on the ground that the Collector had not complied with s. 37 (*b*) or s. 40 of the Act:—*Held*, that the Collector was wrong—*Empress* v. *Dwarkanath Chowdhry* (I.L.R., 2 Cal., 399); *Empress* v. *Soddanund Mahanty* (I.L.R., 8 Cal., 259); *Empress* v. *Janki* (I.L.R., 7 Bom., 82) considered.

Queen-Empress v. *Venkatrayadu* 231

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3. ——————, **sch. I, arts. 25, 36**—*Declaration of trust—Gift:*

Where a donee was directed in an instrument of gift of certain land to maintain the donor out of the profits of the land:—*Held*, that the instrument was liable to stamp duty as a gift and not as a declaration of trust.

Reference under Stamp Act, s. 46 89

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, s. 52—Lis pendens—*Partition suit—Decree by consent:*

Pending a suit for partition of land, &c., two of the parties to the suit sold part of the land in question to a stranger who was not brought on to the record. After the execution of the sale-deed the parties to the suit entered into a compromise and a decree was passed by consent accordingly. In a suit by the purchaser for possession of the land sold to him:—*Held*, the purchaser was not bound by the decree passed by consent.

Vythinadayyan v. *Subramanya* 439

2. ——————, **s. 52**—Lis pendens—*When a suit becomes contentious—Priority of registered mortgage:*

As soon as the filing of the plaint is brought to the notice of the defendant, the proceeding becomes contentious, and any alienation subsequent to that is subject to the doctrine of *lis pendens*. A mortgage was executed on 25th June and was registered. On the same day, a prior mortgagee filed a suit against the mortgagors on an unregistered mortgage of the same land: he obtained a decree and attached the mortgage property:—*Held*, that the registered mortgagee was entitled to priority and his mortgage was not affected by the rule of *lis pendens*.

Abboy v. *Annamalai* 180

3. ——————, **s. 67 (a)**—*Usufructuary mortgage—Remedy of mortgagee:*

A usufructuary mortgagee is not entitled, in the absence of a contract to that effect, to sue for sale of the mortgage property. *Semble.*—The construction placed on s. 67 (*a*) of the Transfer of Property Act, 1882, in *Venkatasami* v. *Subramanya* (I.L.R., 11 Mad., 88) that a usufructuary mortgagee can sue either for foreclosure or for sale but not for one or other in the alternative is wrong.

Chathu v. *Kunjan* 109

4. ——————, **s. 78**—*Priority of mortgages—Gross negligence—Estoppel—Agency:*

On the 20th of February 1888, defendant No. 1 executed a mortgage in favor of the plaintiff Company. Defendants Nos. 2 and 3 bound themselves as sureties for the due payment of the mortgage amount, on default by the mortgagor. This mortgage had not been registered at the date of the execution of the mortgages next referred to. On the 27th of April 1888, the Secretary of the plaintiff Company handed over to defendant No. 1 most of the title-deeds which had been delivered to the plaintiff Company on the execution of the mortgage, and defendants Nos. 1 and 3 undertook that they would raise a loan thereon and discharge the debt due to the plaintiff, or return the title deeds if they failed in raising the loan. On the 20th April 1888 defendant No. 1 deposited the title-deeds with defendant No. 4 and executed a mortgage to her for Rs. 4,000; and on the 7th May 1888, he executed an instrument creating a further charge in her favor for Rs. 1,000. These two sums were applied by defendant No. 1 to his own use, and not in discharge of the prior mortgage. The mortgages to defendant No. 4 described the mortgage premises as being then free from incumbrances:—*Held*, that the plaintiff Company had been guilty of gross negligence in letting the title-deeds out of their possession and that the mortgages of defendant No. 4 had accordingly priority over the mortgage to the plaintiff Company.

Madras Hindu Union Bank v. *C. Venkatrangiah* 424

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5. ——————————, s. 78—*Priority of mortgages —Gross negligence—Registration :*

A mortgagee at the request of the mortgagors returned to them their certificate of title to the mortgage premises to enable them to raise money to pay off his mortgage. This mortgage was duly registered. The mortgagors, who remained in possession of the mortgage premises throughout, having shown the certificate to a third person whom they informed of the existence of the first mortgage, and borrowed Rs. 400 from him, subsequently informed him that the first mortgage was paid off, delivered the certificate to him, and executed to him a mortgage of the same premises to secure the sum of Rs. 400, and a further sum of Rs. 800 :—*Held*, that though the second mortgagee had been wanting in caution, yet since he had been thrown off his guard by the conduct of the first mortgagee, in returning to the mortgagors their certificate of title, the second mortgagee was entitled to priority in respect of his security over the first mortgagee.

Damodara v. *Somasundara* 429

6. ——————————, s. 81—*Marshalling—Contribution—Creditors of coparcenary and separate creditors—Act XXVII of* 1860—*Adoptive son of deceased creditor—Practice—Parties to cross appeals :*

Suit by the adoptive son of the obligee (deceased) of a hypothecation bond to recover principal and interest due on the bond against the land comprised in the hypothecation. Defendant No. 1, the obligor of the bond, had executed it as manager of a joint Hindu family, of which defendant No. 2 was a member, and for the rightful purposes of the family. The family subsequently became divided, and the hypothecated property was divided between defendants Nos. 1 and 2. Defendant No. 1 afterwards hypothecated part of his share for a private debt to defendant No. 3, who having sued on his hypothecation and brought the land to sale in execution became the purchaser. The District Munsif passed a decree for the plaintiff, against which defendants Nos. 2 and 3 preferred separate appeals, the plaintiff being the sole respondent to each appeal. The District Judge on appeal passed a decree directing that the plaintiff should first proceed against all the property which was not subject to the hypothecation to defendant No. 3, including the share of defendant No. 2. Defendant No. 2 preferred a second appeal joining all the other parties :—(1) *Held*, that the plaintiff was under no obligation to obtain a certificate under Act XXVII of 1860 for the purpose of maintaining the suit ; (2) that as the plaintiff and defendant No. 3 were not creditors of the same person having demands against the property of that person, no case for marshalling arose, and consequently that the direction of the District Judge was wrong. *Per cur.*—Though both defendants Nos. 2 and 3 preferred separate appeals from the original decree, they only made the plaintiff respondent, and defendant No. 3 omitted to make the appellant before us (defendant No. 2) party to his appeal, but the relief prayed for in each appeal was that the original decree might be set aside so far as it was in plaintiff's favor and against each appellant . . . . . Having regard to the relief claimed . . . . . we see no reason to hold that the appellant before us was a necessary party to the appeal preferred by defendant No. 3.

Gopala v. *Saminadayyan* 255

7. ——————————, s. 99—*Hindu law—Personal decree against managing member of joint family not impleaded as such—Effect of sale in execution of such decree—Sale of mortgage property in execution of decree on a money bond for interest due on the mortgage :*

The managing member of a joint Hindu family executed in 1878 a mortgage on certain lands, the property of the family, to secure a debt incurred by him for family purposes, and in 1881 he together with his brother executed to the mortgagee a money bond for the interest then due on the mortgage. In 1882 the mortgagee brought a suit on the money bond and having obtained a personal decree against the two brothers merely, brought to sale in execution part of the mortgaged property which was purchased by a third person :—*Held*, that the sale did not convey the interest of another undivided brother who was not a party to the decree :—*Held, further* per *Kernan, J.*, that the sale in execution was invalid under Transfer of Property Act, s. 99.

Sathuvayyan v. *Muthusami* 325

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VILLAGE PROPERTY—*As to what was the common property of a village, viz., a tank—Inability of any of the co-proprietors to exclude the rest from contributing to repair it :*

A village tank, on the site of an ancient one, was the common property of, and used by, all the inhabitants, of whom one family on the ground of improvements and additions made by their ancestor with the general acquiescence of the village claimed, against the rest, the exclusive right of repairing the tank at their own cost. But no corresponding obligation on the plaintiffs to repair was shown ; and from the evidence, including that afforded by a compromise made in 1842, it appeared that the repairs were to be effected by a common collection made through the person in management, who was to account for his receipts and expenses :—*Held*, that it was equally at the option of the rest of the villagers either to permit the repairs to be done by the plaintiffs, or to insist on the work being done at the common cost, the tank remaining the common possession of the village, and no class of the villagers having any right to exclude the rest from contributing to the repairs.

Sivaraman Chetti v. *Muthaya Chetti* 241

THE

INDIAN LAW REPORTS,

Madras Series.

APPELLATE CIVIL.

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

SESHAMA (DEFENDANT), APPELLANT,

and

SANKARA (PLAINTIFF), RESPONDENT.*

1888. February 6. April 20.

Boundary Act, 1860, *ss.* 21, 25, 28—*Limitation Act*, 1877, *ss.* 6, 14—*Appeal from decision of Boundary officer—Limitation—Award by Arbitrators—Irregular procedure.*

The appeal allowed by s. 28 of the Madras Boundary Act, XXVIII of 1860, is one from a decision recorded in the presence of the parties and duly intimated to them as required by s. 25 of the said Act.

In 1883 a plaint, by way of appeal from a decision purporting to be passed under s. 25 of the Boundary Act, was presented to the Court of a District Munsif and returned on the ground that the subject-matter of the suit was beyond the jurisdiction of the said Court. The plaint was then filed in the District Court more than two months after the date when the decision of the Boundary Settlement officer was communicated to the parties :

Held, that s. 14 of the Limitation Act, 1877, applied, and that the suit was not barred by limitation.

The true construction of s. 6 of the Limitation Act, 1877, is that, save as to the *period* of limitation, the other provisions of the Act are applicable to cases governed by special and local laws of limitation.

The omission by the Collector to pass a decision in accordance with an arbitrator's award and to furnish a copy to the parties as required by s. 21 of the Boundary Act is fatal to the award.

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* Appeal No. 7 of 1885.

SESHAMA v. SANKARA.

The power given by s. 21 being a judicial power, a Collector must exercise his independent judgment and should not refer the award for acceptance to the Board of Revenue and Government, nor should he adjudicate when, as agent to the Court of Wards, he represents one of the rival claimants.

APPEAL against the decree of D. Buick, Acting District Judge of North Arcot, in Original Suit No. 22 of 1883.

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

Mr. *Powell* and *Parthasaradhi Ayyangar* for appellant.

Mr. *Subramanyam* for respondent.

JUDGMENT.—The appellant is the palayagar of Bangari and the respondent is the zamindar of Punganur in the District of North Arcot. Both the Bangari palayam and the zamindari of Punganur are permanently-settled estates and they are in part contiguous to each other, the former lying to the east of the latter. The property in litigation consists of certain hills and jungles which lie between them and the contest is as to the estate in which they are included or as to the true boundary line between the two estates where the hills and jungles in dispute are situated.

The boundary in dispute is that between the villages Sarakal, Gurukuvaripalli and Chiltavaripalli, a hamlet of Sarakal in the Bangari palayam, and the villages of Bonamanda and Midimalla subordinate to the village of Avalapalli in the Punganur zamindari. The latter villages are on the plateau and the former are on the plain below the plateau and the dispute is as regards the slopes of the ghats and the valleys between the spurs projecting from the table land. In the plan attached to the decree of the first Court the boundary claimed by the respondent is represented by the yellow line commencing at the spot, marked Q (Bedisakonda) on the south and extending to Virastralapenta on the north, marked A, and the boundary claimed by the appellant is denoted by a green line commencing at Kannapparai, marked W, and extending to an old temple, marked C. In July 1882 the Government invested Lieutenant-Colonel Cloete, Deputy Superintendent of Revenue Survey, with the powers of a Settlement officer under Madras Act XXVIII of 1860 for the purpose of adjudicating on the conflicting claims. The boundary line which he determined as the true line is shown on the plan by a broad blue line.

The Settlement officer recorded his decision at Trichinopoly

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on the 15th November 1882 and forwarded it to Madras where the Superintendent of the Madras Revenue Survey confirmed it on the 10th March 1883. It was then communicated to the parties concerned, the communication from the Collector to the (plaintiff) respondent being dated the 24th March 1883. From that decision, the appellant preferred no appeal by way of regular suit, but the respondent brought this suit on the 8th May 1883 praying for a declaration that he was entitled to have the boundary determined and demarcated in accordance with the yellow line. His case was that the tract between the blue and yellow lines never belonged to the appellant, that it formed part of his zamindari and that it was declared to belong to him by Mr. Sewell in 1871 who then adjudicated on the claim as arbitrator under the Boundary Act. For the appellant it was contended that the tract between the green and the yellow lines never belonged to the respondent but belonged to himself and that the decision of Mr. Sewell was set aside on appeal. For the purposes of this appeal it is necessary to refer only to three questions on which the appellant and the respondent proceeded to trial, viz., (1) Whether the claim was barred by limitation; (2) Whether the claim was *res-judicata* by reason of the decision of Mr. Sewell in 1871; (3) Whether the tract in dispute belongs to the respondent.

As to the first question, the District Judge held that the suit was not barred by limitation, and in this opinion we concur. The question has to be determined in accordance with Madras Act XXVIII of 1860, and it is provided by s. 25 that "The Settlement or other officer shall proceed to investigate the claim, and after examination of the witnesses and documents, shall record his decision and the grounds for arriving at it and after duly informing the parties of the same, he shall proceed to mark out the requisite boundaries in accordance with the decision, which, subject to the revision of the authority to whom the said officer is immediately subordinate, shall be considered as the determination of all claims and disputes until it is set aside by a formal decree of a Civil Court. An appeal shall lie to the Civil Courts from this decision by regular suit, provided it be preferred within two calendar months from the passing of the same." If the decision of the Settlement officer were taken to be passed on the 15th November 1882 when he recorded it at Trichinopoly in the absence of the rival claimants and without previous intimation to them,

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the claim would be clearly barred as it was preferred after the expiration of two months, viz., on the 8th May 1883. If on the other hand, the decision of the Settlement officer were considered to be passed on the 24th March 1883 when it was communicated to the respondent, the suit would be in time. We entertain no doubt that the decision from which an appeal is allowed by s. 28 is the one recorded in the presence of the parties and duly intimated to them, for the right to prefer an appeal within two months presupposes a knowledge of the adverse decision from which the appeal is allowed. We do not consider that there is a real conflict between the decisions reported in *Thir Sing* v. *Venkataramier*(1) and *Annamalai* v. *Cloete*(2). It is not necessary to consider whether the decision of the Settlement officer is only a preliminary proceeding and becomes appealable only after it is confirmed by the revising authority. But it is sufficient to state that the question now under consideration did not arise in the first mentioned case; what was really decided by it being that, when an appeal was preferred from the decision of the Settlement officer to the revising authority and the decision was confirmed by such authority, the period began to run from the date of the original decision and not of the decision of the revising authority. In *Annamalai* v. *Cloete*, however, the question now raised for decision was discussed and the Court observed, that if there was any decision at all in the sense of the Act, it could not date earlier than the date of its communication to the parties; otherwise they might be barred of their right of appeal without any knowledge of the decision having been passed.

Another objection taken in appeal as regards limitation is that although the plaint was presented on the 5th May 1883 to the District Munsif of Palmanair, it was presented to the District Court, which was alone competent to entertain it, on the 15th November 1883, that s. 14 of the General Act of limitations is not applicable to cases governed by a special enactment and that on that ground the suit was barred by limitation. It appears that the suit was at first valued at less than Rs. 2,500 and instituted in the District Munsif's Court, but after enquiry the District Munsif came to the conclusion that the real value was over Rs. 2,500 and on the 13th November 1883 returned the

(1) I.L.R., 3 Mad., 92. (2) I.L.R., 6 Mad., 189.

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plaint to be presented to a Court of competent jurisdiction and the plaint was accordingly presented to the District Court on the 15th November 1883. It is conceded that if s. 14 of Act XV of 1877, the Act in force at the date of the suit, is applicable to cases falling under the Boundary Act of 1860, the claim is not barred by limitation, but it is contended that s. 14 is not applicable to such cases. Although the decision reported in *Thir Sing* v. *Venkataramier* supports this view, that decision was passed, it must be remembered, with reference to Act IX of 1871. Section 6 of that enactment provided that "When by any law not mentioned in the schedule hereto annexed and now or hereafter to be in force in any part of British India, a period of limitation, differing from that prescribed by this Act, is specially prescribed for any suits, appeals or application, nothing herein contained shall affect such law"; but it was modified by s. 6 of Act XV of 1877 and the words "nothing herein contained shall affect or alter the period so described," were substituted for the words "nothing herein contained shall affect such law."

The true construction of s. 6 then is that save as to the period of limitation, the other provisions of the General Act of limitations are applicable to cases falling under special or local law and this view is in accordance with the decisions reported in *Behari Loll Mookerjee* v. *Mungolanath Mookerjee*(1), *Guracharya* v. *The President of the Belgaum Town Municipalities*(2) and *Reference under Forest Act V of* 1882(3). We overrule the objection and hold that the suit was properly considered not to be barred by limitation.

As to the second question, the District Judge is of opinion that the decision of Mr. Sewell was final, that it was binding on the appellant and that it was not competent to the Government to reopen it. It is admitted that on the 24th Aug. 1871, Mr. Sewell, Assistant Collector of North Arcot, professing to act as an arbitrator under Act XXVIII of 1860, investigated the present claim, *inter alia*, and formally adjudicated upon it. At that time the appellant was a minor and his estate was under the management of the Court of Wards. Certain old boundary disputes revived in villages along the border of the Chittur taluk and the zamindari of Punganur and it was considered desirable by the Collector

(1) I.L.R., 5 Cal., 110. (2) I.L.R., 8 Bom., 529. (3) I.L.R., 10 Mad., 210.

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to settle them under Act XXXIII of 1860 and to include the present dispute in the settlement. He proposed that Mr. Sewell should undertake the adjudication of these disputes and adding that the zamindar of Punganur expressed his acquiesence in the proposal, requested the Government to assign to Mr. Sewell the adjudication of the differences of which he enclosed a list including the boundary that forms the subject of the present litigation. The Board of Revenue submitted the proposal for the orders of Government who by their order, dated the 13th September 1870, authorised Mr. Sewell to act as arbitrator under Act XXVIII of 1860 for the settlement of the boundary disputes referred to in their proceedings, observing that the Collector should be careful to see that all the requirements of the Act in regard to arbitration were strictly adhered to (exhibit CC). The Collector communicated the Government order to Mr. Sewell by endorsement and he thereupon proceeded to adjudicate on the claim. He recorded his decision (exhibit V) and forwarded it to the Collector who forwarded it for the approval of the Board (exhibit R) and the Government. They approved of the decision and the Collector deposited it in the District Court (exhibit S). The award was afterwards forwarded to Mr. Rundall to be carried out and he advised the Collector of the difficulty which he experienced in so doing and called attention to several omissions in procedure which in his opinion rendered the award altogether void. A correspondence then ensued and after obtaining the opinion of their Law officers, the Government came to the conclusion either that the question in dispute must again be referred to a new arbitrator if the parties concerned will consent or that if they will not consent, a Settlement officer must be deputed to deal with it under s. 25 of the Act. The parties to this suit consented to the appointment of Major Liardet as arbitrator, and though Government appointed him he was unable to proceed with the arbitration. The respondent then declined to consent to the appointment of any one else as arbitrator and the Government appointed Colonel Cloete to proceed under s. 25 of the Boundary Act. The omissions to which Mr. Rundall called attention are (i) that no written statement nor agreement was filed in accordance with s. 22, (ii) that there was no order of reference as required by the s. 23, (iii) that Mr. Sewell disposed of disputes between villages which are not mentioned in the Government order

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whereby he was appointed arbitrator, (iv) that when the award was forwarded to the Collector he did not confirm it and pass a decision as required by s. 21, (v) that such decision was not intimated to the parties and that a certified copy was not forwarded to the District Court for deposit as provided by s. 24.

Though, as observed by the District Judge, most of the omissions are mere defects of form and may not be considered to be fatal to the award on the ground that there was a substantial, if not a formal compliance with the provisions of the Act, the omission on the part of the Collector to pass a decision in accordance with the award and furnish a copy of the same to the parties is, as pointed out to the Government by the late Advocate-General, fatal to the award. That the Collector intended to approve of the award, there is no doubt, for in his letter to the Board of Revenue dated the 9th October, he expressed his approval and recommended its acceptance by Government. But he overlooked s. 21 which requires him to pass a decision according to the award and to furnish a copy thereof to the parties and provides that the decision given according to the award shall be final. The power given by this section is judicial and the Collector was in error in seeking the acceptance of the award by the Board and the Government instead of exercising his independent judgment as a Judicial officer. Again, his position was anomalous. As agent to the Court of Wards he represented one of the rival claimants, and as the person entitled to approve of the award and pass a decision according to it he was judge in one sense in his own cause. Again, he passed no decision in accordance with the award which alone could become final when duly intimated to the parties and sustain a plea of *res judicata*. We are unable to concur in the opinion of the Judge that this error of procedure is not substantial and that it was not competent to the Government to re-open the question.

On the merits, however, we consider the decision of the Judge is right. The oral evidence upon which the parties rely is sufficiently set out by the Judge and it is scarcely necessary for us to recapitulate it here. It will be observed that the oral evidence is conflicting, but considering it in the light thrown upon it by certain undisputed facts and by the probabilities of the case, the respondent's claim appears to be well-founded. The dispute between these two estates is more than 60 years old and the question of

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actual enjoyment is therefore of considerable importance. The Bangari palayam was under attachment from 1804 to 1827 and it was restored to the palayagar in 1828. During this period the palayam was under Amani management and the accounts do not show that the Government derived any revenue from the forest or hill produce of the tract in dispute, whilst the accounts of Bonamanda indicate that such produce was enjoyed by the zamindar of Punganur. Again, in 1828, a dispute arose in regard to the tract in question between the two estates. Messrs. Macdonald and Inglis, Head Assistant Collectors of North Arcot and Cuddapah, were directed to settle the dispute, and they decided in favor of the respondent in 1832. Their judgment shows that the Punganur zamindar was then in possession; that though the dispute existed even prior to 1804, no evidence was then forthcoming in support of the appellant's claim; and that on the other hand there was positive evidence that the Government was not in possession between 1804 and 1827. It was admitted in the Court below that the respondent was in possession since Mr. Sewell's settlement in 1871. As for possession during the intermediate period, it is shown on the one hand by the oral evidence for the respondent that a Punganur Tana existed at Katu Papannagunta, marked P in the plan, and that tamarind and other forest produce were let on contract by the respondent's family, whilst on the other, there is no trace of interference by the Bangari Palayagar with the possession of Punganur.

Furthermore, though the pymaish accounts of the two estates severally support the rival claims, yet the Punganur Survey Account was considered in 1832 and in 1871 to be more carefully prepared than the Bangari pymaish in regard to waste land and a comparison of O, P, II, III and IV supports the observation of the Judge that the former is more satisfactory and reliable than the latter.

Again, the position of the ruins of a fortification across the Saddikudu Pass not very far on the slope from where the ascent to the plateau begins, the situation of the fortress of Analapallidrug sheltered by jungle all around in which the Punganur Zamindar took refuge in 1785 and on previous occasions and the situation of a ruined wall across the valley in Govindulupenta, marked G, and of a gateway on Thalupula Kamma show that the tract in dispute

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in which the abovementioned Punganur works lie belonged probably to Punganur even before the Mysore war.

With the foregoing evidence before us we are unable to adopt Colonel Cloete's opinion which he formed mainly with reference to the natural features and the lie of the country, the distance of the boundary line from the villages of the rival claimants and the necessity of the villages on the plain for fuel and grazing grounds. In dealing with questions of property a decision must be arrived at upon the evidence on record and we cannot approve of the mode in which Colonel Cloete rejected the evidence on both sides and decided the case on considerations such as those mentioned by him. We are of opinion that the District Judge has come to a correct conclusion as to the effect of the evidence on the record and we dismiss this appeal with costs.

APPELLATE CIVIL.

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

1887. Aug. 11, 31.

RAMASAMI AND OTHERS (PLAINTIFFS), APPELLANTS,

and

APPAVU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Evidence Act, ss. 13, 42—Relevancy of judgments in suits in which right asserted to collect dues for a temple.

In a suit brought by the trustees of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple:

Held, that judgments in other suits against other persons in which claims under the same right had been decreed in favor of the trustees of the temple were relevant under s. 13 of the Evidence Act as being evidence of instances in which the right claimed had been asserted:

Held, also that the said judgments were relevant under s. 42 of the said Act as relating to matters of a public nature.

APPEALS from the decrees of D. Irvine, District Judge of Trichinopoly, reversing the decrees of A. Kuppusami Ayyangar, District Munsif of Trichinopoly, in suits Nos. 208, 209, and 395 of 1884.

* Second Appeals Nos. 455 to 457 of 1886.

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

The Acting Advocate-General (Mr. *Spring Branson*) for appellants in all cases.

Mr. *Brown* for respondents in second appeals Nos. 455 and 456 of 1886.

Parthasaradhi Ayyangar and *Bhashyam Ayyangar* for respondents in second appeal No. 457 of 1886.

JUDGMENT.—These were suits brought on behalf of the Saptharishi pagoda at Lalgudi, in the Trichinopoly District, and the nature of the claim is thus set forth in the plaints.

An annual income called *saiykkurini* has been fixed and collected in the time of the present as well as of previous Governments for the benefit of the said devastanam for (in respect of, or upon,) the lands in the undermentioned Mangamalpuram, Konnakudi, Valuthiyur hamlets of the said village and other villages.

The obligation binding the proprietors of the lands in the said villages, &c., whoever they may be, without any reference to religion, to pay the said income to the said devastanam, has existed from time immemorial.

Out of the saiykkurini of Rs. 69-9-2 per fasli [due] to the said devastanam and fixed for the said Mangamalpuram and its hamlets, the saiykkurini per fasli is fixed at Rs. 49-1-2 for the said Mangamalpuram village, Rs. 7-8-0 for the said hamlet, Konnakudi village, and Rs. 36-8-0 for Valuthiyur village. Each raiyat of the said villages is bound to pay every fasli to the said devastanam at (the rate of) Annas 13-1 per pangu in Mangamalpuram village, Annas 12 per pangu in Konnakudi village, and Annas 9-9 per pangu in Valuthiyur village.

The defendants have owned $4\frac{0}{16}$ pungus of land in the said Mangamalpuram village from fasli 1284 last, $\frac{41}{64}$ pangus in the said hamlet Konnakudi from [a period] prior to the said fasli, and $\frac{1}{16}$ pangu of land in Valuthiyur village from a period prior to the said fasli. The saiykkurini tirva therefor at the aforesaid rate amounts to Rs. 3-12-10 per fasli for $4\frac{0}{16}$ pangus in Mangamalpuram village, Annas 7-6 per fasli for $\frac{41}{64}$ pungus in Konnakudi village, and Pies 8 per fasli in Valuthiyur village. The defendants are bound to pay [it] within the close of each fasli.

The defendants, who have been paying the said saiykkurini tirva all along prior to fasli 1284, have allowed their payments to fall into arrears to the extent of the amount due from fasli 1284 up to date. Besides this, they deny the right (of the devasthanam) to the said income from that date.

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The issues framed in original suit No. 395 of 1884, from which appeal No. 56 of 1885 was preferred to the District Court and second appeal No. 457 of 1886 is preferred to this Court were as follows :—

(1) Whether the pagoda has right to collect the saiykkurini tax ?

(2) Whether the defendants are bound to pay and have paid such tax till fasli 1284 ?

(3) Whether the claim is in any way barred by time ?

(4) What amount the plaintiffs are entitled to recover from the defendants ?

In original suit No. 208 of 1884 [appeal No. 53 of 1885, second appeal No. 456 of 1886] the issues were :—

(1) Whether the plaintiffs have no cause of action against the defendants by reason of their being Christians ?

(2) Whether the claim is *res judicata* ?

(3) Whether the defendants are bound to pay the saiykkurini tirva mentioned in the plaint ?

In original suit No. 209 of 1884 [appeal No. 48 of 1885, second appeal No. 455 of 1886] in addition to the issues just above recorded, additional issues were framed as to whether the right to collect what is styled the tirva is barred by time or not.

The defendants disputed the plaintiffs' right to the payments claimed ; denied that such payments had been made up to fasli 1284, and, in the case of the defendants, who are Christians, pleaded that, by reason of their religion, the obligation, if any, is not binding on them.

The Court of First Instance gave decrees for the plaintiffs in each case, but the District Judge in appeal reversed those decrees and dismissed the suits with costs throughout.

Against the decrees in appeal these second appeals are preferred.

[After dealing with the plea of *res judicata* the judgment proceeded as follows.]

The District Munsif held it proved by the documentary and oral evidence that payments have been made presumably since

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1811, and that the temple authorities have a right to collect them; the objection that the origin of the right to claim payment had not been explained, and that, in the absence of such explanation, the payment must be held to be voluntary, he disposed of by saying that it was "too late in the day" for the defendants to question the right.

The District Judge says that the plaintiffs "base their right to collect" what he calls "*the tax*," "upon custom;" he also remarks that they are unable to describe the origin of the right asserted, and states that they cannot explain the meaning of the word itself or the nature of the thing claimed, and on these grounds, apparently, holds that the custom is not shown to be reasonable; and he decides that the "tax" is not certain, because "the mode of assessment is purely arbitrary." He further held that though the payments now claimed have been made under the name of saiykkurini for a long time, they have not been made without objection, and therefore the alleged custom, if made out, has not been acquiesced in.

It is desirable to clear the case of any misconception which may arise from the use of the word "tax;" no word corresponding thereto is used in the plaint; the words used "Varambadi," *i.e.*, income and "Yerpattu," *i.e.*, "settled" do not necessarily or even primarily import a power created by the sovereign authority to collect a tax. Again the fact that there have been at times disputes as to the payments claimed is no evidence that the right to claim them does not exist; payments made by parties to suits in consequence of such disputes being decided against them in Courts of Law, and by others similarly situated without recourse to law, might be, on the other hand, evidence, so far as it goes, of the continuance of a demand as matter of right and of submission thereto by reason of a corresponding obligation.

Objection is taken on the respondents' part that the judgments filed showing that certain persons holding lands in villages in which it is in evidence that these payments are claimable as of right have been compelled by decrees of Court to pay are not admissible against the appellants.

It is contended that such judgments not being "transactions" or "facts," they are not admissible under s. 13 of the Evidence Act, and that they do not relate to a matter of a public nature within the meaning of s. 42 of the same Act.

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We concur with the majority of the learned Judges who decided in *Gujju Lall* v. *Fatteh Lall* (1) that a judgment of the character thereunder consideration, viz., as to whether a certain person was or was not the heir to another, is neither a transaction nor a fact in the sense in which the words are used in s. 13 of the Evidence Act, and that the judgment referred to in that case could not be given in evidence, but the judgments filed in this case are not of the character under consideration in that case; the question for determination in the previous suits was whether the payments then claimed, and which are in contest in the present suits, were claimable as of right, and in one case whether they were so claimable from a particular class of persons, viz., Christians; and it appears to us that, when a right of the character now in question is at issue, such judgments are admissible in evidence as evidence of "particular instances in which the right or custom was claimed," and "in which its exercise was disputed, asserted, or departed from," and was further adjudicated upon; and that the right was a right of the character dealt with under s. 13 of the Evidence Act. The case for the appellants is—and there is evidence in support of it in the case before us as to at least six of such villages—that from those who hold lands in a large number of villages in the vicinity of the temple (see Exhibit F) the payment claimed is demanded as of right, and that such payments have been made after suits from time to time brought and determined in reference to the liability of persons occupying lands in these villages; and this being so, we are further of opinion that the decisions in the former suits are decisions which relate to "matters of a public nature" within the meaning of s. 42 of the same Act.

The question for determination before us is not dissimilar in principle from that reported in *Naranji Bhikabhai* v. *Dipa Umed* (2). The right now claimed appears to us to be as much a right of the character indicated in s. 13 of the Evidence Act as the right to a fishery, and the judgments go far to support the finding of the District Judge as to the payments claimed having been customarily made. The assumption that the appellants based their claim upon an alleged custom only appears to us to be unwarranted. The allegations in the plaint appear perfectly

(1) I.L.R., 6 Cal., 171. (2) I.L.R., 3 Bom., 3.

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compatible with the case that the appellants base their claim upon a right; the origin of that right is not clearly defined, but from evidence of custom, in the sense of payments extending over a long series of years, the existence of a right may, in connection with other circumstances, possibly be inferred; and the dismissal of the appellants' suits for the reasons stated affords good grounds for second appeal. The word "custom" is not used in the plaints.

On the facts then as found by the Courts below, such payments have been ordinarly made, and, as would appear from Exhibit C, not only from the year 1830 and subsequently, but, as certified in that report, there was evidence of such payments from 1801.

No doubt it is also stated that no *collections* were made from 1801 to 1822; there were, however, as recited in C, agreements to pay taken from the mahajanams in 1813 in a lease for 10 years, and the fact of nothing having been collected is explained, viz., that the people had been suffering much and unable even to pay the Government dues; it further appears that in 1828 "the mahajanams of the Lalgudi country" voluntarily gave an agreement to the Tahsildar in which "they admitted the right of the said temple to 7½ mercals for sayikkurini which was allowed *from the beginning*" (or as we should say from time out of mind), excused themselves for not having paid it, and agreed to pay it in future in money at a commutation rate to be fixed by Government.

There is moreover a reference to an excuse said to have been made by the raiyats from which it would appear that these payments were made in the time of the Mussalman rule also.

As to the objection that the claim is bad by reason of the nature and amount of the payments being indefinite, the word itself indicates (payment of) a "Kuruni" or mercal for every cheyyi of land, a well-known measure; and from Exhibit C it seems that the raiyats' share of produce from such area was estimated at 40 kalams of grain, and indeed there appears to have been no contest whatever as to the rate claimed, viz., 7½ mercals for every 40 kalams or the equivalent after the charge was commuted into a money payment.

As to antiquity in the case of a right no less than of a custom, usage for a number of years, such as is proved in this case, certainly raises a presumption that such right or custom has existed beyond the time of legal memory.

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The question is whether a legal origin is to be assigned to the plaintiffs' claim. The evidence to which we have above referred is hardly consistent with the payments having been of voluntary character; it is also to be observed that when the temple was under the management of Government, the sums now claimed were collected in addition to the revenue and credited to the temple, while the suit in 1861, in which the defendants were Christians, is of importance not only as bearing on the question whether the obligation to pay exists, but also whether, if it exists, it constitutes a charge on the land; that suit was carried up to the High Court in appeal, and among the contentions raised throughout was one that whatever the case might be as regarded other persons, there could be no obligation to pay binding upon persons professing the Christian religion; but the second appeal was dismissed, from which it would appear that the obligation must have been held to be something more than a mere personal obligation, and that the payment was not a mere voluntary payment.

A grant from the sovereign power need not necessarily be presumed; the customary payment may be accounted for as a payment charged upon the cultivator's interest in the land (subject to payment of the landlord's share) and created in favor of the temple by the then owners of that interest, in which case the charge would be binding on them and on their successors and on purchasers for value from them.

We have not, however, been referred to any evidence showing that, notwithstanding devolution of these lands from generation to generation and transfers to strangers for value, the demand has been ordinarily made and submitted to by heirs and by purchasers and by persons of different religious persuasions not being worshippers in the temple. Evidence as to this would be of great value in assisting us to determine whether the obligation is one which has run with the land, or, in other words, whether the sums claimed constitute a charge on the lands, and as the matter is obviously one of considerable importance, seeing that in the list F there are some 65 villages in the neighbourhood described as villages "from which in 1861 saiykkurini was collected" and the effect of our decision in this case may affect holders of land in all such villages, we shall desire the District Judge to take such evidence on this point also as the parties may adduce, and to

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return a finding within two months from the date of receipt of this order, when ten days will be allowed for filing objections.

On receipt of the findings of the District Court, these appeals came on for hearing on the 28th February 1888, and judgment was reserved. On the 25th April judgment was delivered as follows:—

These second appeals came on for disposal with reference to the findings on the questions referred for retrial on the 31st August last. Two questions were referred, viz., whether the claim is *res judicata*, and whether the payment claimed to be recovered is voluntary. The finding is that the claim is not *res judicata*, because the present defendants are not shown to be connected with or claim under defendants in the previous suits. As regards the defendant Appavu, however, the District Judge observes that the decision in Original Suit No. 51 would bind him in respect of the land at Seshamangalam.

On the merits the Judge is of opinion that the payment is voluntary and cannot be treated as a charge on the land. It is objected that the finding should not be accepted.

The Judge's opinion that a revised finding was required from him on the general issue of liability is correct. The special question which he was required to consider by the last paragraph of this Court's order of August last was referred to him as a subsidiary question in order that a correct decision might be arrived at as to the character of the payment. The effect of the evidence is summarized by the Judge in paragraph 24 of his return in the following terms:—

"What appears to me to be the inference to be drawn from the whole evidence is that the Government collected this rate for the benefit of the temple not as a rate or charge on land belonging to the temple, but as an additional charge imposed of its own authority to enable it to make an allowance to the temple, to be continued or discontinued at its own will or pleasure, and to which the temple had no independent title; that when the Government ceased to collect it, the people continued to make the payments generally either because they were willing to do so or because they were bound to do so; that for many years past many persons have refused to make any payments, denying their liability to do so; that the temple authorities have got decrees in many cases without dispute, and in two cases against Christians who

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denied their liability; that in spite of such enforcement in individual cases large numbers of persons have been left unmolested in their refusal to pay. In short, I think that ever since the Government have ceased to collect the rate, the people have held that it was a voluntary payment, and the temple, it was compulsory, and that the temple has never been sure of its ground to try to enforce the claim generally against those who resisted, but has rather been trying to build up a case for itself by degrees, and practically no one was likely to be made to pay if he was determined that he would not pay unless he was compelled to do so."

The Judge refers to exhibits C, E, F, and, adverting to the facts that the collection was made because the mahajans were willing to pay, that the fees were classed with devadayam, brahmadayam and others which are charitable fees, that arrears were remitted without reference to the gurukkals of the temple who are considered to be entitled to them, he comes to the conclusion that there was no grant from Government of a charge on land, and that the fee was collected as a payment voluntarily made to a religious institution. It was in evidence that from 1801 to 1822 no collections were made on the ground that the people were suffering much. It was also in evidence that in 1813 agreements to pay were taken from the mahajans when a lease for 10 years was taken in connection with the Government demand; that in 1828 the mahajans voluntarily gave agreements admitting the right of the temple; and that there was an allusion that such payments were made in the time of the Mussulman rule also. Having regard to the foregoing evidence, we cannot say that it is not consistent with the view taken of it by the Judge that the payments were made along with other charitable fees; that they were not made when the raiyats could not afford to do so; that promises were obtained from time to time from the mahajans to continue the payments; that the Government enforced their collection on the basis of those promises; and that they were remitted without reference to the gurukkals who were said to be entitled to the collections when the raiyats could not afford to pay.

We may note here that the raiyats accustomed to worship in the temple would ordinarily continue a payment, such as the one in dispute, as an act of piety, and that there is no evidence of grant of a charge on land or of its confirmation by the British

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Government. In this connection we may draw attention to the evidence which shows that the owners of 24 out of 28 pangus in the village of Sattamangalam, who are Vishnuvites, pay the fee to the Vishnu temple though, as observed by the Judge, saiykkurini was originally claimed on all the 80 pangus on behalf of the temple in suit which is a Siva temple. It is also worthy of remark that though decrees were obtained, many were not enforced, and that though a pretty large number of raiyats refused payment, legal proceedings were not instituted to enforce payment. We are unable to say upon the whole evidence that the Judge has not come to a correct finding.

As to those cases in which decrees have been obtained and a plea of *res judicata* can be founded upon them, it may be that a fresh inquiry into the merits is precluded. But the decision in each of those cases must depend on the special circumstances of that case in relation to the question of *res judicata*. Among the defendants before us, the Judge has come to the conclusion that the decree in Original Suit No. 51 is binding upon the defendant Appavu in respect of his land in Seshasamudram. We accept the finding of the District Judge and dismiss the second appeals except in respect of the land in Seshasamudram held by the defendant Appavu. We set aside the decree of the District Judge and restore that of the District Munsif as regards defendant Appavu in respect of the land belonging to him in the village of Seshasamudram in second appeal No. 455 of 1886.

We direct each party to bear their own costs throughout in the special circumstances of these cases.

PRIVY COUNCIL.

P. C.
J. C.*
1888.
June 27.

ARUNACHELLAM (OBJECTOR),

and

ARUNACHELLAM AND ANOTHER (BY THEIR GUARDIANS) PETITIONERS.*

[On appeal from the High Court at Madras.]

Civil Procedure, 1882, *s.* 311.—*Alleged irregularity attending sale in execution—Failure to prove substantial injury resulting.*

A judgment-debtor having allowed the execution-sale of immovables to be completed without objecting on the ground afterwards alleged by him, viz., insufficiency of description within the requirements of s. 287, he having been throughout aware of what the description was, the sale is not invalid on this ground alone without more.

No evidence having been given in the Court executing the decree of substantial injury having resulted by reason of such irregularity, *i.e.*, the alleged mis-description:

Held, that, although the Appellate Court below had assumed that the property had been sold for less than it ought to have fetched, such substantial injury as inadequacy of price should have been proved to have occurred in order to bring the case within s. 311. *Olpherts and Macnaghten* v. *Mahabir Pershad Singh* (1) referred to and followed.

APPEAL from two orders (16th October 1883) of the High Court reversing two orders (9th August 1882 and 26th September 1882) of the Subordinate Court of the Madura District.

The question now raised was whether there had been such an irregularity in a sale in execution of a money decree involving substantial injury to the judgment-debtor that it had been rightly set aside under s. 311 of the Code of Civil Procedure. The appellant was the purchaser at the sale, and the respondents were the judgment-debtors, whose property had been sold in execution, the sale having been afterwards cancelled in pursuance of the orders of the High Court.

The property sold was an estate lying within the Sivaganga zamindari, consisting of fifteen villages, of which the first, Kattanur, gave its name to the whole estate.

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

(1) L.R., 10 I.A., 25; reported as *Macnaghten and another* v. *Mahabir Pershad Singh* in I.L.R., 9 Cal., 656.

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The family to which the respondents belonged owned one-half of Kattanur in possession, and in 1879 obtained the remaining half in mortgage to secure the sums of Rs. 2,582 and Rs. 14,000.

The decree as to which the question of its due execution had arisen was obtained on 6th January 1880 by Tolaja Rama Rao in a suit of 1879 against the present respondents besides others, and on the 30th January 1882, an application was made by Tolaja for execution of his decree by sale of the village Kattanur in satisfaction of a sum of Rs. 5,083 then due upon that decree. An order for attachment of the property was made on the 7th March, the usual proclamation of approaching sale was made on the 11th March, and on the 25th May an order for sale was made with the customary notification, the sale to take place on the 22nd July. The notification stated that "the right herein below mentioned of the defendants in the said property will be sold." Then followed the boundaries and other description of the village of Kattanur and its hamlets about to be sold. No complaint was then made to the Court that this description was insufficient. On the 27th July, several days after the village had been put up for sale, and the day before it was actually sold, these respondents presented an application praying for a postponement of the sale on the grounds that steps were being taken to set aside the decree and that the Court already held funds sufficient to satisfy the judgment-creditor. The Court refused to postpone the sale unless the debtors paid into Court the balance of the judgment-creditor's claim, and on the next day these respondents filed another petition suggesting another mode of meeting the creditor's demand. In neither of these petitions was any complaint made against the mode in which the property was described or put up for sale.

Having been put up on the 22nd July and four following days, the property was sold on the 28th to the present appellant for Rs. 20,500. And on the 29th, the judgment-debtor petitioned the Court to set aside the decree on account of irregularities causing loss. It was complained that the decree might have been satisfied by selling one hamlet only, named Pottapicheri, which it was said would have fetched about Rs. 10,000. The petition proceeded: "It is the object of law that the balance of the decree debt should be collected by selling Kattanur and its hamlets one after another. In direct contravention to it, the village of

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Kattanur, &c., and its hamlets were all sold together in one lot, inclusive of the said mortgage right and the proprietary right, and this fact is brought to the notice of the Court as irregular. The minors, who are the owners of the said village, have thereby sustained a heavy loss to the extent of Rs. 40,000." This petition was presented on behalf of these respondents as plaintiffs in Original Suit No. 28 of 1882.

On the 7th August an identical petition was put in on behalf of the respondents as defendants in suit No. 44 of 1879. Both petitions were disposed of on the 9th August by an order which was one of the two orders appealed to the High Court. The order was as follows: "The village of Kattanur with its hamlets was attached as one lot and sold as such. It is now alleged that such a sale was irregular, and that it has caused substantial injury to the defendants, and that hamlet after hamlet ought to have been sold. If anybody had suggested it at the time of the sale, it could have been done; and Sabapathi Chetti, who by so many petitions protested against the sale did nothing of the kind. There is no irregularity, I think, in selling a property in the manner it was attached. Here the property was attached in one lot and was sold as such." The petition was accordingly rejected.

On the 25th September two more petitions were presented to the Subordinate Court that the sale should be set aside. On the 29th, the order was made, which was the second of the two orders appealed to the High Court, that the sale would be confirmed unless an order to the contrary should be made by the High Court within an interval allowed. That time having elapsed, and no order to the contrary having been received from the High Court, the sale was confirmed on 30th September. The specification of the property in the sale certificate was in the same terms as in the notification. Meantime, on the 9th September, an appeal had been preferred by the judgment-debtors to the High Court against the order of the 9th August on the ground of irregularity on the part of the lower Court in selling the whole estate when the sale of a part would have been sufficient, "and in not appropriating the moneys already in Court to the credit of the decree."

By the order of the Chief Justice, dated 19th September, the appeal was admitted on the ground of the "grievous and irreparable loss alleged to have accrued to the appellant," the Chief Justice observing that "he saw no irregularity."

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On the 27th September 1882, an application to the High Court to direct the lower Court to postpone confirmation of the sale till the then pending appeal from the order of the 9th August should have been disposed of was rejected. Consequently the sale was confirmed by the lower Court on the 30th September, and a certificate followed as above stated.

On the 7th November 1882, the present appellant was on his own application made respondent in the two appeals then pending in the High Court. In these, the order of remand, of which the effect is stated in their Lordships' judgment, was made on 30th April 1883, and was followed by the judgment of the High Court, dated 16th October 1883. This order directed that the orders of the Subordinate Court confirming the sale and refusing to cancel it should be set aside, adding that, as the appellants to the High Court, who were the judgment-debtors, had not asked, as they might have done at the right time for the amendment of the proclamation of sale, they should pay the costs in both Courts.

On this appeal Mr. *J. D. Mayne* for the appellant argued that the orders of the Subordinate Court were correct and should not have been cancelled. The High Court had set aside the sale upon a ground of objection which was for the first time suggested in the Appellate Court. There had been no insufficiency in the description nor any mis-description of the property which could have prejudiced the purchaser. Nor had any proof been given that the judgment-debtors had sustained substantial injury by reason of any irregularity in the publishing or conducting the sale. So that the mis-description, if any, had taken place was not a material irregularity within the meaning of s. 311 of the Code of Civil Procedure. He referred to *Olpherts and Macnaghten* v. *Mahabir Pershad Singh*(1).

For the respondents, Mr. *R. V. Dyne* and Mr. *H. Cowell* argued that there had been on the part of the executing Court such a failure to comply with the provisions of the Code of Civil Procedure and of s. 287 in particular as to vitiate the sale in execution and that it had been rightly set aside.

Mr. *J. D. Mayne* was not called on to reply.

Their Lordships' judgment was delivered by

Sir RICHARD COUCH.—This is an appeal against two orders

(1) L.R., 10 I.A., 25; I.L.R., 9 Cal., 656, *nom. Macnaghten and another* v. *Mahabir Pershad.*

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and one judgment of the High Court of Madras which reversed the proceedings of the Subordinate Court of Madura in execution of a decree in a suit which had been brought in that Court. The respondents were defendants in the suit, and in execution of the decree which had been obtained against them, a village called Kattanur was sold by the order of the Court and was purchased by the appellant. The High Court, by their judgment, which is now appealed against, set aside the sale, and the grounds upon which they did so are stated by them to be that: "It is clear that the description of the properties advertised for sale was most imperfect. The judgment-debtors enjoyed not only proprietary rights in some portion of the property, but rights as mortgagees of very considerable value in other portions of the property, and there was nothing to indicate the possession by the judgment-debtors of any rights as mortgagees in the villages. The purpose of the law would be entirely defeated if a more complete description were not enforced than was given in this case." . . . . "It cannot be doubted that the inadequate description led to sale of property valued at upwards of Rs. 40,000 together with mortgage claim for Rs. 40,000 for Rs. 20,000." Then they say they must set aside the order confirming the sale and also another order made upon another petition by which an application to set aside the sale was refused.

It is true, as stated by the High Court, that the judgment-debtors had proprietary rights in a part of the property and were only mortgagees of the other part. The decree was obtained in January 1880, and an application was made to the Court for the execution of it, and attachment was made of the village, which contained 15 hamlets; there was the usual proclamation of the sale and notification that it was to be on the 22nd of July 1882 and the usual warrant, and apparently the judgment-debtors knew perfectly well that the whole of the village was going to be sold. They state in an application which they made that "the Kattanur village of these plaintiffs has been attached on account of the said debt, and the sale is fixed by this Court for the 22nd instant." Notwithstanding this, the first complaint which was made by them was on the 29th July 1882, and in their petition they complained that the village had several hamlets attached to it, and if one of them alone had been sold it would have been sufficient. They also complained that one moiety of the villages

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belonged to them by right of mortgage, and the other they had their property in, raising for the first time the objection upon which the High Court has founded its judgment. The sale was completed, and they then petitioned the High Court on the 9th September 1882. In this petition they state that the villages ought to have been sold each by itself and not all in one lot, and that the villages being separately numbered for the attachment there was no necessity for a representation that they should be separately sold.

Upon that petition an order appears to have been made by the Chief Justice in which he says: "I see no irregularity. The judgment-debtor might have applied that the sale should be made in lots." There is a distinct opinion of the Chief Justice that the judgment-debtors might, if they had considered the sale of the villages in one lot would have been unfair, have made an application to have them sold in lots, which they did not do. However, notwithstanding the Chief Justice's opinion that there was not any irregularity, he admitted the appeal, and the High Court, when the appeal came before them, made this order: "We require the Court below to ascertain and report what is the interest enjoyed by the family in the villages; whether it intended to sell the mortgage and other rights; whether the appellants in that Court made any complaint of the insufficiency of description in the proclamation of sale; and whether any injury has occurred to the appellants from any such insufficiency." It would appear from what the High Court then directed to be ascertained and reported that they were satisfied with the opinion which had been expressed by the Chief Justice that there was no ground for saying that the sale ought to be set aside because it had not been sold in lots.

A report was made by the Subordinate Judge, and it is this: "There are four points sent down for report: (i) The interest enjoyed by the family in the villages is as stated in the judgment of their Lordships; (ii) the sale proclamation says that the right, title, and interest will be sold, and this must include the mortgage and other rights, but they were not specified; (iii) no complaint was made of the insufficiency of description in the proclamation of sale. Two petitions are relied on by the petitioners, one dated the 29th July 1882 and the other dated the 7th August 1882. The first petition is said to be before the High

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Court. The second petition makes no such complaint; (iv) as I find that no such complaint was made, I thought that any evidence as to any injury resulting from such insufficiency was unnecessary."

Therefore, as far as regards the objection that the description was insufficient, which is relied upon, as their Lordships understand, as vitiating this sale—for that appeared to be the contention of the counsel for the respondents—the objection was not taken until the sale had been completed. The judgment-debtors knowing, as they must have known, what the description was in the proclamation, allow the whole matter to proceed until the sale is completed, and then ask to have it set aside on account of this, as they say, mis-description. It appears to come within what was laid down by this Board in the case in the 10th Indian Appeals, page 25(1), that if there was really a ground of complaint, and if the judgment-debtors would have been injured by these proceedings in attaching and selling the whole of the property whilst the interest was such as it was, they ought to have come and complained. It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any mis-description of the property attached and about to be sold, which he knew well, but of which the execution creditor or decree-holder might be perfectly ignorant—that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated. That, in their Lordships' opinion, cannot be allowed, and on that ground the High Court ought not to have given effect to this objection.

There is another objection to this decree of the High Court. The law provides, by s. 311 of Act XIV of 1882, that an objection may be taken by the judgment-debtor to an irregularity in the sale, but then it says that no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity. The Subordinate Judge finding, as he says, that no complaint had been made of this irregularity, did not receive evidence that there was any injury occasioned by it. If he was wrong in the opinion of the High Court in

(1) *Olpherts and Macnaghten* v. *Mahabir Pershad Singh.*

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doing that, they ought to have sent back the case to him to take that evidence. Instead of doing this when the case comes before them and they give judgment, they assume that there was a substantial injury and that the property, in consequence of this mis-description, had sold for less value than it would otherwise have fetched. There seems to be no ground for an assumption of that kind by the High Court, and, therefore, both as to the objection to the non-description, or not mentioning the mortgage in the attachment proceedings, and that there was no proof that any special injury was occasioned, their Lordships think that the judgment of the High Court was wrong, and that it must be reversed.

Their Lordships will, therefore, humbly advise Her Majesty that the orders of the High Court should be reversed, the appeals to the High Court dismissed with costs, the orders of the Subordinate Court, which were appealed against, affirmed, and the costs in the Subordinate Court ordered to be paid by the respondents. The respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant—*Lawford, Waterhouse, & Lawford.*

Solicitors for the respondents—*Rowcliffes, Rawle & Co.*

PRIVY COUNCIL.

P.C. & J.C.*
1888.
May 3 & 4.
June 23.

APPASAMI ODAYAR AND OTHERS (PLAINTIFFS),

and

SUBRAMANYA ODAYAR AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Madras.]

Limitation Act, 1859, *s.* 1, *cl.* 13—*Partition suit for share of joint family estate—Failure to prove participation in the family coparcenary within the period.*

In a suit brought in 1881 for a share of joint family estate, the question whether the plaintiffs' right to sue was barred by limitation under Act XIV of 1859, s. 1, cl. 13, depended on whether there had been any participation of profits between the plaintiffs' father and the defendants, who with him were co-descendants from a common ancestor, after 1837 down to which year the family was certainly joint. If in 1871 the period of limitation had expired, the Act IX of that year and the later Acts need not be referred to; for, if they altered the law, they would not revive the right of suit.

* *Present:* Lord MACNAGHTEN, Lord HOBHOUSE, and Sir R. COUCH.

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Upon the evidence it was found that whatever might have been the father's intention when he settled in another village in 1837, the effect of what had been since done, or omitted, on both sides, was that in due time the right of suit had become barred under the first Limitation Act.

APPEAL from a decree (1st April 1884) of the High Court reversing a decree (13th April 1882) of the Subordinate Judge of Kumbakonam.

The appellants, plaintiffs in the suit, and the respondents, who were defendants, belonged to branches of a family whose gentile name was Odayar and who were mirasidars, the former being residents of Karuppattimulai, in Mannargudi taluk, and the latter living on the family land at Aravur in Kumbakonam. The question on this appeal was whether the plaintiffs had a still subsisting right to sue, notwithstanding the law of limitation, as members of an undivided family, to have partition made of estate, alleged to be ancestral and joint, and to hold their share in severalty from the defendants, their alleged coparceners, who were in possession, or the coparcenary had ceased for so long a time as that the claim had become barred by limitation.

The plaint (25th July 1881) claimed one-fourth of the family property at Aravur, land, houses, and appurtenances, setting forth the descent of the parties in the manner stated in their Lordships' judgment. The plaintiffs alleged that down to 1877 they had not been excluded from joint enjoyment of the profits of the lands at Aravur to which they were entitled, but that since that year their share had been denied to them. As to their own lands at Karuppattimulai, these had been partly obtained by their mother as stridhanam and inherited by them from her, and partly had been purchased out of income, so that they were not joint property of the family in general.

The defendants alleged that the branch of the family to which they belonged had been separate as to food, residence, and property since the time of the defendants' grandfather, Thoppai, who died in 1838 or 1839; and that he and Chidambara, who died in 1868, the father of the first defendant, had themselves acquired the properties in suit after the cessation of joint living on the part of the plaintiffs' father. They also relied on the law of limitation.

The issues were: 1st, whether the parties were members of an undivided or divided family, and if the latter, when and how

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divided, and down to what period did the coparcenary last? 2ndly, whether the claim was barred by limitation? 3rdly, whether the property claimed was acquired as alleged for the defence?

The Subordinate Judge found that there had been no partition, and that the property claimed was not the self-acquisition of the defendants or of any of them. He found that the coparcenary had continued down to 1877. He, therefore, made a decree for partition in favor of the plaintiffs.

On appeal the High Court (Turner, C.J., and Muttusami Ayyar, J.) reversed the decree of the Subordinate Judge. Their judgment was as follows:—

"It is scarcely possible, upon the evidence before us, to resist the conclusion that for upwards of 45 years there has been no participation on the part of the plaintiffs' branch in the beneficial enjoyment of the property in question. There is a great deal of documentary evidence to show that from 1835 the plaintiffs and their father have lived at Karuppattimulai, whilst the first defendant and his father and the second defendant and his branch of the family have always lived in their ancestral village Aravur. The plaintiffs' fourth witness, Kuppu Odayar, to whose evidence the Subordinate Judge attaches weight, and who is certainly not biassed in favor of the defendants, has deposed that the joint family at Aravur was reduced in circumstances at the time of the father Palaniappa Odayar's marriage; that upon his marriage a moiety of the village of Karupattimulai was granted to his wife as stridhanam, and that he then removed to that village and lived and died there. Documentary evidence shows that this was about 1837, and that the property which Palaniappa Odayar or his wife then acquired consisted of 14 velis 12 mas $44\frac{1}{16}$ kulis of land. It is also in evidence that subsequently to 1837 the members of the family at Aravur bought lands, from time to time, extending to nearly 85 velis, while the total extent now belonging to the defendants' branch is nearly 120 velis. This affords a reasonable ground for the inference that when the father left Aravur to take up his residence at Karuppattimulai, the joint family probably owned about 35 velis of land, of which his quarter share would have amounted to $8\frac{3}{4}$ velis if a division had then been effected. This fact and the evidence of witness Kuppu Odayar to the effect that the family

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at Aravur was then in reduced circumstances convey the impression that Palaniappa Odayar, who acquired by marriage considerable separate property, did not probably intend or care to claim a share from his coparceners, who were considered to be worse off than himself, either from the unproductiveness of the family property or from the number of members in the family who had to be supported.

"It was suggested for the defendants at the trial in the Court below, and also mentioned at the hearing of this appeal, that, at or before this time, there was a partition or some arrangement which determined the coparcenary between the two branches of the family. On referring to the evidence, however, it appears that this suggestion is made more in reference to the subsequent conduct of the parties than to any express agreement between the plaintiffs' father and his coparceners. Although the second defendant spoke of his having heard of a formal division from the deceased members of his family between the plaintiffs' grandfather Karuttasami Odayar and the defendants' father Chidambara Odayar, we cannot rely on his evidence as it is inconsistent with the rest of the evidence, which discloses that Palaniappa Odayar had lived in coparcenary with the defendants' branch until his marriage. It is also inconsistent with the defendants' statement that he knew of no formal partition in the family at any time. The other evidence bearing on the question of division is only an opinion founded on separate residence and separate enjoyment for a considerable length of time. We are therefore not prepared to hold that the Subordinate Judge was in error in declining to accept the plea of formal division or any other express agreement equivalent to it. Neither do we see reason to doubt the propriety of the finding that were the plaintiffs entitled to claim partition, the plea of self-acquisition set up by the defendants could not be upheld. The effect of the evidence on this point is that there were about 35 velis of land in the family when Palaniappa Odayar separated from it, while there was no other ostensible source of income to which subsequent acquisitions might be reasonably traced. There may have been good husbandry, thrift and care on the part of those who managed the affairs of the family at Aravur subsequently to 1837, or the property itself may have become more productive. In the absence of clear evidence disclosing an independent source of income and an inde-

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pendent means of acquisition, we cannot hold that the later acquisitions have been made otherwise than with the aid of family property. The material question, therefore, is whether the relation of coparcenary was continued after Palaniappa Odayar's separation, and if it was not, what is its legal effect upon the plaintiffs' claim.

"It does not appear that the plaintiffs' or their father ever received part of the income derived from the family property. The first plaintiff no doubt deposed that at one time he took some money from the family house at Aravur. But his statement is not corroborated, and as he is an interested party, it cannot be accepted without corroboration. It was next alleged by the plaintiffs that the first plaintiff had lived at Aravur until four years ago and that his joint residence was a continuation of the coparcenary."

In regard to this subject, the Court found that in some of the written transactions of the family between 1864 and 1881, the defendants were described without exception as residing at Karuppattimulai. The Court considered it unlikely that Palaniappa would have lived at Aravur without taking part in the family affairs. In regard to money said to have been received by the defendants for marriage expenses, the Court said that the evidence of its having been paid was doubtful, and added "were we to accept it, these payments would not show that the plaintiffs' father had not already virtually relinquished his interest in the joint property. It occasionally happens, when even divided cousins are married at one time in the same house and there is an elderly member in either branch, that that member bears the whole cost more from family affection and pride than in acknowledgment of a subsisting coparcenary. If the coparcenary had continued, the managing coparceners would have ordinarily interfered in the case of every marriage in the plaintiffs' branch and paid its expenses from family funds. The only other matters mentioned as evidence of coparcenary are that Chidambara Odayar, the defendants' father, lighted the funeral pyre when Ponnammal, the plaintiffs' paternal grandmother, died, and that the daughters of Ayyadorai Odayar, the second defendant's cousin, are still living at Karuppattimulai with the plaintiffs. As to the first, it proves nothing more than that Chidambara Odayar acted as proxy for the first plaintiff, on whom the duty of setting fire to the

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funeral pyre devolved in consequence of his father having predeceased his grandmother. If the evidence is intended, as seems to be the case, to convey the impression that Chidambara Odayar lighted the funeral pyre, because there was coparcenary, such an effect cannot be attached to it under the ceremonial law. Whether the family is joint or divided, it is the duty of the son, and, in his absence, of the grandson to perform the funeral obsequies; and when he is too ill or too young to undertake the duty, some elderly member, either an undivided or divided uncle or granduncle, acts as his substitute. As to the residence of Ayyadorai's daughters in the plaintiffs' house at Karuppattimulai, it may be owing to their junior paternal aunt living there, and it cannot be accepted as evidence of coparcenary."

The judgment concluded thus :—

"The conclusion we come to upon the whole evidence is that from 1837, when the plaintiffs' father went to Karuppattimulai, the two branches have acted as if they had no community of interest, and that the plaintiffs' branch has neither directly nor indirectly participated in the beneficial enjoyment of the property in dispute. In this view of the facts of the case the suit was clearly barred when Act XIV of 1859 was in force. By s. 1, cl. 13, there must be a participation in the family income, or some act equivalent to it, within twelve years, from which a joint interest may reasonably be inferred, and the evidence on record discloses neither the one nor the other.

"It has been held that what is necessary to bar the claim is proof of possession and enjoyment of the property as the possessor's separate property, to the absolute exclusion of the person suing to enforce the right to a share, for more than twelve years. We are of opinion that the appeal must be decreed; that the decree of the Subordinate Judge must be set aside, and the suit dismissed with all costs."

On this appeal Mr. *T. H. Cowie* and Mr. *R. V. Doyne* for the appellants argued that the judgment of the High Court was not completely consistent with the case set up for the defence. A case of abandonment by Palaniappa of his joint interest, after 1837, should have been proved by definite acts, or omissions, on his part, of which there had been no sufficient evidence. Moreover, as regards the immovable property of the family, upon the construction of cl. 13, s. 1, of Act XIV of 1859, the claimant, in

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order that a bar might be constituted, must have been entirely out of possession, from which he must have been excluded altogether by those former coparceners against whom he claimed. *Govindan Pillai* v. *Chidambara Pillai*(1). But here the evidence showed no such entire exclusion. Again, although Act XIV of 1859, s. 1, cl. 13, required a plaintiff to prove possession on his part within twelve years, the corresponding enactment in Act IX of 1871 required adverse possession on the part of the defendant. Reference was made to *Lakshman Dada Naik* v. *Ramchandra Dada Naik*(2) and *Rao Karan Singh* v. *Raja Bakar Alikhan*(3).

Mr. *J. D. Mayne* and Mr. *G. P. Johnstone* for the respondents were not called upon.

On a subsequent day (June 23rd) their Lordships' judgment was delivered by

Sir R. COUCH.—This is a suit between the members of a Hindu family, of which the common ancestor was one Ramalinga Odayar. He had two sons, Kutti Odayar and Subramanya Odayar. Kutti had an only son, Thoppai, who had three sons, one of whom died without issue, another, Subba, had three sons who have died without leaving issue, and the third, Sabhapati, left an only son, the second defendant Sami Odayar. Subramanya had two sons, Karuttasami and Chidambara. Karuttasami had an only son, Palaniappa, the father of the three plaintiffs, and Chidambara left an only son, the first defendant Subramanya. At the time the suit was instituted the plaintiffs and defendants were the only remaining members of the family. The share of the plaintiffs would be one-fourth if they are entitled to any part of the property claimed in the suit. They sued for possession of that share. The first defendant Subramanya, in his written statement, said that the plaintiffs and defendants were not members of an undivided family; that no portion of the property sued for was ancestral property of Chidambara and Thoppai; that they lived jointly and acquired some property through their own exertions, and the properties in litigation consisted of such self-acquisitions and of property subsequently acquired by their descendants, including the defendants.

Palaniappa, the father of the plaintiffs, was married in 1837, and there is no doubt that up to that time the descendants of

(1) 3 M.H.C.R., 99. (2) L.R., 7 I.A., 181; I.L.R., 5 Bom., 48.
(3) L.R., 9 I.A., 99; I.L.R., 5 All., 1.

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Ramalinga were a joint family. The material questions are whether Palaniappa then separated himself from the family in respect of the family property, or if he did not, whether he afterwards participated in the profits of it. It appeared from the evidence of Kuppu Odayar, who was connected by marriages of his own and his younger brother's daughter with both the plaintiffs and defendants, that Palaniappa married the daughter of Kuppu's paternal uncle, and on his marriage went to live at Karuppattimulai, the village of that family, which is about ten miles distant from Aravur, the residence of the Ramalinga family. At that time the family at Aravur was reduced in circumstances, and a moiety of the village of Karuppattimulai was given to his wife by her family. Palaniappa continued to live at Karuppattimulai and died there. The property thus acquired by him consisted of rather more than 14 velis of land, and it is said by the High Court that the family at Aravur probably owned about 35 velis, of which Palaniappa's share would have amounted to 8¾ velis. The High Court say that this fact and the evidence of Kuppu Odayar as to the circumstances of the family at Aravur convey the impression that Palaniappa did not probably intend or care to claim a share from his coparceners. It may be that he did not, but in order to see whether he lost his right to a share, what was done afterwards must be considered.

By s. 1, cl. 13 of Act XIV of 1859 a suit for a share of the family property not brought within twelve years from the date of the last participation in the profits of it would be barred. This Act continued in force until the 1st July 1871, when Act IX of 1871 came into force. Consequently if there was no participation of profits between 1837 and 1871, the suit would be barred, and the later Acts for limitation of suits need not be referred to. If they altered the law they would not revive the right of suit.

The plaintiffs sought to avoid the law of limitation by evidence of the actual receipt of money, by payments of marriage expenses by Chidambara and Sabhapati, and by residence in the family house at Aravur. Appasami, the first plaintiff, in his evidence said that about fifteen years ago he took from Aravur Rs. 2,000 or Rs. 3,000. This, if true (and he was not corroborated), would not avail to prevent the operation of Act XIV of 1859.

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There was evidence of the payment by Chidambara of the expenses of the marriages of members of the plaintiffs' family, when there was at the same time a marriage in his own family. The High Court justly say that this evidence is vague and unsatisfactory. Even if true it cannot be said to prove a participation in the profits of the estate received by Chidambara as manager for the family. As to the residence, their Lordships have been carefully referred by Mr. Doyne to all the evidence on this subject. It is conflicting, and the evidence of Ramu Odayar, one of the defendants' witnesses, is that the plaintiffs would come to Aravur on marriages and deaths and take their meals either in the old or new house, and would either come alone or with their family. This would explain what residence there was, and is more probable than the plaintiffs' case that the eldest member of their branch of the family resided at Aravur as a member of the joint family. Looking at the whole of the evidence it appears to their Lordships that whatever may have been Palaniappa's intention when he left Aravur, a suit for his share of the family property became barred by the law of limitation. This was the decision of the High Court, which reversed the decree of the Subordinate Judge and dismissed the suit. Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal. The appellants will pay the costs of it.

Appeal dismissed.

Solicitors for the appellants—*Burton, Yeates, Hart, & Burton.*

Solicitors for the respondents—*Gregory, Rowcliffes & Co.*

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

QUEEN-EMPRESS

against

SIVARAMA.*

1888. August 1.

Criminal Procedure Code, s. 494—Irregular procedure—Discharge of prisoner committed to sessions—New trial—Conviction quashed.

A prisoner committed to Sessions on a charge cannot be discharged by the Sessions Court under s. 494 of the Code of Criminal Procedure, but must be convicted or acquitted.

Where a prisoner was erroneously discharged by a Sessions Court under s. 494 (*a*):

Held, that as the prisoner was entitled to be acquitted, a conviction obtained in a second trial for the same offence was bad in law.

APPEAL from the decree of G. T. Mackenzie, Sessions Judge of Kistna, in calendar case No. 10 of 1888.

The prisoner was convicted of giving false evidence under s. 193 of the Penal Code.

In a suit before the District Munsif, prisoner was defendant, and sanction was granted to prosecute him for giving false evidence in the suit. Prisoner was committed for trial. The Sessions Judge, W. G. Underwood, being of opinion that the sanction granted by the District Munsif was too vague and did not apply to the prisoner, the Public Prosecutor withdrew from the prosecution, and the Sessions Judge directed the prisoner *to be discharged*. Thereupon a fresh sanction was obtained from the District Munsif, and the prisoner was again committed to Sessions and convicted. It was stated in the judgment that the Public Prosecutor withdrew from the case "before a charge was framed."

Anandacharlu for accused.

Mr. *Wedderburn* for the Crown.

(KERNAN, J., called attention to the fact of the former trial and order of discharge.)

Mr. *Wedderburn*.—The conviction is bad. The mistake has

* Criminal Appeal No. 183 of 1888.

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arisen apparently from the practice of Sessions Courts not trying prisoners on the charges framed by the committing magistrates, but on charges framed at the Sessions trial. The Sessions Judge evidently thought that the words "before a charge has been framed" in s. 494 of the Code of Criminal Procedure mean before the Sessions Court has framed a charge. But the charge referred to in s. 494 is evidently the charge mentioned in s. 210 and in s. 271 (see also s. 226). A prisoner once committed to Sessions on a charge cannot be discharged, but must be acquitted or convicted. The only way to remedy the defect now is to set aside all proceedings, including the erroneous order of discharge, and direct a new trial from that point.

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

JUDGMENT.—The prisoner was charged for the same offence that he is now charged with in case No. 19 of 1887 before the Sessions Judge on the 22nd day of July 1887. The charge was withdrawn by the Public Prosecutor by permission of the Sessions Judge. The result was that under s. 494(*b*) the prisoner should have been acquitted. But he was merely discharged by the Sessions Judge. This procedure was wrong. The Sessions Judge should have referred the matter to the High Court to quash the committal as he thought the sanction insufficient.

As the prisoner was entitled to be acquitted on the charge, the second charge for the same offence, though on a new sanction, is bad. We must, therefore, reverse the conviction in the present case.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

1888. April 17.

QUEEN-EMPRESS
against
NIRICHAN AND ANOTHER.*

Criminal Procedure Code, s. 35—Penal Code, ss. 71, 72—Separate convictions for different offences in the same transaction.

An accused person was convicted under s. 457 of the Penal Code of house-breaking by night in order to commit an offence (mischief and assault) and also

* Criminal Revision Cases Nos. 87 and 88 of 1888.

QUEEN-EMPRESS v. NIRICHAN.

under ss. 426 and 352 for the offences of mischief and assault and punished separately for each offence. These offences formed parts of one transaction:

Held, that the sentences were legal.

CASES referred by H. M. Winterbotham, Acting District Magistrate of Malabar.

The facts were stated as follows:—

Regarding the first case, the Joint Magistrate remarks—

"In this case the Sub-Magistrate has convicted and punished the accused under s. 457 of house-breaking by night with intent to commit mischief and assault, and has also convicted and punished the accused for the offences of mischief and assault separately.

"These latter sentences are illegal under the High Court ruling in criminal appeal No. 352 of 1873 (Weir's Digest, p. 381), where it was held that the law forbids two punishments for an offence so compounded that one substantive offence is the aim of the other and evidentiary matter of the intent necessary to constitute that other.

"This ruling of the Madras High Court was, however, passed under the late Code of Criminal Procedure. The Bombay High Court have lately discussed the legal question and have decided that the double punishment is legal under the present Code X of 1882—*Queen-Empress* v. *Sakharambhai*(1).

"The point is one of almost daily occurrence, and it seems to me to be of great importance that it should be ascertained whether the law on the point is the same now under Act X of 1882 as it was declared to be by the Madras High Court under the Code before in force.

"In my humble opinion the ruling of the Bombay High Court is the one that should be followed. An offence under s. 457, Indian Penal Code, is complete when a man commits house-breaking by night in order to the committing of assault or mischief, and if he proceeds further and actually commits assault or mischief, he then commits distinct offences punishable under ss. 352 and 426 of the Indian Penal Code, and these subsequent offences do not cease to be distinct offences because they also furnish evidence of the intention necessary to constitute the first offence."

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

(1) I.L.R., 10 Bom., 493.

QUEEN-EMPRESS v. NIRICHAN.

The Court (Kernan and Muttusami Ayyar, JJ.) delivered the following judgments:—

KERNAN, J.—The decision in *The Queen* v. *Noujan*(1) was made on the Criminal Procedure Code of Act X of 1872. Illustrations (*n*) and (*p*) to paragraph 3 of s. 454 were relied on by the Court as evidencing the rule that, although there might be separate convictions for different offences committed in a series of acts in the same transaction, yet there could only be punishment inflicted to the measure of the largest amount awardable for any one of the offences. In the Act X of 1882, although the first portion of the illustrations (*n*) and (*p*) in the former Act are to be found in illustrations (*b*) and (*c*) to paragraph 1 of s. 235, yet the part of the illustrations (*n*) and (*p*) in the former Act, which limits the punishment to that for one offence only, is not re-enacted. Section 71 of the Penal Code is not interfered with by s. 235 of Criminal Procedure Code. But in neither of the two cases before us did the different offences, when combined, constitute an offence. Therefore s. 71 does not apply. I think the sentences imposed in each case were legal.

MUTTUSAMI AYYAR, J.—In criminal revision case No. 88, the accused was convicted at one trial of three offences punishable under ss. 354, 380, and 451 of the Indian Penal Code. In criminal revision case No. 87 the accused was found guilty of offences punishable under ss. 352, 426 and 457 of the Penal Code. The several offences formed parts of one criminal transaction, and the second-class Magistrate passed separate sentences for each of the offences. The question referred to us is whether separate sentences can be lawfully passed. I would also answer the question in the affirmative. Section 235 of the present Code of Criminal Procedure contains only rules of criminal pleading in regard to joinder of charges, and reading cl. I, together with illustrations (*b*) and (*c*), it is clear that separate convictions for the several offences were perfectly legal.

As to the punishments to be awarded, the rule is now to be found in s. 35 of the Code of Criminal Procedure and in ss. 71 and 72 of the Indian Penal Code. According to s. 35, separate sentences awarded in the cases before us were legal. And s. 71 has no application, for the several offences are not parts of one

(1) 7 M.H.C.R., 375.

QUEEN-EMPRESS v. NIRICHAN.

and the same offence as shown by the illustration (*a*) of that section. Nor do the cases before us fall either under cl. III of s. 235 of the Code of Criminal Procedure or s. 72 of the Indian Penal Code.

On comparing s. 235 with the corresponding section of the former Code of Criminal Procedure, it will be observed that the rules for assessing punishment, which cls. II and III of s. 454 contained, are omitted in the present Code, and illustrations (*b*) and (*c*) of s. 235, cl. I of the present Code appeared in the former Code as illustrations of s. 454, cl. III. This modification clearly indicates an intention on the part of the Legislature to provide, by s. 235, rules of criminal pleading only and to leave the rules for assessing punishment to be found in s. 71 or 72 of the Indian Penal Code and s. 35 of the Code of Criminal Procedure. The ruling in *The Queen* v. *Noujan* had reference to the provisions of the former Code of Criminal Procedure, and it is no longer applicable. I do not, however, desire to be understood as saying that it may not usefully be kept in view for the purpose of seeing that the aggregate sentence is not excessive or unnecessarily severe.

APPELLATE CRIMINAL.

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

HAYES *in re.* *

1888. July 27, August 1.

Jurisdiction of High Court—Foreign Jurisdiction Act, 1879, ch. II—European British subjects in Bangalore—Justices of the Peace for Mysore.

The Civil and Military Station of Bangalore is not British territory, but a part of the Mysore State, and the Code of Criminal Procedure is in force therein by reason of declarations made by the Governor-General in Council in exercise of powers conferred by the Foreign Jurisdiction and Extradition Act, 1879.

Justices of the Peace for the State of Mysore are also Justices of the Peace for Bangalore, and both the Civil and Sessions Judge and the District Magistrate of Bangalore being such Justices of the Peace, are, by virtue of s. 6 of the said Act, subordinate to the High Court at Madras.

APPLICATION to the High Court under s. 526 of the Code of Criminal Procedure for the transfer of a criminal case from the Court of the District Magistrate of the Civil and Military Station

* Criminal Miscellaneous Petition No. 41 of 1888.

HAYES *in re.*

of Bangalore to the Court of one of the Presidency Magistrates at Madras.

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

Mr. *Hayes* for petitioner.

Laing for defendants.

JUDGMENT.—This is an application under s. 526 of the Criminal Procedure Code for the transfer of a criminal case pending in the Court of the District Magistrate of the Civil and Military Station of Bangalore. One Mr. Hayes filed a complaint in the said Court under s. 500 of the Indian Penal Code against (i) the editor and managing proprietor and publisher of the *Bangalore Spectator*, and (ii) against the joint-proprietor and publisher of the *Bangalore Spectator*. Both the accused are European British subjects. It appears the complaint has reference to matters connected with the Municipality of Bangalore, and that the District Magistrate is also the President of the Municipality. It is further alleged for the complainant and admitted for the accused that the Magistrate may probably be cited as a witness in the case. Affidavits are also filed to show that the Magistrate himself expressed a wish that the case might be removed from his Court. We consider, therefore, that it is expedient to transfer the case to some other magistrate competent to try European British subjects and having jurisdiction as a first-class Magistrate in the Civil and Military Station of Bangalore. The next question we have to consider is whether we may transfer the case either to the Civil and Sessions Judge for the station of Bangalore or to the Assistant Resident of Mysore. In this connection three points are urged for the accused, viz., (i) that the Civil and Military Station of Bangalore is not British territory; (ii) that the Code of Criminal Procedure is in force there in common with other Acts by virtue of declarations made by the Governor-General in Council in exercise of the powers conferred upon him by Act XXI of 1879, and (iii) that those who are appointed Justices of the Peace for the State of Mysore under the said enactment are also Justices of the Peace for the station of Bangalore. We are of opinion that the contention is well founded. We see no reason to doubt that the station of Bangalore is foreign territory. That it was so prior to 1881 was already

HAYES *in re.*

decided by this Court in *Regina* v. *Shallard*(1). In 1881 when the State of Mysore was transferred by the Governor-General in Council to His Highness the Maharaja of Mysore, the whole province of Mysore was transferred, and the Civil and Military Station of Bangalore was not specially excluded. The instruments of transfer, however, provided for the establishment of British cantonments in the State of Mysore, for the Maharaja granting free of all charge such lands as may be required for such cantonments and for renouncing all jurisdiction within the lands so granted. (*Mysore Blue Book*, page 193.) On the 19th May 1881, the Maharaja of Mysore assigned the Civil and Military Station of Bangalore to the British Government and renounced the exercise of all jurisdiction within the said station with effect from the 25th March 1881. (See Notification, *Mysore Gazette*, Part I, No. 8, page 25, of 21st May 1881.) It is clear then that the station of Bangalore is part of the State of Mysore, assigned by the Maharaja to the exclusive management of the British Government, and in which the Maharaja renounced the exercise of all jurisdiction. Nor is there any reason to doubt that the Code of Criminal Procedure and other Acts of the Legislative Council are in force in the station of Bangalore by virtue of declarations made from time to time by the Governor-General in Council under Act XXI of 1879. Thus on 3rd March 1883 Act X of 1882 was introduced into Bangalore with the exception of so much of it as applies (i) to the Courts of Presidency Magistrates, (ii) to Justices of the Peace, (iii) to European British subjects, and (iv) to the High Courts of Judicature established under 24 and 25 Vict., ch. 104. (*Gazette of India*, Part I, page 137, of 3rd March 1883.) Again on the 7th August 1883 the Governor-General in Council published a list of Acts declared applicable to Bangalore Civil and Military Station, and the notification published in the *Gazette of India*, Part I, page 332, of the 11th August 1883, announced that the declaration was made under ss. 4 and 5 of Act XXI of 1879 (The Foreign Jurisdiction and Extradition Act, 1879). Further it is clear that the jurisdiction which Justices of the Peace exercise over European British subjects in the Civil and Military Station at Bangalore depends upon their appointment for that station and upon Act XXI of 1879 and

(1) 2 M.H.C.R., 444.

HAYES *in re.*

upon the enactments extended by the Governor-General in Council under the authority conferred upon him by the Foreign Jurisdiction Act.

Accordingly on the 21st July 1881 ten persons were appointed to be Justices of the Peace in the State of Mysore under s. 6 of Act XXI of 1879. (*Gazette of India*, Part I, page 296, of the 23rd July 1881.) On the 3rd January 1884 the Assistant Resident was similarly appointed a Justice of the Peace. The District Magistrate before whom the complaint of Mr. Hayes is now pending, and the Civil and Sessions Judge to whose file its transfer is suggested, were appointed to be Justices of the Peace in the State of Mysore on the 22nd March 1884 and on the 14th October 1884 respectively. (*Gazette of India*, Part I, pages 124 and 360.) Though they are all appointed Justices of the Peace in the State of Mysore, they are Justices of the Peace also for the Civil and Military Station of Bangalore, which is included in and part of that State as already stated. It is conceded by the counsel for the complainant that no other construction is possible, for there would be no Justice of the Peace at all for the station of Bangalore if it were not taken to be included in the words "In the State of Mysore."

The conclusion we come to is that the Civil and Sessions Judge, as well as the District Magistrate, of the Civil and Military Station of Bangalore are appointed Justices of the Peace, by virtue of their offices, in the said station for the State of Mysore, which includes the Civil and Military Station of Bangalore; that by virtue of s. 6 of Act XXI of 1879, they are also magistrates of the first class, and that both their Courts are subordinate to this Court under the same enactment.

We order, therefore, that the complaint of the petitioner now pending in the Court of the District Magistrate of Bangalore Civil and Military Station be transferred from his file to that of the Civil and Sessions Judge of that station.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

NARASAYYA (DEFENDANT No. 1), APPELLANT,

and

SAMI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1888. Aug. 2, 16.

Fishery—Tidal river—Customary right.

Plaintiffs claimed a right to catch fish in a tidal river at a certain place by putting up stake nets across the river. This right was alleged to be based on custom which was not denied by defendants and user for thirty years was proved. The claim was decreed:

Held, that plaintiffs were not bound to prove sixty years' exclusive user to support their claim.

APPEAL from the decree of V. Srinivasacharlu, Subordinate Judge at Cocanada, confirming the decree of C. Rangayyar, District Munsif of Narasapuram, in suit No. 457 of 1885.

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

Anandacharlu for appellant referred to *Viresa* v. *Tataya*(1).

Mr. *Michell* for respondents. The respondents have acquired a right by prescription long before the Easements Act, 1882, was passed. *Ponnusawmi Tevar* v. *The Collector of Madura*(2), *Mullick Kurim Baksh* v. *Harrihar Mandar*(3). In the absence of a specific rule for easements in the Limitation Acts of 1859 and 1871, the twelve years' rule applies.

WILKINSON, J.—The plaintiffs are fishermen residing in the village Kalipatam on the banks of the Upputeru, a river which issues forth from a fresh water lake called Kolleru and empties itself into the sea. The river appears to be throughout its entire course tidal. The plaintiffs claim the exclusive right of fixing stakes and nets for the purpose of catching fish, in other words of putting a *valakattu* at a certain point of the said river and sue for

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* Second Appeal No. 1309 of 1887.

(1) I.L.R., 8 Mad., 467.
(2) 5 M.H.C.R., 6.
(3) 5 B.L.R., 174.

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a perpetual injunction to restrain the defendants from interfering with their rights. They also claim damages.

The defendants denied the plaintiffs' exclusive right and asserted that they and their ancestors had long used the said spot.

The Munsif found that the *valakattu* sued for had been used by the plaintiffs for more than thirty years in their own right, and that there existed a custom for the owners of each *valakattu* to make use of a particular spot for putting up their nets. He did not consider the case a proper one for a perpetual injunction, and therefore gave the plaintiffs a decree declaratory of their right to the fifth *valakattu*.

On appeal, the Subordinate Judge upheld the decree of the Munsif.

In this Court it is urged that plaintiffs can have no legal title unless they establish an enjoyment for sixty years. Reliance is placed on the decision reported in *Viresa* v. *Tataya*(1).

The plaintiffs in that case claimed a right by immemorial prescription to place stake nets across the Upputeru and to prevent any other person placing similar nets between their village and the place at which the river issued for the Kolleru lake.

It was held that as an infringement on the general rights of the public, it is clear that the right claimed by the plaintiffs could be acquired by a period of enjoyment which would suffice for the acquisition of an easement against the Crown. This is the portion of the judgment which the appellant's pleader relied on in support of this appeal. But it was also added that assuming that the plaintiffs have not established such a common of fishery as they claimed, they may have established a right to a fishery of such a nature that they are entitled by custom to prevent the exercise of a similar right by others within a distance which would necessarily injure the exercise of the right by the plaintiffs.

Now it cannot be denied that the plaintiffs have, as members of the public, a right to fish in the Upputeru which, as a tidal river, is open to the public. The defendants undoubtedly have a similar right and that right is conceded by the plaintiffs. What the plaintiffs contended is that, according to a custom which has been in existence from time immemorial, they have been in the habit of putting up stake nets at the spot marked 5, and that

(1) I.L.R., 8 Mad., 467.

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in April 1885 the defendants obstructed them. Both the lower Courts have found that the custom has been made out. It appears that there are 28 *valakattus*, the property of different fishermen of Patapadu, and that these *valakattus* are put up every year for certain months in certain recognised places according to an immemorial custom. In breach of that custom the defendants have trespassed upon and interfered with the plaintiffs' *valakattu* and caused damage to them. There being a right, there must be a remedy, and I think this suit lies although the plaintiffs may not have proved enjoyment for sixty years. The defendants were bound to exercise their right of fishing in the Upputeru in a fair and reasonable manner in accordance with the established custom of the village and not so as to impede the plaintiffs from doing the same. Both plaintiffs and defendants are entitled to put up stake nets and catch fish in the Upputeru. But an immemorial custom having been established, according to which the rights of the parties are to be exercised in a particular way, defendants are not at liberty to set that custom at defiance to interfere with plaintiffs' customary exercise of the right. But independently of custom if the conduct of the defendants towards the plaintiffs prevented the latter from a fair exercise of their equal right and special injury thereby accrued to the plaintiffs, the conduct of the defendants is actionable.

There being no grounds for interference, this appeal is dismissed with costs.

MUTTUSAMI AYYAR, J.—The right recognised by the Courts below is a right to catch fish in a tidal stream by fixing stake nets across it at a spot indicated by what is called the fifth *valakat*, and the contention for the appellant is that the user in evidence extends to no more than thirty years, and that unless it is shown to have extended to sixty years, it is not sufficient to support a claim of exclusive right to the fifth *valakat*. On the other hand it is urged for the respondents that thirty years' user is evidence of immemorial enjoyment and consequently of a grant from the Crown unless the evidence discloses a specific period short of sixty years as the origin of the user. Our attention is also drawn to a special custom found by the District Munsif to exist in the village to which the parties to this appeal belong. The facts found by the District Munsif are that the fifth *valakat* was used by the respondents for more than thirty years, and that there was

NARASAYYA v. SAMI.

a custom in the village as alleged by them, according to which the owners of each *valakat* had a right by usage to use a particular spot in the creek for fixing his stake nets. He also observed that the appellant did not deny the custom. The Subordinate Judge concurred in the opinion of the District Munsif as to the period for which the respondents and there predecessors had used the *valakat* in question, but did not treat the special custom as one of the questions arising for determination; nor did he record a distinct finding in regard to it. It appears, however, from the judgment of the District Munsif that the existence of the custom as a fact was not denied by the appellant. This Court observed in *Viresa* v. *Tataya* that "though the plaintiffs had not established a right to such a common of fishery as they claimed, they may have established a right to a fishery of such a nature that they are entitled by custom to prevent the exercise of a similar right by any other persons within a distance which would necessarily injure the exercise of the right by the plaintiffs." Allusion was also made to the judgment in *Baban Mayacha* v. *Nagu Shravucha*(1) in which the learned Chief Justice of Bombay stated that a fishery common to the public might be used subject to such regulations as are essential for its enjoyment by members of the public. If such a regulation is evidenced by a custom obtaining in the village for upwards of thirty years, I see no reason why it should not be enforced as creating an obligation as between the residents of the same village not to interfere with each other's privilege founded upon such custom. As the District Munsif states that the existence of the custom was not denied, I do not consider it necessary to refer an issue. Concurring with my learned colleague, I would also dismiss the second appeal with costs. I do not consider it necessary to express an opinion on the other questions raised by respondents' counsel.

(1) I.L.R., 2 Bom., 19.

APPELLATE CRIMINAL.

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

THATHAYYA *in re.**

1888. Sept. 5.

Criminal Procedure Code, s. 195—Sanction does not lapse with the death of grantee.

A civil court granted sanction under s. 195 of the Code of Criminal Procedure to the defendant in a suit to prosecute certain witnesses for perjury. The defendant died without having preferred a complaint. His brother, thereupon, preferred a complaint and the magistrate dismissed it under s. 253 of the Code of Criminal Procedure, on the ground that the sanction died with the defendant. The Sessions Judge held that the sanction was alive and directed the District Magistrate to make further inquiry under s. 437:

Held, that the Sessions Judge was right.

APPLICATION under ss. 435 and 439 of the Code of Criminal Procedure to set aside the order of G. T. Mackenzie, Sessions Judge of Kistna, directing further inquiry into charges of perjury brought against petitioners.

The facts appear from the order of the Sessions Judge, which was as follows:—

"The District Munsif of Bapatla, in deciding suit No. 64 of 1886, expressed an opinion that two witnesses had given false evidence. Afterwards, the defendant in that suit, Rudrarazu Somarazu, presented a petition to the Munsif praying that these witnesses might be prosecuted for perjury. The Munsif heard the vakils on both sides, and, on 27th June 1887, issued an order permitting the prosecution of these witnesses under s. 193 of the Penal Code.

"Rudrarazu Somarazu died before he lodged any complaint in pursuance of the Munsif's sanction, and, on 22nd October, his brother, Rudrarazu Sivaramarazu, preferred a complaint before the Joint Magistrate.

"The Joint Magistrate has discharged the two men accused of false evidence under s. 253 of the Code of Criminal Procedure.

* Criminal Revision Case No. 347 of 1888.

THATHAYYA *in re.*

The Joint Magistrate considers that, as the person who obtained the sanction died, the sanction has elapsed.

"I am unable to concur in this view. I find nothing in s. 195 of the Code of Criminal Procedure which warrants this view. The sanction given by a court under s. 195 is not a personal privilege granted to a petitioner, but a decision that the case is one suitable for magisterial investigation.

"The Joint Magistrate had power to receive a complaint from his brother, Rudrarazu Sivaramarazu. There is nothing in s. 4 (*a*), s. 191, or s. 200 that prevents it. The only bar is s. 195, which requires the previous sanction of the District Munsif, and that sanction had been given.

"In the inquiry held by the Joint Magistrate, the accused put in a memorandum in which they call attention to the case of *Giridhari Mondul, in re*(1).

"The Joint Magistrate quotes the head-note of the report to the effect that permission is granted to a private person to exercise his own unfettered discretion as to whether he will take proceedings or not. It is not safe to follow the head-notes of reports, and I think that this head-note has misled the Joint Magistrate. In this Calcutta case a District Magistrate, on perusing the police reports of a complaint of dacoity against one Numboo, issued an order 'Numboo directed to bring a case under s. 211.' The High Court pointed out to the District Magistrate that his order was expressed in an improper manner, but declined to stop the prosecution instituted by Numboo in accordance with that order. I can see nothing in that remark of the Calcutta High Court which supports the view taken by the Joint Magistrate that the sanction granted by the District Munsif of Bapatla was personal to Rudrarazu Somarazu. I consider that, on the death of Somarazu, his brother could, within six months of the date of the Munsif's order, file the necessary complaint before the magistrate.

"The Joint Magistrate has discharged the accused upon this preliminary point and has not entered into the merits of the case against them. I consider that these two cases ought to be heard on their merits, and, under s. 437 of the Code of Criminal Procedure, I direct the District Magistrate to make further inquiry into these cases either himself or by any subordinate magistrate."

(1) I.L.R., 8 Cal., 435.

THATHAYYA *in re.*

Anandacharlu and *Sundaram Sastri* for petitioners.

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

JUDGMENT:—A sanction granted under s. 195 of the Code of Criminal Procedure is a condition precedent to the entertainment of a complaint by the magistrate. There is nothing in the section to restrict the right of complaint to any particular individual when a sanction has been granted under that section.

The order of the Sessions Judge is right.

APPELLATE CRIMINAL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

1888. Sept. 11.

QUEEN-EMPRESS

against

RAMAKRISHNA.*

Penal Code, s. 403—Criminal misappropriation—Intention, Proof.

R. was a Government servant, whose duty it was to receive certain monies and to pay them into the treasury on receipt. He admitted that he had retained two sums of money in his possession for several months when fearing detection he paid them into the treasury making a false entry at the time in his books with a view to avert suspicion. His explanation as to his reason for retaining the money was not credited by the magistrate who convicted him of criminal misappropriation under s. 403 of the Indain Penal Code:

Held, that the conviction was right.

APPLICATION under ss. 435 and 439 of the Code of Criminal Procedure to quash the conviction of petitioner by W. E. Clarke, First-class Magistrate, Nilgiris, confirmed on appeal by D. Irvine, Sessions Judge of Coimbatore, in appeal No. 11 of 1888.

The facts of this case are set out in the judgment of the Court (Wilkinson and Shephard, JJ.).

Mr. *Wedderburn* for petitioner.

Mr. *Subramanyam* for the Crown.

For the prisoner it was argued that there was no proof of criminal intention, and that the prosecution was bound to prove something more than retention of the money and non-payment.

* Criminal Revision Case No. 405 of 1888.

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There must be proof of denial of receipt or a false account or the like. *Rex* v. *Owen Jones*(1), *Rex* v. *Hodgson*(2). The false entry of payment was not evidence of any such intent (2, Russell on Crimes, p. 455, note), for if the crime had been committed it was complete long before the false entry was made. However suspicious the circumstances might be, the reasons given by the prisoner for non-payment were not proved to be false.

For the Crown it was urged that the circumstances of the case precluded any reasonable hypothesis of innocence, and that if further proof was necessary, it would be almost impossible to convict Government servants who misappropriated the public monies.

WILKINSON, J. — The petitioner was, in 1887, Income-tax clerk in the office of the Collector of the Nilgiris. As such, it was his duty to receive monies paid by persons assessed to income-tax, to enter such receipt in the remittance book, to pay such monies into the treasury, and to prepare and obtain the signature of the Deputy Collector to receipts to be given to the payees. The facts found are (1) that petitioner received Rs. 17-5-1 in July 1887, and failed to pay in the same to the treasury until January 23rd, 1888; (2) that he received Rs. 44-10-0 on September 9th, 1887, but did not pay in the same to the treasury till January 23rd, 1888; (3) that he made false entries in the remittance book as to date of receipt; and (4) that he had these monies in his own possession from the dates of receipt until January 1888. The petitioner admitted these facts and stated that he had put the monies into his pocket and taken them home awaiting an opportunity of replacing them without detection. Under these circumstances, the petitioner has been found guilty of criminal misappropriation under s. 403, Indian Penal Code, and sentenced to six months' rigorous imprisonment. The finding and sentence have been confirmed on appeal by the Acting Sessions Judge of Coimbatore. We are asked to set aside the conviction on the ground that there is no evidence of dishonest misappropriation or conversion. I am of opinion that the petitioner has been rightly convicted of the offence of criminal misappropriation. The offence consists in the dishonest misappropriation or conversion either permanently or for a time of property which is already without wrong in the

(1) 7 C. & P., 833. (2) 3 C. & P., 422.

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possession of the offender. There must be the intention to cause wrongful gain or wrongful loss, and it is argued that such intention must be affirmatively made out by the prosecution, as the original taking in this case was innocent. In my judgment the Lower Court rightly held that in a case like the present dishonest intention can only be inferred from the circumstances of the case, looking at all the facts of the case it seems to me that the only conclusion to be drawn is that the intention of the prisoner was dishonest, if not when he put the monies in his pocket and carried them home with him, at all events the next day when he omitted to take back the monies with him to the office and credit them to Government. The learned counsel for the petitioner has referred us to the case of *Rex* v. *Owen Jones* decided by Baron Bolland in 1837. That was a charge of embezzlement, and the learned Judge ruled that it was not enough to prove that the accused had received a sum of money and failed to enter it in his accounts unless there was evidence that he had denied the receipt or rendered some false account. The facts of that case are entirely different from this. There the prosecutor and the prisoner had mutual dealings and accounts which had not been adjusted for two years. All that was proved was an omission to enter certain sums received on behalf of the prosecutor in the books kept by the prisoner. The case of the *Queen* v. *Proud*(1) is more in point. The prisoner was a member of a friendly society, and his duty as paid secretary was to receive monies from members to pay what was due from the society, and to place the balance in a box in the society's room. Suspicions having arisen, prisoner was called upon to deliver up his books, and it was discovered that he had omitted to enter in the book a large number of subscriptions. When called upon for an explanation, prisoner at once admitted he had received the money and offered to repay it. The prisoner was found guilty, and the conviction was affirmed by the Court of crown cases reserved. I may notice here the remarks of the Judges in Criminal Revision Case No. 913 of 1883 (Weir, 3rd Edition, p. 265), a case very similar to the present.

It was the duty of the prisoner to remit the monies he received to the treasury immediately. Instead of doing so, he retained two sums for several months without entering them in his accounts,

(1) 31 L.J. (M.C.), 71.

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and it was not until he knew that detection was inevitable that he paid up the money; and even then he attempted to impose upon his superior by putting before him for signature false receipts. There were circumstances from which a fraudulent intention might have been inferred, and I see no reason for interference on revision. The sentence is not too severe.

The petition is therefore dismissed.

SHEPHARD, J.—The petitioner has been convicted on two charges framed under s. 403 of the Indian Penal Code, the Magistrate who tried the case and the Sessions Judge on appeal appearing to take much the same view of the facts. There is no question as to the fact of the petitioner having received the sums on account of income-tax in the months of July and September 1887 and retained them in his hands till the 23rd January 1888. But it is objected that there is no proof of any dishonest conversion of the monies to his own use. The petitioner has endeavoured to account for an act which *primâ facie* does not seem consistent with honesty, by saying that he received the two sums late in the day and was therefore unable to enter them in his book or pay them into the treasury in the usual course; apprehensive of official displeasure on account of the breach of duty, he says he kept the monies with him waiting for an opportunity of replacing them without detection. It is to be observed that he admits having taken these two sums to his own house and does not say he kept them there intact, whereas, with regard to a third sum, in respect of which he was also charged, he says, he kept it in his office desk, and on the strength of this circumstance, as it appears, he was acquitted by the magistrate. As I read the magistrate's judgment touching the sums in respect of which he convicts the petitioner, the magistrate did not accept his explanation as true. Having regard to the circumstances, he did not believe that the petitioner really had intended to pay the monies into the treasury, but thought that he had intended to appropriate them to his own use. And the Sessions Judge agrees in thinking that the explanation cannot be accepted. If the petitioner's account of the reasons for not crediting the money in the usual way is put aside, I think there is no doubt the conviction is right. If he did not intend to pay the money into the treasury, he must have intended to appropriate it to himself, and it cannot make any difference that one of his reasons for adopting this course,

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which was clearly a dishonest one, was that he desired to avert the displeasure of his superior. It was argued that proof of the offence was not complete, because the petitioner was not shown to have ever denied receipt of the money; and we were referred to the case of *Rex* v. *Jones*(1) as authority for the position that evidence of denial is essential. But the facts of that case were very different. The prisoner then, though called a clerk, was really an agent carrying on the prosecutor's business at another place. There were accounts between them unsettled for two years, and all that was shown was that certain small sums received by the prisoner had not been entered in his accounts. It is clear that in such a case the prisoner's conduct was quite consistent with honesty—the omission to make the entries might be attributed to carelessness. It might well, therefore, be said that without evidence that he had denied receipt of the money or made some false account, no case of embezzlement was made out.

The position of the present defendant was very different. He had no business to retain in his own hands money received by him in his official capacity: strictly he was bound to pay it as and when he received into the treasury without waiting for any request; and if it were proved against him that instead of paying the money into the treasury he had put the money in his pocket and taken it home, that without any more would, I think, be sufficient to convict him of dishonest misappropriation. Unless he convinced the magistrate that he had made a mistake or had kept the money intact fully intending to pay it in, he must have been convicted. Lapse of time makes it less likely such an explanation would be credited, but otherwise is I think immaterial.

There are doubtless cases in which a denial of receipt of the money is necessary in order to prove the dishonest intention, but this case in my opinion is not one of them. I think the case against the petitioner was complete, when once it was found that having taken the money he resolved to keep it and not pay it into the treasury.

I agree in holding that the petition must be dismissed.

(1) 7 C. & P., 833.

APPELLATE CRIMINAL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

1888. Sept. 11.

MADURAI *in re.**

Penal Code, ss. 426, 477—Destruction of promissory note—Offence not triable by Magistrate, but by Sessions Court only.

P. M. was convicted by a magistrate under s. 426 of the Indian Penal Code on a charge of mischief by tearing up a promissory note for Rs. 20:

Held, that the offence charged fell under s. 477 of the Penal Code and was therefore triable by a Sessions Court only.

APPLICATION under ss. 435 and 439 of the Code of Criminal Procedure to quash the sentence of Colonel McDonald Smith, Chief Presidency Magistrate, in calendar case No. 12102 of 1888.

The facts and arguments necessary for the purpose of this report appear from the judgment of the Court (Wilkinson and Shephard, JJ.).

Mr. *Wedderburn* for petitioner.

The Public Prosecutor (Mr. *Shaw*) for the Crown.

Alagasingarachari for the complainant Chinnasami.

JUDGMENT.—The complaint against the accused is that he tore in pieces a promissory note which the complainant, having come to demand payment, had put into the hands of the accused. The Chief Presidency Magistrate has found the accused guilty and convicted him of an offence punishable under s. 426 of the Indian Penal Code. It is objected on behalf of the accused that, having regard to the complaint and the evidence in support of it, the Magistrate ought to have treated the case as one in which an offence punishable under s. 477 was charged and ought, in his view of the evidence, to have committed the case for trial, having himself no jurisdiction to try a charge under that section.

We are of opinion that the objection is well founded. The destruction or attempted destruction of such an instrument as a promissory note is, by s. 477 specifically made an offence which is triable by the Session Court only. With evidence of such an offence before him, the Magistrate ought, we think, to have

* Criminal Revision Case No. 433 of 1888.

committed the case. *Empress* v. *Paramananda*(1). The Magistrate refers us to a case reported in Weir's Criminal Rulings, page 259, where it is held that because the evidence may be sufficient to support a charge of robbery with violence or other circumstances of aggravation so as to bring the case within s. 394 or 397 of the Indian Penal Code, the jurisdiction which the Magistrate has under the general s. 392 is not necessarily ousted. The present case, however, is different. The distinction between s. 426 and s. 477 is of a different character. Mischief done by a particular means or to particular things is in several cases treated as a specific offence and in some cases, *e.g.*, those of mischief by fire and mischief by destroying a light-house, the offence is triable only by the Court of Session. When there is evidence of such an offence having been committed, the Magistrate cannot, we think, disregard the fact that the mischief was committed in a particular way or to particular property, as he might disregard the circumstances of aggravation which convert a case which would otherwise be simple robbery into robbery with violence. We may also refer to the later ruling reported in page 701 of Weir's Criminal Rulings as showing that the Magistrate is not justified in assuming jurisdiction, when the evidence plainly points to a more serious offence of the same genus without his jurisdiction. Exception was also taken to the judgment of the Magistrate, on the ground that he had misunderstood the evidence of the defence witnesses in supposing that they had been called to prove an *alibi*. However, it is unnecessary to make any observation on this point, because for the reason already stated we think the case is one in which the Magistrate ought, if he thought a *primâ facie* case made, to commit accused for trial at the sessions. We must set aside the conviction and sentence and direct the Chief Presidency Magistrate to rehear the case, examining such witnesses as the parties may produce, and dispose of the case according to law.

(1) I.L.R., 10. Cal., 85.

APPELLATE CRIMINAL.

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

1888. July 18.

QUEEN-EMPRESS

against

DAMODARAN.*

Penal Code, s. 304a—Causing death by a criminal act.

Where death is caused by an act being in its nature criminal, s. 304*a* of the Indian Penal Code has no application.

APPLICATION under ss. 435 and 439 of the Code of Criminal Procedure by the Public Prosecutor to set aside a conviction by W. M. Scharlieb, Presidency Magistrate (Black Town), and to direct a committal to sessions.

The facts of the case are set out in the judgment of the magistrate, which was as follows :—

"The facts of this case, as proved by the prosecution and not denied by the prisoner, are very simple, and there is no doubt that the deceased, Muniappan, met with his death from the injuries sustained by him at the hands of the prisoner. But after all, it was a sudden drunken squabble in which there was no premeditation whatever, and certainly no previous animosity on the part of the prisoner against the deceased. This is clear from the deposition which I took from the deceased himself when he lay on his death-bed in the General Hospital. The deceased solemnly assured me that he and the prisoner had never had any previous misunderstanding, and that all that had led to the prisoner falling upon him and beating him in the manner he did the previous evening was the altercation that had taken place between them at the time at the toddy-shop. It appears that the deceased, who was a cook in the service of Conductor Taylor living in the Ordnance Lines, went with two fellow-cooks between 8 and 9 that night, viz., the 19th March last, to a toddy-shop near the Memorial Hall where they had some toddy to drink; that as they were

* Criminal Revision Case No. 285 of 1888.

leaving, the man (Manikam, W. 4), who had served them with their liquor, asked deceased for the payment of some money which he (deceased) said he had already paid, and that the prisoner, who happened to be lolling about at the time against a post in the verandah, interposed—in the insolence of his youth perhaps—and insisted on the deceased paying for what he had drunk before leaving the shop. The deceased—not unnaturally—bid the prisoner mind his own business and leave the toddy-seller and himself to settle their own differences. As the two got into words, another servant of the toddy-shop named Govindan (W. 5) put them out of the shop. The two, viz., the prisoner and the deceased, passed into the street continuing their altercation; and when they were in front of a betel-bazaar next to the toddy-shop, they passed from words to blows, in the course of which the deceased was knocked down and sat upon by the prisoner, who appears to have dealt the prostrate man some further blows about the neck and body. The evidence of the deceased's wife, Paliam (W. 1), and of his two companions, Chockalingam (W. 2) and Mukundu (W. 3), does not touch the details of the fight. As Mrs. Taylor called for her supper, Paliam ran to the toddy-shop, which was close by, to fetch her husband to serve it, but she only arrived on the spot to see the prisoner seated on her husband in the act of assaulting him, when she seized the prisoner by the hair of his head and dragged him off her husband. Chockalingam and Mukundu had lingered in the verandah of the toddy-shop to light their cheroots and did not come out till attracted by the noise in the street, and then they only came on the scene as Paliam ran up and dragged the prisoner off the prostrate body of her husband. The deceased was lying insensible on the ground; his wife and friends tried to set him on his legs, but he could not stand; and as his head seemed to be helplessly hanging down, they carried him to his godown in the Ordnance Lines, and then his wife, Paliam, ran and fetched the police, who conveyed the deceased to the General Hospital, where he died at noon on the 21st March from fracture of the spine. Seeing that the facts of the case were not disputed, and that the prisoner, who simply pleaded that he was so drunk that he had no consciousness of what had taken place, had no defence to make, the question I had to debate in my own mind was the nature of the charge established against the prisoner. The prisoner might be committed to the High Court to take his trial under s. 304

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of the Penal Code on the charge of culpable homicide not amounting to murder, or his case was open to be determined by this court under s. 304*a* for causing the death of a person by doing a rash act not amounting to culpable homicide. In *Nidamarti Nagabhushanam* v. *The Queen*(1) the prisoner killed his mother by beating and kicking her. The Sessions Judge found that the death resulted from a brutal beating and kicking; but, acquitting the prisoner of culpable homicide on the ground that the violence was not such as the prisoner must have known to be likely to cause death, he convicted the prisoner under the new s. 304*a* of causing death by a rash act. The High Court did not think the Judge's reason any ground for acquitting the prisoner of culpable homicide not amounting to murder, because the question was, whether the act was done with the knowledge of causing bodily injury likely to cause death. In the case in question, the brutal beating and kicking and dragging by the hair of an old woman of 60 was by a powerful man who had acted without the smallest provocation. The High Court pointed out that culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope they may not, and often with the belief that the actor has taken precautions to prevent them happening, and that the imputability arises from acting despite the consciousness. In the present case the facts are widely different. The deceased, according to Dr. Smith who made the *post-mortem* examination, was a well nourished man, in strong good health, while, to all appearance, the prisoner is a young and rather a small and lightly built man, and, as far as the police knew, he is not a professional bully or a frequenter of gymnasiums. He appears to have officiously interfered on behalf of the toddy-seller, and when told to mind his own business got into words with the deceased. As to what happened in the street after they were turned out of the shop, there is the evidence of a cooly named Arogiam (W. 6) who had come to the betel bazaar to buy betel. This man's evidence was not given in any clear or intelligible manner. When coming to the supreme point in the case, his words could scarcely be grasped, and he really conveyed more by his pantomime than by the actual words he used. This man was the only eye-witness forthcoming

(1) 7 M.H.C.R., 119.

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of what occurred. According to him, the deceased first struck the prisoner, who immediately retaliated with a blow, and, as the deceased turned away, sprang upon him, struck him on the neck, pushing him at the same time, and thus threw him down. All this was done, apparently in a moment, in the suddenness of the provocation and without any premeditation whatever. The only circumstance which bears upon intention or consciousness is that Arogiam says that when laying hands on the deceased, the prisoner exclaimed he would twist his neck. On this point, I am not disposed to place much reliance on the witness' statement. He dealt more in gesture than in words at this particular point, and although he fitted in the words to suit his pantomime, it appeared from his description of what the prisoner did that he gave him a violent blow on the back of the neck, and at the same time pushed him with his fist thus planted on the nape. It may here be noted that the deceased in his deposition before death did not say a word about the prisoner twisting his neck. But even if it be true that the prisoner said 'I will twist your neck,' such words are often used in an angry moment without any meaning, and then there is the doubt that there was any consciousness on the part of the prisoner that such a treatment of a man's neck might cause injury to the spine and thus likely lead to death. To my mind, upon a careful review of the whole of the evidence, it was the hot-headed act of a young man in drink angered first by altercation and then provoked by being struck. It was in fact a drunken squabble, when passions are more or less excited on both sides and blows are struck without calculating the cost. The medical officer was of opinion that the injury to the spine was most likely caused by planting the fist or knee against the back of the neck and then violently wrenching the head backwards. The evidence of Arogiam so far consists with this that, as gathered from his description of the scene he witnessed, the prisoner violently struck the deceased on the back of his neck and simultaneously pushed him with his fist thus planted. This had in all probability the effect of jerking the deceased's head backwards, but there was no putting forth of the other hand and wrenching the head backwards with it. The blow on the neck was no doubt repeated perhaps several times; for the medical officer found that there was a contusion on the nape of the neck and that there was an extravasation of blood beneath the skin, which he said must

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have been caused by repeated blows of the fist. Being of opinion that the circumstances of the case, as gathered from the witnesses and as spoken by the deceased himself before his death, are not such as to justify me in framing a charge against the prisoner of culpable homicide not amounting to murder, and that it is not a case of sufficient importance to put before a Judge and Jury, I find that the prisoner did cause the death of the deceased by using violence to him which had the effect of injuring his spine, and I therefore convict him under s. 304*a* of the Penal Code of causing death by a rash act not amounting to culpable homicide and sentence him to suffer rigorous imprisonment for the space of one year."

The Public Prosecutor (Mr. *Shaw*) for the Crown.

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

JUDGMENT:—We are clearly of opinion that s. 304*a* of the Penal Code has no application in this case. The magistrate has misapprehended the purport of the remarks made in *Nidamarti Nagabhushanam* v. *The Queen*(1). There is evidence that the accused struck the deceased several blows on the nape of the neck and that the spine was fractured. There is no dispute as to these facts.

The act being in its nature criminal, s. 304*a* has no application. On referring to the evidence, we are unable to say there was not a *primâ facie* case of culpable homicide not amounting to murder, which was an offence triable exclusively by the High Court.

We set aside the conviction and sentence and direct the magistrate to commit the accused to the ensuing sessions on a charge of culpable homicide not amounting to murder.

(1) 7 M.H.C.R., 119.

APPELLATE CIVIL.

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

SELLAMAYYAN (PLAINTIFF), APPELLANT,

and

MUTHAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

1888. August 7. October 4.

Civil Procedure Code, s. 258.

In 1877, M. executed a mortgage to S. in consideration of a sum paid in cash and a debt due by M. to S. under a decree. S. did not certify satisfaction of the decree to the Court under s. 258 of the Code of Civil Procedure, nor was this stipulated for in the instrument of mortgage:

Held, in a suit to enforce the mortgage, that s. 258 was no bar to the plaintiffs' right to recover.

APPEAL from the decree of G. D. Irvine, District Judge of Trichinopoly, modifying the decree of K. Rangamannar Ayyangar, District Munsif of Kulitalai, in suit No. 148 of 1886.

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

S. Subramanya Ayyar and *Sundara Ayyar* for appellant.

Pattabhirama Ayyar for respondents.

JUDGMENT.—In September 1877, respondents mortgaged certain property to appellant for Rs. 450, of which Rs. 60 was paid in cash, Rs. 390 being due to him under the decree in original suit No. 306 of 1874. It is found by the District Judge that appellant failed to certify satisfaction to the Court that passed the decree, but its execution was admittedly barred by limitation at the time of the suit. The Judge disallowed appellant's claim to Rs. 390, observing that, when the judgment-creditor failed to certify satisfaction of the decree adjusted out of Court, the consideration for the contract of adjustment failed, and he was not entitled to enforce it. Hence this second appeal.

The instrument of mortgage recites that Rs. 60 was advanced in cash and that the balance was already due under the decree in question and stipulates for repayment of Rs. 450 with interest on the security of the mortgaged property. It contains no

* Second Appeal No. 1153 of 1887.

SELLAMAYYAN v. MUTHAN.

allusion either to the creditor's obligation to certify satisfaction or the debtor's right to compel him to do so, or to such certificate as the consideration for the contract. The document is susceptible of the construction that certifying satisfaction of the decree was not in the contemplation of the contracting parties, and that an undertaking on the part of the creditor not to execute the decree in his favor was accepted and relied on as the consideration. The question then that arises for decision upon the facts of this case is whether a contract, of which the consideration is in part an undertaking by the creditor not to execute a decree in his favor, is void *pro tanto* by virtue of s. 258. There can be no doubt that apart from that section, the contract would be valid under the rules of substantive law. As to the effect of s. 258 upon the contract, there is a conflict of opinion between the different High Courts, and the words in that section material to our present purpose are, "no such payment or adjustment shall be recognized by *any* Court unless it has been certified as aforesaid." Under the earlier enactment the words were, "by such Court," that is to say, by the Court executing the decree.

That the change must have some significance is not denied; the question is as to its nature and extent. The view adopted by the Full Bench of this Court in *Mallamma* v. *Venkappa*(1) by the Allahabad High Court in *Ramghulam* v. *Janki Rai*(2) and by the Calcutta High Court in *Jhabar Mahomed* v. *Modan Sonahar*(3) was that "any Court" meant any Court dealing with the question of the execution of the decree. The principle on which those decisions proceeded was that s. 258 introduced but a rule of procedure, that the probable intention was that the adjustment of a decree should, like the decree itself, be a matter of record, and that unless it is made a matter of record, no Court having to determine whether the decree has been executed shall recognize it as evidence of a valid adjustment. The construction adopted by the Full Bench of the Bombay High Court is that an uncertified adjustment is valid for no purpose whatever, and even in a separate suit in which the ground of claim is the breach of an otherwise valid contract by which the decree-holder has undertaken not to execute the decree. The Full Bench decision of this Court was founded on the con-

(1) I.L.R., 8 Mad., 277. (2) I.L.R., 7 All., 124. (3) I.L.R., 11 Cal., 671.

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sideration that a rule of procedure should not be taken to repeal a rule of substantive law unless the intention to do so was clearly expressed or must necessarily be implied. The Full Bench of the High Court at Bombay consider that such intention must necessarily be implied from the course of legislation. If the latest modification of the Code of Civil Procedure is any indication of the intention of the Legislature, it lends support to the view taken by the Full Bench of this Court. However this may be, the decision in *Mallamma* v. *Venkappa* is binding upon us as observed in second appeal No. 278 of 1887 until it is set aside by a Full Bench. Though the decision in *Thirumalai* v. *Sundara*(1) seems to follow the Bombay decision, it distinguishes that case from case of *Mallamma* v. *Venkappa*. Again, the creditor may certify the adjustment whenever he likes, and the new contract is not therefore void *ab initio*. We can only refuse to enforce it on the ground that the consideration had failed at the date of this suit, but we are unable to say so in the case before us as the creditor had allowed the decree to become barred by limitation relying on the mortgage. Following the decision of the Full Bench of this Court, we set aside the decree of District Judge and restore that of the District Munsif and direct the respondent to pay the appellant's costs both in this Court and in the Lower Appellate Court.

APPELLATE CIVIL.

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

1888. April 13. October 4.

IBRAHIM (PLAINTIFF), APPELLANT,

and

SYED BIBI (DEFENDANT), RESPONDENT.*

Muhammadan law—Divorce.

Under Muhammadan law no special expressions are necessary to constitute a valid divorce, nor, except when the repudiation is final, need the words be repeated thrice. If the divorce pronounced is liable to be, but is not, revoked within the period of iddut, it becomes final.

APPEAL from the decree of G. D. Irvine, District Judge of

(1) I.L.R., 11 Mad., 469. * Second Appeal No. 759 of 1887.

IBRAHIM v. SYED BIBI.

Trichinopoly, reversing the decree of A. Kuppusami Ayyar, District Munsif of Trichinopoly, in suit No. 104 of 1886.

The plaintiff sued to recover his wife Syed Bibi, defendant No. 1, from Syed Ali Peran Sahib, defendant No. 2.

In the plaint it was alleged that defendant No. 1 had left plaintiff and was kept concealed by defendant No. 2. Defendant No. 1 pleaded that the marriage tie which existed between her and plaintiff was broken by plaintiff uttering the word "talak" two years ago. She denied that she was with defendant No. 2. Defendant No. 2 was discharged at plaintiff's request, and the only issue was whether defendant No. 1 was divorced as alleged.

The Munsif decreed that defendant No. 1, the subject of the suit, shall be taken possession of by plaintiff.

On appeal the District Judge accepted the evidence as to divorce and dismissed the suit without deciding an objection taken on appeal that the words used did not amount to a divorce.

Plaintiff appealed.

Sadagopacharyar and *S. Subramanya Ayyar* for appellant.

Narayana Rau for respondent.

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

JUDGMENT :—The appellant and the respondent are Muhammadans, the former being the husband of the latter, and it is found by the Court below that the appellant divorced the respondent by uttering the word "talak." Our attention is called to the evidence showing that the words used by the appellant were "as you give the income to another, I do not wish that you should continue to be my wife." It is urged in appeal that there is no distinct finding that the expression used was sufficient in law to constitute a divorce, that it was repeated three times after the intervention of one month between each time, and that the divorce was not reversed within the period of probation allowed. On the other hand, it is contended for the respondent that no special words are necessary, that they need not be repeated thrice, and that if there is an intention to divorce and it is manifested by apt words and if the divorce pronounced is not reversed within the period of iddut, it becomes irreversible. Reliance is also placed on *Hamid Ali* v. *Imtiazan*(1). Before disposing of this second appeal we con-

(1) I.L.R., 2 All., 71.

sider it necessary to ask the Judge to try the following issues and to remit findings thereon :—

(1) Whether any and what special expressions are necessary under Muhammadan law to constitute a valid divorce ?

(2) Whether it is necessary to repeat them thrice, and, if so, subject to what conditions ?

(3) Whether the divorce pronounced in this case was reversed by the husband within the period of iddut ?

In compliance with the above order the District Judge submitted the following

FINDING—*First issue.*—Whether any and what special expressions are necessary under Muhammadan law to constitute a valid divorce.

No such special expressions are required.

Reasons therefor.—No such special expressions are declared necessary in Baillie's Muhammadan Law or Macnaghten's Principles and Precedents, to both of which I have referred, the former (Book III, Chapter II, Section 5) gives an immense number of ambiguous expressions, the effect of which generally depends on intention as stated by the husband or shown by his action in contentedly living separate or otherwise. I can find no decided cases which speak of special expressions as necessary. *Hamid Ali* v. *Imtiazan* cited by defendant throws no light on the matter. The only other case mentioned in the digest is *Furzund Hossein* v. *Janu Bibee*(1) which seems merely to determine that the words must be uttered to the wife, not to other persons. Anger makes no difference, except as giving more weight to the husband's subsequent denial of intention.

Second issue.—'Whether it is necessary to repeat them thrice, and, if so, subject to what conditions.'

FINDING.—The words of repudiation must be repeated three times, but not necessarily the same words on each occasion, and the three occasions may be continuous. The husband may repudiate three times and therefore irrevocably in one sentence without pause.

Reasons therefor.—I rely on *Abdul Ali Ishmailji, in re*(2). Also on Baillie's Mahammadan Law, Book III, Chapter I and Chapter II, Sections 1, 3 and 5. Macnaghten, Chapter VII,

(1) I.L.R., 4 Cal., 588. (2) I.L.R., 7 Bom., 180.

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Section 24, says that there must be an interval of a month between each repudiation.

Third issue.—'Whether the divorce pronounced in this case was reversed by the husband within period of iddut.'

FINDING.—There is no proof that it was so reversed.

Reasons therefor.—There is no evidence on record as to any formal reversal. It might be inferred from plaintiff's action in sending to call her back from her father's house after she left him, and in subsequently filing a criminal complaint, if he did so within the period of iddut. The only date given in the original record is that of defendant's departure from plaintiff's house at Trichinopoly, 21st May 1884. The date of the complaint is 27th May 1884 as ascertained from the record of calendar No. 237 of 1884 on the file of the Town Second-class Magistrate of Trichinopoly. Defendant in her written statement gives no place and no date, speaking vaguely of "two years ago." The evidence of her witnesses is equally vague as to date. In a deposition taken by this Court since the remand and herewith enclosed, she says that the talak was pronounced in her own house at Talanji, where she lived always from the date of her marriage. She never lived in her husband's house. He lived in hers. She still avoids giving any exact date, but says that the complaint was filed five or six months after the divorce which was pronounced 4 years and half ago. The parties, as often happens, seem to be each possessed with the one idea of contradicting absolutely everything asserted by the other, without the slightest regard to truth or falsehood or probability. As plaintiff does not assert a revocation, and as the interval between the alleged divorce and the visit for recall, which immediately preceded the criminal complaint of May 27th, 1884, is very uncertain, I find that there is no proof that the husband reversed the divorce within the period of iddut.

On the 4th October the Court delivered the following

JUDGMENT:—We agree with the Judge that no special expressions are necessary under Muhammadan law to constitute a valid divorce. It is sufficient if they clearly indicated an intention to put an end to the relation of husband and wife; nor do we consider that the expressions should be repeated thrice except when the repudiation is final and irrevocable. If the divorce pronounced is liable to be reversed, as in the case before us, and if it is not

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reversed within the period of iddut, it becomes thereafter irrevocable. The same view was taken by the High Court of Allahabad in *Hamid Ali* v. *Imtiazan*. It is then urged that the District Judge refused to accept fresh evidence tendered by the appellant to prove that the divorce had been reversed, but there is no affidavit to that effect. Nor does the record support the statement. On the other hand, we observe that the Judge took some new evidence after the issues had been remitted to him.

We accept the findings and dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

VENKAMMA (DEFENDANT), APPELLANT,

and

SAVITRAMMA (PLAINTIFF), RESPONDENT.*

1888. August 6. October 23.

Parent and child—Interference with natural rights for the benefit of the child—Equity and good conscience.

Plaintiff, a Brahman widow, sued to recover her illegitimate infant child from defendant, to whom she had entrusted it since its birth for nurture:

Held, that it being proved that the plaintiff was leading an immoral life, the suit was rightly dismissed.

APPEAL from the decree of A. L. Lister, District Judge of Godavari, reversing the decree of G. Jaganadha Rau, District Munsif of Amalapur, in suit No. 240 of 1886.

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

Subha Rau for appellant.

Venkataramayya Chetti for respondent.

JUDGMENT.—The plaintiff's claim to the possession of the female infant, as stated in the plaint, is that the mother of the child died leaving her with the plaintiff's mother, who, before her death, gave the custody of the child to the plaintiff. The plaintiff gave to the defendant the child, then only one month or so old. The plaintiff alleges that the child was entrusted to the defendant

* Second Appeal No. 1255 of 1887.

VENKAMMA v. SAVITRAMMA.

as a temporary convenience, but the defendant says the plaintiff gave over the child to be maintained and provided for permanently by the defendant. What the arrangement was is not important to the question to be decided.

It turned out on the hearing before the Munsif that the child was born of the plaintiff, who is 25 years old and a Brahman widow, more than twelve months after her husband's death. The plaintiff and defendant were examined before the Munsif, and he was of opinion that the child was probably born in the house of the defendant and was kept there to avoid the disgrace that would fall on the plaintiff if it was known she had an illegitimate child. The Munsif found that the child produced before him was well cared for and apparently attached to the defendant. The Munsif also found that defendant is in good circumstances and that the plaintiff has no visible means of livelihood and is houseless, and, in the interest of the infant, he declined to make a decree in favor of the plaintiff for the custody of the child. The District Judge reversed the Munsif's decree and decreed that the plaintiff should have the custody of the child and directed that the child should be delivered over to the plaintiff.

When the case came before the Court on second appeal we directed the Munsif to inquire how the plaintiff is maintained or with whom she resides and whether she is of respectable character.

After examining the plaintiff and witnesses for the plaintiff and for the defendant, the District Munsif, himself a Brahman, after referring to the evidence, found that, though there are many Brahmans in the village where plaintiff lives, some of whom are closely related to her, she has not summoned even one to prove that she still is respected as a caste-woman, and he is satisfied she is not regarded as a Brahman; that though she is visited by Brahman men they do not dine there, and that the object of their presence there is obviously for immoral purposes. On the whole he reports he is disposed to think her character is immoral.

No question has been made as to the jurisdiction of the Munsif to try this suit; and, admitting that ordinarily the mother of an illegitimate infant is entitled, during the period of nurture, to the custody of the infant, the question in this suit is whether the plaintiff is, upon the facts found by the Munsif (as to plaintiff's conduct) in the original hearing and on the inquiry by him, entitled to the custody of the infant as against the defendant who

has had the custody of the child committed to her by the plaintiff. There is no reason why the principle applicable to the Mufassal of "Equity and good conscience" should not be applied to determine whether the infant should be given over to the custody of a natural guardian leading an immoral life and by whose example the morals of the child are likely to be corrupted. The Minors' Act IX of 1861 recognizes the authority of the Principal Civil Courts in India of original jurisdiction to determine on petition questions as to the custody of infants. On the ground of pecuniary benefit alone to the child, the plaintiff could not be deprived of her right to the custody. But the Courts of Law in England and Ireland, in cases where immoral conduct and character is proved against even a mother of a legitimate child, interfere with the ordinary legal right of the mother to the custody of the child. See *Reg.* v. *Clarke*(1) and *Skinner* v. *Orde*(2).

It would be against equity and good conscience to deliver the infant into the custody of the plaintiff whom the Munsif has found to be a person who receives visits from men for immoral purposes and to be of immoral character. Moreover, the plaintiff delivered over the infant almost from her birth to the defendant, a respectable woman in good circumstances, who has since nurtured the child for upwards of two years, and to whom the child is affectionately attached, while she is a stranger to her mother. Under these circumstances we reverse the decree of the Lower Appellate Court and restore that of the Munsif. No costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

COOLING AND ANOTHER (DEFENDANTS), APPELLANTS,

and

SARAVANA (PLAINTIFF), RESPONDENT.*

1888. July 30. August 14.

Lien on land created by agreement—Sale to stranger without notice—Purchaser bound.

D mortgaged certain land to S to secure repayment of a loan, and covenanted that in a certain event S might realize the money from the house of D. D sold this house to C, who purchased without notice of the covenant.

Held, that C could not resist the claim of S to have the house sold under the covenant.

(1) 7 E. & B., 186. (2) 14 M.I.A., 309.

* Second Appeal No. 1112 of 1887.

COOLING v. SARAVANA.

APPEAL from the decree of S. T. McCarthy, District Judge of Chingleput, confirming the decree of C. Suri Ayyar, District Munsif of Chingleput, in suit No. 618 of 1885.

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

Mr. *Subramanyam* for appellants.

Srirangacharyar for respondent.

JUDGMENT.—The house in dispute belonged to one Varada Desikachari, and in August 1879 he mortgaged some land to the respondent with possession. The instrument of mortgage (Exhibit A) contained a covenant in the following terms:—"If any 'halal' (danger or peril) be occasioned by the temple people whilst you are in enjoyment of the land under mortgage, you are at liberty to realize the money from my tiled house." The respondent entered into possession of the land mortgaged by document A, and, in May 1881, Varada Desikachari, the mortgagor, sold the house in suit to the appellants who purchased it *bonâ fide* for value without notice of the covenant contained in document A. The temple authorities mentioned in that document brought original suit No. 455 of 1885 to eject the respondent, who thereupon instituted the present suit to recover the mortgage debt by the sale of the house in dispute. The debt was found to be neither immoral nor vicious, and the District Munsif considered it to be binding upon defendants 1 to 3, who are the sons of the mortgagor since deceased; they have preferred no appeal from his decision.

The fourth and fifth defendants, who are the appellants before us, resisted the claim on the ground (1) that the suit was premature; (2) that document A created no lien on the house; (3) that they were *bonâ fide* purchasers for value without notice; and (4) that the mortgagee forfeited his lien on the house, if any, by laches in original suit No. 455 of 1885.

Both the Courts below considered that the pleas set up by the appellants could not be upheld and decreed the claim, and the contention in second appeal is that they ought to have been upheld.

As regards the first contention, viz., that the suit is premature, our decision must depend on the construction of the stipulation contained in document A. We agree in the opinion of the Courts below that, according to the true construction of the clause in A relating to the house in question, actual dispossession or eviction

from the land is not a condition precedent to the accrual of respondent's right to proceed against the house. In their ordinary sense the words "if any halal supervenes from the action of the temple authorities," whilst the respondent is in enjoyment of the land mortgaged, do not import actual eviction by the establishment of adverse title, but they only signify any disquieting or menacing action which places the mortgagee's right of possession in peril. The first contention must be over-ruled.

Another contention is that as *bonâ fide* purchasers for value without notice the appellants are not bound by the stipulation in document A. This Court has already held that a subsequent purchaser makes the purchase subject to a pre-existing encumbrance, although he may have had no notice of such encumbrance *Golla Chinna Guruvuppa Naidu* v. *Kali Appiah Naidu*(1). The substantial question then is whether document A created no lien on the house in dispute because it was to have arisen on a contingency. When that document was executed, Varada Desikachari was competent to encumber his property either at once or subject to a contingency, and a subsequent purchaser who can only stand in his place takes the property subject to such restrictions as would attach to him as owner if he never parted with the property. In the absence of a special provision of law, we do not see how a *bonâ fide* purchase can operate to secure a larger interest than the vendor himself had and was competent to transfer. It was suggested by the appellant's pleader that the stipulation ought to be treated as a personal covenant giving a right to claim compensation for its breach from the mortgagor's heirs, and not as a covenant running with the house. We are referred to no authority in support of the suggestion which, if adopted, would defeat the intention of the parties to the contract of mortgage, namely, that of securing the mortgage debt on the house in the event of the mortgagee's right to treat the land as primary security being placed in peril. As to the question of laches, we see no reason to doubt the correctness of the conclusion to which the District Judge has come.

We are of opinion that the second appeal cannot be supported, and we dismiss it with costs.

(1) 4 M.H.C.R., 434.

APPELLATE CIVIL.

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

1888. March 6, 6, 8, 9. April 17.

BRINDAVANA (PLAINTIFF), APPELLANT,

and

RADHAMANI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Gandharva marriage without nuptial rites invalid—Mitakshara, ch. I, s. 12—Illegitimate son—Status of illegitimate son of Kshatriya by Sudra woman.

In order to constitute a valid marriage in Gandharva form, nuptial rites are essential.

Although the illegitimate children of members of the regenerate classes are excluded from inheritance by the Mitakshara, the absence of legal marriage is no bar to the determination of their caste with reference to the law applied to Anulomajas (children born of mixed marriages).

The illegitimate son of a Kshatriya by a Sudra woman is not a Sudra but of a higher caste called Ugra.

APPEAL from the decree of J. R. Daniel, District Judge of Ganjam, in suit No. 23 of 1885.

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

Bhashyam Ayyangar, *Pattabhiramayyar*, and *Desikacharyar* for appellant.

Ramachandra Rau Saheb, *Ananda Charlu*, and *Sundra Rau* for respondents.

JUDGMENT.—The property in litigation is a moiety of the zamindari of Tekkali in the district of Ganjam, and the last male holder was one Krishna Chandra Deo who died in 1854. Upon his death, the estate was divided by his two widows, Nilamani and Radhamani and on the death of the former, her share survived to the latter. The appellant is the illegitimate son of Krishna Chandra Deo by a woman named Priyavati, and his right of succession to his father as heir-at-law is, on his own showing, barred by limitation.

In September 1879, Radhamani, respondent No. 1, adopted respondent No. 2, her brother's son, with the consent of certain

* Appeal No. 148 of 1886.

alleged sapindas of her husband, and the present litigation is the outcome of that adoption.

The plaint stated that, as the illegitimate son of Krishna Chandra Deo, the appellant was not only his lawful successor but also his reversioner and entitled to the estate on the death of his widow Radhamani, and that the adoption made by her was not duly authorised, and that it was therefore illegal. The appellant prayed for a decree setting aside the adoption and establishing his right as reversioner. For the respondents it was contended that Krishna Chandra was a Kshatriya by caste, and that, as an illegitimate son, the appellant was neither his heir nor his reversioner. It was alleged further that the appellant's mother Priyavati was brought up by a dancing girl of Nellore, that she had exercised the profession of that class of women for some time before she became Krishna Chandra's concubine, and that on that ground the appellant was not an illegitimate son of the class referred to in s. 12, ch. I of the Mitakshara. It was also urged that appellant's claim was barred by limitation, that he was not entitled to maintain the suit, and that adoption of respondent No. 2 was *bonâ fide* and duly authorised. The District Judge held that Krishna Chandra was not a Sudra by caste and that the appellant was not his reversionary heir, and the Judge found also that Priyavati, the appellant's mother, was a virgin when she became Krishna Chandra's concubine. In the result, he dismissed the appellant's claim with costs, and it is from this decision the appeal is preferred.

It is conceded that Krishna Chandra Deo's father Padmanabha Deo was a pure Kshatriya. It is also admitted that Krishna Chandra's mother was one Padmamala, and that her paternal and maternal grandfathers, Narahari Rao and Giridhara Rao, were Kshatriyas. Nor is it denied that both the wives of Krishna Chandra, Nilamani and Radhamani, were of Kshatriya caste by birth. But the matters in contest are whether Padmamala's paternal and maternal grandmothers and mother were Sudras, whether the two former were married women, and whether Padmamala was Padmanabha's concubine or his lawful wife by Gandharva marriage. The District Judge was of opinion that nothing was known of the caste of the ladies mentioned above, but, assuming that Padmamala was a Sudra, he considered that Krishna Chandra was of a higher caste than a Sudra, as his father

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was a pure Kshatriya. The main question for decision in this appeal is whether Krishna Chandra was a Sudra or one of the regenerate classes within the meaning of s. 12, ch. I of the Mitakshara. As it is a mixed question of fact and law, we shall first state the effect of the evidence in regard to questions of fact in dispute.

The first of those questions is whether, as alleged by the respondents, Padmamala was the lawful wife of Padmanabha Deo by Gandharva marriage. The Judge has recorded no finding in regard to it, but treated the matter as one of little moment. We observe, however, there is no satisfactory evidence in support of the contention. None of the respondents' witnesses deposed to the *factum* of a Gandharva marriage between Padmamala and Padmanabha Deo, and there is no direct evidence at all on the point. It was no doubt in evidence that Padmamala was addressed as Maha Devi, that she wore gold jewels on her legs, that she performed a ceremony called Bandapan which married women alone ordinarily perform, and that she was the brother's daughter of Nila Patta Maha Devi, the senior wife of Padmanabha, admittedly a lady of the Kshatriya caste. But these circumstances are not in themselves conclusive on the question of lawful marriage, and although Padmamala was the niece of the senior wife and taken by Padmanabha under his protection on her recommendation, yet it is by no means unlikely that her *status* was not higher than that of a concubine if she was only an illegitimate relation. Exhibit O shows that in June 1833 Mr. Ogilvie stated in his official report that Krishna Chandra Deo's legitimacy was a matter of doubt though he referred to Padmanabha having recognized him as his heir, and he further gave what was then believed to be a correct account of the relation between Padmamala and Padmanabha, which is inconsistent with the contention that there was a lawful marriage between them. Again, exhibit III, which is copy of a letter addressed by Padmanabha's senior wife to the Collector in 1838, is inconsistent with a consciousness in the family that there was a lawful marriage between Padmamala and Padmanabha. She stated in exhibit C that Gopinatha was the son of a maid servant by Padmanabha, and that Krishna Chandra Deo should be preferred to him, but she did not say that he was her husband's Aurasa or legitimate son, or that he was a child born in wedlock. On the other hand she rested his claim on his adoption by her as

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a son by her husband's desire. Again in document III addressed by her in 1838 she said that Padmamala was of the same caste with her husband, but did not refer to a lawful marriage between them. Moreover, the form of Gandharva marriage such as the one in question is described by the respondents' ninth witness as consisting in an exchange of garlands of flowers between the bride and the bridegroom without a nuptial rite, *homam*, and without the customary token of legal marriage called Pustelu being tied round the neck of the bride. Sir William Macnaughten also says: "The Gandharva marriage is the only one of the eight modes for the legalizing of which no ceremonies are necessary, and it seems that mutual cohabitation, as it implies what the law declares to be alone necessary, namely, a reciprocal amorous agreement, would be sufficient to establish such a marriage if corroborated by any word or deed on the part of the man." (Macnaughten's Principles of Hindu law, page 61.) But according to Hindu texts the religious element appears to be indispensable to a valid Gandharva marriage. Devala says, "The nuptial rites are ordained in the marriages styled Gandharva and the rest and to the contract the nuptial fire must be made witness." There is a passage to the same effect in Nirnaya Sindhu, ch. III, p. 37 (see Shyamachurn's Vyavastha Chandrika, vol. II, 444). Adverting to the opinion of Sir William Macnaughten, the compiler of the Vyavastha Chandrika observes: "It is to be remarked in the Gandharva form of marriage the only ceremony that may not be required to be performed is that of the gift, the exchange of garlands of flowers being expressive of the gift of the one to the other, but the ceremony of *homam* should be performed, as otherwise the marriage is not complete." In vol. III, Colebrooke's Digest of Hindu Law, 606, it is said that nuptial rites are necessary even in the marriage named Gandharva and the rest. Devala's Smriti is also cited therein as saying, "Nuptial rites are ordained in the marriage styled Gandharva and the rest. To this contract the nuptial fire must be made witness by men of the three classes." Sir Thomas Strange refers to Gandharva marriage as a form permitted to the Kshatriya or military class, but adds that nuptial rites accompanying them all have the effect of distinguishing even the less approved ones from commerce purely illicit to which otherwise Gandharva and Rakshasa marriages might be assimilated, the former importing

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an amorous connexion founded on reciprocal desire. I. Strange's Hindu Law, 44. Further, in the Madras Edition of Colebrooke's translation of Jaganatha's Digest, Yajnyavalkya is cited in page 613 as saying that Gandharva marriage is permitted to the military class and consists in reciprocal amorous agreement, but the compiler of the Digest, Jaganatha, adds, "Nuptial rites are necessary even in the marriage named Gandharva and the rest." Though as defined by Manu and Yajnyavalkya, Manu, ch. III, sloka 32, Gandharva marriage originally consisted in a sexual union founded on a reciprocal agreement made for sensual gratification, yet later texts, such as the Smiriti of Devala, appear to have prescribed *homam* as an essential in order to constitute it into a union in wedlock, and thereby distinguish it from an illicit commerce, permanent and exclusive. Even assuming then that, as suggested by the respondent's pleader, the circumstances already mentioned in regard to the mode in which Padmamala was treated constitute indirect evidence of a Gandharva marriage, we must hold, with reference to the evidence of the ninth witness and the text of Devala, that the marriage, if any, was not contracted in the prescribed form, and that the intention to constitute the relation of husband and wife, which the observance of that form is designed to indicate, was wanting. This is the most favorable view which it is possible to take upon the evidence of the relation between Padmamala and Padmanabha with reference to the consciousness in the family, for Nila Patta Maha Devi spoke of Krishna Chandra as adopted by her husband's desire, an adoption for which there was no legal necessity if he was already born to her husband in lawful wedlock. The conclusion to which we then come is that it is not shown that Padmamala was the married wife of Padmanabha, or that Krishna Chandra was born to him in wedlock, and that he must be taken to have been illegitimate.

Another fact in contest is whether Padmamala's paternal and maternal grandmothers were of the Sudra caste, and the appellant's pleader relies on the evidence of his first witness Kamalalochana Rayi Santo, brother of Padmamala. On this point the evidence is conflicting, and the District Judge observes that nothing is known of the caste of the ladies mentioned above, and that they were the illegitimate relations of Nila Patta Maha Devi, the senior wife of Padmanabha. The only witness who deposed to the caste of one of them is the first witness for the appellant, and

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his evidence is that his paternal grandmother Chompa was a woman of the Vodra or Sudra caste and that he derived his information from his parents. But his evidence is not otherwise corroborated, and though he is Padmamala's brother, his sympathy is with the appellant as the person in whom Nila Patta Maha Devi and Krishna Chandra Deo took considerable interest. The evidence is also open to the remark that, though the witness calls himself a Sudra, yet he has a *gotra*, he has been invested with the sacrificial thread, and he performs all the purificatory and other ceremonies prescribed for Kshatriyas. On the other hand, the respondents' witnesses say that Krishna Chandra Deo and Padmamala, her father, were all Kshatriyas, and they say so because their fathers were Kshatriyas. We see no reason to doubt that the Judge has come to a correct conclusion.

Another fact in dispute is whether the appellant's mother practised the profession of a dancing girl before she was kept by Krishna Chandra Deo. On this point again there is a conflict of oral testimony, but the probability is in favor of the appellant, regard being had to the mode in which Nila Patta Maha Devi, Krishna Chandra Deo, and his widows treated him. We cannot say that the Judge is in error in holding that Priyavati was a virgin when she began to live with Krishna Chandra Deo. We take it then that Padmamala was not a married wife of Padmanabha, that Krishna Chandra was not born to him in wedlock, that Padmamala's paternal and maternal grandfathers were pure Kshatriyas, that Padmanabha was a Kshatriya, that Padmanabha's mother Chandramani was the wife of Ramakrishna Rao, that Ramakrishna Rao was the son of Narahari Rao, a Kshatriya by his concubine Chompa, and that Chandramani was the daughter of a Kshatriya by his concubine Tulasi, that there is no satisfactory evidence as to the caste of Chompa and Tulasi, and that the appellant's mother was a virgin when she commenced to live with Padmanabha as his concubine. Upon these facts two questions of law arise in the main for decision, viz., whether Krishna Chandra was a Sudra by caste, and whether the appellant was his illegitimate son within the meaning of ch. 1, s. 12 of the Mitakshara. According to the District Judge, Krishna Chandra was an Ugra and not a Sudra, and the same opinion was expressed by this Court in regard to another illegitimate member of this family *S. G. H. Krishna Devi Garu* v. *S. G. R. P. Maha Devi*

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Garu(1). In *Chuoturya Run Mardun Syn* v. *Sahub Purhulad Syn*(2), the Privy Council observed as follows with reference to the *status* of the son begotten by a Rajaput on a Sudra concubine: "Whatever weight might be due to the authorities cited in support of a speculative opinion entertained perhaps by learned Brahmins and others, their Lordships have nevertheless no doubt that the existence of a Kshatriya class as one of the regenerate tribes is fully recognized throughout India, and also that Rajaputs in Central India and in this district are considered to be of that class." Whilst stating that the question which had then to be decided was, not whether the illegitimate son of a Sudra man by a Sudra woman can inherit, but whether the illegitimate son of a Kshatriya can in any event inherit whether his mother be a Sudra or of any other caste, the Judicial Committee observed: "Although their (Rajaputs') intercourse with females of a lower tribe may have in some instances produced a mixed race, yet even in this class, which Sir John Malcolm termed 'the Bastard Rajaput tribes,' the lowest of them who aspire to Rajaput descent consider themselves far above Sudras." That this is also the case in the Kshatriya family before us, there is no reason to doubt. According to the evidence, the illegitimate relations are called in common parlance Kshatriyas, they have *gotras*, they are invested with the sacred thread, and they perform the purificatory ceremonies and the obsequies and the *dharma* prescribed for Kshatriyas. It is also noteworthy that Kshatriya women by birth marry them at times, as the widows of Krishna Chandra and Gopinath did in the case before us, and that they recognize and treat them as their own sons in the absence of legitimate sons, as was done by Nila Patta Maha Devi in this case. We entertain, therefore, no doubt that, according to the belief of the class, illegitimate descent does not operate to degrade the offspring to the position of Sudra, or deprive them of the social position of Kshatriyas, though it is in evidence, and very probably the case, that pure Kshatriyas do not eat with them and regard them as an inferior class on account of their illegitimate descent.

But to return to their legal *status*: when intermarriages were permitted by ancient Hindu law, children born of mixed marriages were termed *Anulomajas*, and their caste was neither that of

(1) 2 M.H.C.R., 360. (2) 7 M.I.A., 46.

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their father nor that of their mother. They belonged to an intermediate caste higher than that of their mother and lower than that of their father, and the caste assigned to the son begotten by a Kshatriya on a Sudra wife was called that of Ugra.

So Yajnyayavalkya says: "The son begotten by a Brahamana upon his Kshatriya wife is a Murdhavasikta, one upon a Vaisya wife is an Ambashta, one upon a Sudra is Nishada or Parasava. The sons borne by Vaisya and Sudra wives to a Kshatriya are called respectively Mahishya and Ugra. The son born of a Vaisya by a Sudra wife is a Karana." This rule refers to married sons begotten by what was called *Anuloma* marriage, or on wives whose caste was inferior to that of their husbands. It must be remembered that this classification had reference to the notion that there was a rise in caste by the fifth or seventh birth. Thus Vijnanesvara says, "that a Brahmin begets upon a Sudra a Nishada; she [the Nishadi] marrying a Brahmin produces a girl, who again marries a Brahmin; in this manner the marriage of the sixth daughter with a Brahmin produces a Brahmin. Again, a Brahmin produces upon a Vaisya an Ambashta, who marrying a Brahmin bears a daughter, and these connections going on for five generations produce a Brahmin." The notion underlying the theory is that the seed has a superior efficacy and renders the field, though inferior, as pure as itself when the latter is in union with the former for five or seven generations. It is also said by some commentators that in the *Anulomajas* there is a germ of *Dvijaship*, which if the *Anuloma* union is repeated for five or seven generations is perfected into maturity and becomes equal to that of their father. (Mandalik's Yajnyayavalkya, page 173). The same classification is referred to and recognized by the authors of the Mitakshara and of the Madhaviya in the Acharakanda, of which passages relating to the question before us we were referred to during the argument. Translations of those passages, admitted on both sides to be correct, are appended to this judgment for reference. The opinion of the Judge that Krishna Chandra was an Ugra on the assumption that his mother was a Sudra is therefore in accordance with the texts on Hindu law in regard to the caste of *Anulomajas*.

To this view several objections were taken at the hearing by the appellant's pleader.

The first objection has reference to the *Dharma* or duty prescribed for the *Anulomajas*, but it is anticipated and answered by

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the author of the Madhaviya. The objection referred to by him is that the *Anuloma* offspring are of the caste of their mothers, implying thereby that if the mother is a Sudra, the offspring would be a Sudra likewise. The Smrities of Vishnu and Sankha are also mentioned as at first sight supporting the objection. Vishnu said, "Children born of parents of equal caste are of like caste. As for the *Anuloma* offspring, they are of their mother's caste." Sankha said, "One begotten on a Kshatriya female by a Brahmin can be a Kshatriya only, one begotten on a Vaisya by a Kshatriya is a Vaisya alone, one begotten by a Vaisya on a Sudra woman is a Sudra alone." The commentators reply to the objection thus: "The objection is of no avail, as these verses only secure or indicate to the offspring the *Dharma* (religious rites) appertaining to the mother's caste. Otherwise, the superior efficacy of the seed will become nugatory. Just as the defect of the field (mother) debars entrance into a superior caste, why should not the superiority of the seed debar a lapse into a lower caste?" It follows that Murdhavasiktas and others unquestionably denote distinct castes. Again, the Mitakshara reconciles the apparently conflicting Smritis in the same way. There is further a passage to the same effect in Vaiyadynatha Dikshitiyam, a modern commentary of authority in the southern district. It follows then that there were originally four castes, Brahmins, Kshatriyas, Vaisyas, and Sudras, that *Karma* and *Dharma* (religious rites and duties) were prescribed for each of the four only, and that when mixed marriages came to prevail, intermediate castes were recognized in the case of *Anuloma* offspring in order that they might eventually rise to the superior caste of their fathers on account of the germ of *Dvijaship* in them, but that the *Karma* and *Dharma* prescribed for them until the *Dvijaship* was perfected were those which appertained to their mother's caste. Thus, according to two commentators of paramount authority in this part of India, the *Anulomajas* had an intermediate caste superior to that of their mothers on account of the superior caste of their fathers, though the *Dharma* prescribed for their guidance whilst their *Dvijaship* was in the course of gradual development was that which appertained to the caste of their mothers. We must, therefore, overrule the first objection.

The next objection taken in appeal in view to deny an intermediate caste to *Anulomas* superior to that of their mothers is that those only have intermediate castes who are begotten by twice born men on women of the class next immediately below them.

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It was urged that a child begotten by a Kshatriya on a Sudra woman was not begotten by a twice born man on a woman of the class immediately below him. In support of this contention our attention was drawn to Manu,* ch. X, sloka 14, and to several

* MANU.

Commentaries on Sloka 14, Chapter X, Manu, *vide* pp. 1287, Vol. II, Manava Dharma Sastra by V. N. Mandlik.

Medhatithi.—The sons that are begotten by a Brahmin on a Kshatriya woman and on a Vaisya woman, and in the same way (the sons) by a Kshatriya on the two, are said to have *Anantara* names. *Anantara* means the *Anuloma* caste equal to that of their mothers. The mention of the word *Anantara* is unnecessary. Therefore he says "by the lowness of their mothers." They cannot be blamed by reason of the superior caste of their fathers. Though they are thus of *Sankeerna Jati* (mixed class) they are considered by this *Vachanam* (text) to have *Matri Jati* (mother-caste). It amounts to saying that *Samskaras* must be performed to them. Therefore even without the help of this *Vachanam* they have the said Kshatriya *Samskaras*. As they are like *Asvatara* (donkey or mule) of a class intermediate, there will be no harm even if *Matri Jati* (mother-caste) be stated by this Vachanam.

Sarvajna Narayana.—They say that the sons born of women of the *Anantara* classes as of Kshatriya woman by a Brahmin, of a Vaisya woman by a Kshatriya, and of a Sudra woman by a Vaisya, have the *Anantara* names (that is) the names of Kshatriya, &c., on account of the lowness of their mothers. The meaning is that they have the general *Dharmas* belonging to their mother-castes as they have for mothers (women of) Kshatriyas and other (classes). By the statement that they have *Anantara* names only their names are indicated and not their castes.

Kulluka.—As the reason given is lowness of the mother (the word) *Anantara* should include the classes with one interval and with two intervals just like the one next below. The sons aforesaid begotten of women of the class next below and of the classes with one and two intervals by the twice born in the order of descent are said to belong to the caste of their mothers owing to the blemish of the mother who is of a lower caste. Though (they) are *Sankeerna Jati* distinct from that of mother or father, giving them the caste of their mother was for the purpose of receiving the *Samskaras* and the *Dharmas* pertaining to the caste of the mothers.

Nandana,—He states another view by the verse "*Putrayenantarastreejah.*" "*Anantara Namnah*" means "*Anantara Varna Namnah*" which means having the name of the caste next below, *i.e.*, in the order having the name (or caste) of a Kshatriya, Vaisya, Sudra, *i.e.*, the meaning is "being of the caste of the mother."

Govindaraja.—(1) The *Vachanam* (statement) that the sons mentioned in order begotten by the twice born classes on women of classes with no interval, one interval and with two, are called by the names of their mother-castes as they have low mothers (that *Vachanam*) is (made) in order that the *Dharmas* of these (sons) belonging to castes different from those of their fathers and mothers may be (the same as) the *Samskaras* and other *Dharmas* belonging to their mother-castes. By the phrase (*Matridoshat*) viz., by the lowness of their mothers, the word *Anantara* mentioned is for mentioning (also) that with one interval.

Manu Chap. X, Sloka 41, page 1301, of Mr. V. N. Mandlik's Edition.

Kulluka.—Those (sons) that are born of equal castes of the twice born and thus in the direct order, those begotten by a Brahmin on a Kshatriya and a Vaisya woman, and that by a Kshatriya on a Vaisya woman, those six sons have the *Dharmas* of the twice born classes and are fit for having *Upanayana* performed.—Some one

[1] Vol. III, p. 136.

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commentaries on that passage. In Sir William Jones' Translation of Manu, the sloka is rendered as follows: "Those sons of the

may mistake that what has been said in the verse "Tavanantara jastviti" is for mentioning their caste (*Jati*) only, and not for mentioning their *Samskaras*. Therefore this *Vachanam* is for (their receiving) the *Samskaras* of the twice-born classes. The others that are the *pratilomas* though they are born of the twice born classes have (only) the *Dharmas* of Sudras. These are Sudras, &c., for them there is no Upanayanam.

Medhatithi.—"Those born of own caste," *i.e.*, those born to men of the three castes on women of equal caste, have the *Dharmas* of the twice-born. This simply lays down again what has already been established. Those born of *Anantaras* are *Anulomas*. They are begotten by a Brahmin on a Kshatriya or a Vaisya woman and by a Kshatriya on a Vaisya woman. It means that even they, having Dvija *Dharmas*, are fit for *Upanayana*. Having *Upanayana* performed, they receive all *Dvija Dharmas*. (Here an objection is raised). By stating that they have *Anantara* names, it is the caste (*jati*) of their mothers, that is said of them. Hence follows their capacity for those *Dharmas* equal to their mother's caste (*jati*). True. In stating *anantaranamnah* as name is mentioned it is only a name to them and not mention of caste. Thus a doubt may rise in some. To clear it, therefore, is another *vachanam*, viz., 'six sons have *Dvija Dharmas* (Shat Sutah Dvija Dharminah). By the word *Dharminah*, *Dharma* is to be understood. As for those born of *Apadhvamsa* they are born in *Sankara*. They have the *Dharmas* of Sudras. They have equal *Acharas*. The meaning is they have those *Dharmas*. *Pratilomas* will be treated later on. Saying "*Anantara*" is only for indicating *Anuloma*. Therefore, though there is an interval, the son begotten by a Brahmin on a Vaisya woman is taken up. *Parasava*, the son born of a Sudra woman is not (taken) as he is outside the six.

Sarvajna Narayana.—He gives this (*sloka*) "*Sajati Iti*" to state something specially with regard to those born of *Anulomas*. The sons begotten by a Brahmin on a Brahmin (woman) and also on a Kshatriya and a Vaisya (woman) who are *Anantara*, three in number, the sons begotten by a Kshatriya on a Kshatriya and a Vaisya (woman), two in number, the son begotten by a Vaisya on a Vaisya woman, one, thus these six sons of the twice-born class have the *Dharmas* of the twice-born. These are similar to the castes of their fathers. Here by saying that they are said to be *Sajati* (own caste) they are qualified for *Upanayana*, &c., along with their distinct occupations. As for the rest born of *Apadhvamsa* (they) are born of *Sankara* (mixed). They have *Dharmas* equal to Sudras. They are not fit for such kind of *Samskaras*.

Nandana.—He says by the sloka "Svajatijanantarajah" how we may know those of *Sankirna* (mixed) *jatis* (castes) and who have *Sudra Dharmas*. Brahmins, Kshatriyas, Vaisyas and Sudras are those born of *Sajati* (own class.) *Anantaraja* (means) those that are born of *Anantaras Apadhvamsajas* means *Pratiloma* classes.

Raghavananda.—Here just likeBrahmins and others, so (also) for the three ending with *karana* he (author) prescribes "*Asaucham*" (impurity at birth and death) and *Upanayanam*, &c. (*Dvijavat*) like to the twice-born: and he prescribes "*Asaucham*" &c., of Sudras for the six sons, viz., *Ayogava*, *Kshatri*, *Chandala*, *Magadha*, *Vaideha*, and *Suta* "*Sajatiya Iti*." By "*Apadhvamsaja*" are mentioned *Ayogava* and the rest.

Mahabharata Anusasana Parva, Chapter 48, Sloka 7.

Three of Kshatriya connection his self is born of two. From the third persons of inferior *Varna* (caste) *Sudras* (called) *Ugras*: this is the Smuiti.

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twice born who are begotten on women without an interval (*antara*) between the classes mentioned in order, the wise call

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SECTION ABOUT DISTINCTION OF CASTES. (1)

Having explained "sons born in the castes," the author explains *Anulomas* in verse 90. A son begotten by a Brahmin on a Kshatriya wife is called *Murdhavasikta*. Begotten on a Vaisya wife he is called *Ambashta*. Begotten on a Sudra wife he is called *Nishada*. There is a *pratiloma* caste named *Nishada* who live by fishing. To distinguish this *Nishada* from that caste, the alternative name of *Parasava* is mentioned. The words "by a Brahmin" should be understood all along. As for Sankha's text, viz., "that he who is begotten by a Brahmin on a Kshatriya female becomes only a Kshatriya, that on begotten by Kshatriya on a Vaisya female becomes only Vaisya and that one begotten by Vaisya on a Sudra female is a Sudra," it is for securing the *Dharma* of Kshatriya, &c., but not to negative their being of *Murdhavasikta*, &c., castes nor to secure (the status of) Kshatriya and other castes. Therefore *Murdhavasikta*, &c., are entitled to *Upanayana* with the same *Danda* and *Ajina* and to behave, speak and eat as they please prior to *Upanayana*, as Kshatriyas, &c.

Now as to verse 91. By a Kshatriya on a Vaisya wife and a Sudra wife are born sons called *Mahishya* and *Ugra* respectively. By a Vaisya on a Sudra wife is begotten a son called *Karana*. "This" the giving of the names *Savarna Murdhavasikta*, &c., should be understood to be applicable to women who have been married (*i.e.*, to wives). It should be known that these are the six *Anuloma* sons styled *Murdhavasikta*, *Ambashta*, *Nishada*, *Mahishya*, *Ugra*, and *Karana*.

Now as to verse 92. The author speaks of *Pratiloma* children. Sons begotten on a Brahmin female by a Kshatriya, a Vaisya, and a Sudra are respectively designated *Suta*, *Vaidehaka*, and *Chandala*. Among these a *Chandala* is excluded from all *Dharmas* or rites.

Now as to verse 93. Further; a Kshatriya female begets by a Vaisya a son named *Magadha*. She begets by a Sudra a *Kshatri*. A Vaisya female begets by a Sudra a son named *Apogava*. These, namely, *Suta*, *Vaidehaka*, *Chandala*, *Magadha*, *Kshatri*, and *Apogava* are the six *pratilomajas*. As to their duties see Usanas and Manu.

Now as to verse 94. The author here explains the mixed castes springing from further intermixtures. The son born of *Mahishya* (who springs from a union of a Kshatriya with a Vaisya female) on a *Karani* (who springs from the union of a Vaisya with a Sudra female) is said to belong to the caste named *Rathakara*. He is entitled to *Upanayana* and all other rites agreeably to texts; for SANKHA says—such as are born of (children) born to Kshatriya and Vaisya on women of the caste next below their [father's] are *Rathakaras*. They are entitled to sacrifice and offer gifts and *Upanayana Samskara* and they should learn about horses, building chariots, and architecture as their profession. Those that fall by *Anuloma* connection under the classes of *Murdhavasikta*, *Mahishya*, &c., begotten by a Brahmin and a Kshatriya are entitled to *Upanayana*, &c. The reason is that those two have *Dvijaship* in them. As for the names they should be known from other *Smritis*. The mention of them here is merely indicative, the reason being that they cannot be enumerated as they are countless.

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Exposition of the Anuloma and Pratiloma Castes. (2)

Yajnavalkya.—Children of like caste are begotten by men of a caste, on women of equal caste. By means of marriages which are blameless sons continue the line.

Explanation.—Children of like caste = those whose mother and father are of equal caste.

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[1] Mitakshara. [2] Madhavayam.

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anantaras, giving them a distinct name from the lower degree of their mother." Stress is laid on the opinions of several commentators,* and it is argued that there are only six sons fit for the *Dharma* of the twice born, sons begotten by a Brahmin on a Brahmin woman and on women of the next two castes, making three in all, by a Kshatriya on Kshatriya and Vaisya women making two, and by a Vaisya on a Vaisya woman and that sons by Sudra wives are excluded. But it does not follow that the son begotten on Sudra woman in the *Anuloma* form has not a higher

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Even MANU says :Chap X, *verse* 5.

Explanation.—Children born of a Brahmin couple become Brahmins by caste. Similar is the rule for Kshatriya and other (castes).

DEVALA also says:—One begotten on a Brahmin female by a Brahmin male becomes a Brahmin when subjected to *Samskara* (*i.e.*, purificatory ceremonies); same should be known to be the case among Kshatriyas, Vaisyas, and Sudras when men of a caste beget children on women of like caste.

MANU speaks of *Anuloma* progeny in different (unlike) cases as follows:—
(Chap. X, *verse* 6).

Explanation.—One begotten by a Brahmin on his wedded Kshatriya wife is similar to a Brahmin—not same. Reason is the inferiority of the mother to a Brahmin because of his relation to his mother whose caste is lower than a Brahmin. Such is the case even in the other castes.

Such children born in the *Anuloma* (direct) order fall under six castes styled Murdhavasikta, &c.

NARADA says:—Kshatriyas beget on Vaisya and Sudra women sons called Mahishya and Ugra according to Smriti.

"A Vaisya begets on a Sudra woman a son called Karana. This holds good if the couple were wedded to each other."

Among these, *three* are begotten by a Brahmin, *two* are begotten by a Kshatriya and *one* by a Vaisya.

This is explained by MANU.
(Chap. X, *verse* 10.)

Objection.

Murthavasiktas and others do not denote distinct castes as *Anuloma* offspring fall under the caste of their mothers.

VISHNU says so,—

Children born of parents of equal caste are of like caste. As for Anuloma offspring, they are of their mother's caste. As for Pratiloma offspring they art despised by Aryas (worthy men).

Also *Sankha*. One begotten on a Kshatriya female by a Brahmin can be a Kshatriya alone. One begotten on a Vaisya by Kshatriya is a Vaisya alone. One begotten by a Vaisya on a Sudra woman is a Sudra alone.

Reply.

The objection is of no avail, as these verses only secure or indicate (to the offspring) the Dharmas (religious rites) appertaining to mother's caste. Otherwise the superior efficacy of the seed will become nugatory. Just as the fault of the field (mother) debars entrance into a superior caste, why should not the superiority of the seed debar a lapse into a lower caste.

It thus follows that Murthavasiktas and others unquestionably denote distinct castes.

* Medhatithi, Saryajna Narayana, Kulluka, Nandana, and Govindaraja.

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caste on account of the superior efficacy of the seed as explained by Madhava although, for the purposes of *Dharma*, his caste may be that of his mother. The notion of caste rested on the presence of some *Dvijaship* or of the blood of the twice born in the son on account of the superior efficacy of the seed, whilst the conception of the *Dharma* appropriate to him, when the *Dvijaship* was imperfect and required repetition of the *Anuloma* union for certain number of generations to ripen into that of the father or, in other words, when it was in a state of transition rested on the caste to which his mother belonged. The fallacy in the contention of the appellant's pleader consists in ignoring the distinction between the two conceptions and assuming that the *Dharma* and the caste went together under the ancient law applicable to *Anulomajas*.

The third objection on which the appellant's pleader relies when his attention is called to the finding that nothing was known of the caste of Padmamala's paternal and maternal grandmothers is that the doctrine applied to *Anulomas* who were born in wedlock should not be extended to children born of illicit intercourse.

In verse 92, the author of the Mitakshara speaks of *Pratilomajas* who are the offspring of irregular union in the inverse order and mentions their several castes, adding that a child begotten on Brahmin woman by a Sudra is alone a Chandala, and as such excluded from all *Dharmas* and rites. With reference to the other *Pratilomajas*, he refers to the texts of Usanas and Manu in regard to their duties. But it is not necessary to dwell further on this branch of the ancient Hindu law, for Krishna Chandra was *ex hypothesi* the son of a Kshatriya by a woman of inferior caste, and there is no analogy between his *status* and that of *Pratilomajas*. Though the illegitimate children of members of the regenerate classes are excluded from inheritance by the author of the Mitakshara, they are substantially recognized by him as members of their fathers' families for purposes of maintenance, and the absence of legal marriage is, in our judgment, no bar to the determination of their caste with reference to the law applied to the *Anulomajas*, the point in analogy being the conventional notion in regard to the superior efficacy of the seed. Again, we have already pointed out that this Court judged of the caste of another illegitimate member of the family by analogy to the caste of *Anulomajas*.

Although we have assumed that Padmamala was a Sudra in dealing with the objections, yet it should be borne in mind that

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nothing is known of the caste of her paternal or maternal grandfathers, while it is shown that her father and mother were the children of Kshatriyas, that her father was the illegitimate brother of Padmanabha's wife, and that he as well as her brother have followed the *Dharma* prescribed for Kshatriyas. It is true that when no marriage is proved, there may be no ground for presuming, as a matter of law, that the parents were of the same caste. But when it is shown that her father and brother observed the rules prescribed for Kshatriyas, it would not be unreasonable to presume, in the absence of distinct evidence to the contrary, that their mothers were at least of a caste which did not, according to the notion of the Kshatriyas in this part of the country, incapacitate them for the *Achara* (*Dharma*) they were accustomed to follow. We may here refer also to the statement of Padmanabha's senior wife that Padmanabha was of the same caste with her husband (exhibit III). We are, therefore, of opinion that the District Judge was right in holding that Krishna Chandra was not a Sudra, and that he was at least an Ugra or of a higher caste than a Sudra.

As for the respondent's contention that the appellant's mother practised the profession of a dancing girl, we have already observed that we agree with the Judge that she was a virgin when she became Krishna Chandra's concubine. It is in evidence that she was only brought up by a dancing girl for a time and that she did not belong by birth to the caste of dancing girls. It is, therefore, unnecessary, for the purposes of this appeal, to consider whether dancing girls may not give up their profession and become mothers of illegitimate children within the meaning of the Mitakshara law. Nor do we think it necessary to notice the contention that the Mitakshara law regarding illegitimate children is no longer in force, that the illegitimate children contemplated by the commentator are the children of mothers whose legal *status* was that of slaves, and that Act IV of 1843 which repealed slavery virtually repealed this portion of Hindu law. The contention appears to us to be at variance with a long course of decisions in this Presidency, and with the decision of the Privy Council already mentioned in this judgment.

The only question then which remains to be considered is whether the adoption made by the first respondent is valid. As to the *factum* of the adoption, there is no dispute. Nor is it denied

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that five of the sapindas of Padmanabha authorized the adoption as asserted by the respondents. As to the suggestion that the consent was given from corrupt motive, we attach no weight to it. We are referred to an entry in exhibit KK, which is to the following effect: "Expense for obtaining the consent of five sapindas and Collector's order, Rs. 10,000." It is said by the ninth witness for the plaintiff that respondent No. 1 handed over the account to him in order that, as her gumasta, he might give instructions in a suit brought by her against Krishnama Nayudu and others, and that though that suit was compromised the paper was allowed to remain with him, and that he now produced it as the plaintiff's witness in the present suit. Kamesam Pantulu was not cited as a witness, though the exhibit is said to be a settlement of account between him and the first respondent and is in his handwriting. Although the defendants' ninth and tenth witnesses were some of the sapindas who authorized the adoption, they were not at all cross-examined with reference to the entry. The witness did not state that he had the first respondent's permission to produce it in evidence, and his object in producing it was obviously to injure her and favor the appellant. If the account were genuine, it is not likely that it would be allowed to remain with the witness as alleged by him. We are not prepared to say that the account is genuine, and we reject the evidence of plaintiff's ninth witness as untrustworthy. It is next contended by the appellant's pleader that as Krishna Chandra was the illegitimate son of Padmanabha, the sapindas of the latter were not his sapindas competent to authorize his widow to adopt. If Padmanabha were alive, he would be competent to authorize the widow of his son to adopt as her adviser and guardian though that son was illegitimate. Though his sapindas may not be his illegitimate son's sapindas in the sense that they are heirs to one another in any event, we see no valid objection to holding that they are competent to represent her father-in-law after his death for the purpose of authorizing her to adopt. We consider that the adoption was duly authorized.

For these reasons, we are of opinion that the appeal must fail and we accordingly dismiss it with costs.

As to the memorandum of objections, it is clearly inadmissible under s. 561 of the Code of Civil Procedure. The decree passed by the District Judge was not in part against the respondents and the memorandum cannot be regarded as being in the nature

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of a cross-appeal. As it is, however, competent to the respondents to support the decree on a ground which was decided against them, the only effect we can give to it is to treat it as suggesting a ground to be urged at the hearing of the appeal.

We dismiss it as a memorandum of objections but without costs.

APPELLATE CRIMINAL.

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

1888. Sept. 6.

RAMASAMI

against

DANAKOTI AMMAL. *

Criminal Procedure Code, s. 145—Dispute as to right to collect rents.

A dispute between two persons as to the right to collect rent from the tenants of an estate is cognizable under s. 145 of the Code of Criminal Procedure.

APPLICATION under s. 439 of the Code of Criminal Procedure to revise an order passed by V. Subbayyar, Deputy Magistrate of Chingleput, under ch. XII of the Code of Criminal Procedure.

A dispute having arisen as to the right to collect rents between one Danakoti Ammal and Ramasami Mudali, the magistrate declared that the former was 'in possession of the right to collect rents in the village of Ammanur as lessee', and that she should retain possession of such right until eviction in due course of law, citing *P. B. Deb Roy* v. *D. Churn Bhattacharji*(1) in support of his ruling.

Ramasami Mudali applied to quash this order as being *ultrâ vires*.

Ramasami Mudaliar for applicant.

Mr. *Subramanyam* and *Srirangacharyar* for the lessee.

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

JUDGMENT :—We see no reason to hold that the Deputy Magistrate was not justified in holding that there was a reasonable apprehension of a breach of the peace. The ruling in IV, Madras

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* Criminal Revision Case No. 359 of 1888. (1) I.L.R., 11 Cal., 413.

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High Court Reports, Appendix XII, was under the Criminal Procedure Code of 1861. We think that a dispute about the right to collect the rents of lands from the tenants in possession is a dispute concerning tangible immovable property within the meaning of s. 145 of the Criminal Procedure Code.

We refuse to interfere in revision.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Parker, and Mr. Justice Wilkinson.

1888. Sept. 7.

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

Stamp Act, sch. I, arts. 25,36—Declaration of trust—Gift.

Where a donee was directed in an instrument of gift of certain land to maintain the donor out of the profits of the land :

Held that the instrument was liable to stamp duty as a gift and not as a declaration of trust.

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

A document whereby a Hindu widow purported to confer all her property on a kinsman and imposed on him the duty of maintaining her from the profits thereof was impounded by the Sub-Collector of Chingleput on the ground that it was not a mere instrument of gift (in which case the document was properly stamped), but was in fact a declaration of trust and was, therefore, liable to a higher duty.

The Board of Revenue being of opinion that this decision was wrong, referred the case for the decision of the High Court.

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

The Full Bench (Kernan, Muttusami Ayyar, Parker, and Wilkinson, JJ.) delivered the following

JUDGMENT :—We think the instrument is one of gift and is not a trust deed under the Stamp Act, and comes within article 36, schedule I of the Stamp Act.

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* Referred Case No. 6 of 1888.

APPELLATE CIVIL.

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

1888. Sept. 11.

KUNHAMMAD AND ANOTHER (DEFENDANTS Nos. 1 AND 3), APPELLANTS,

and

KUTTI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code, s. 234—Sale in execution of decree against deceased Muhammadan's estate—Representation of deceased by some only of his next-of-kin—Sale held to be valid.

V., a Muhammadan woman, died, leaving her husband and several minor children as her representatives. In execution of a money decree obtained against V., the creditor attached certain land which belonged to V. and made her husband and two of her children parties to the execution proceedings. The land was sold and purchased by the decree-holder:

Held, in a suit brought by the children of V. to set aside the sale on the ground, *inter alia*, that some of them were no parties to the proceedings in execution, and that the others, being minors at the time, had not been represented by a guardian appointed by the Court, that the sale was valid.

APPEAL from the decree of E. K. Krishnan, Subordinate Judge at Calicut, modifying the decree of P. J. Ittiyerah, District Munsif of Kutnad, in suit No. 203 of 1886.

The plaintiffs were three sons and a daughter of one Viyyathamma, a deceased Muhammadan.

Defendant No. 1 was the assignee of a decree for money against Viyyathamma, in execution of which he attached, brought to sale, and purchased certain land. Defendant No. 2 was the husband of Viyyathamma, and defendant No. 3 was a purchaser from defendant No. 1. This suit was brought to set aside the sale.

On the death of Viyyathamma, defendant No. 2 and two of the plaintiffs only were made parties to the execution proceedings as representatives of the deceased. All the plaintiffs were then minors and no guardian *ad litem* was appointed, but their father, defendant No. 2, objected to the execution proceedings on behalf

* Second Appeal No. 35 of 1888.

of himself and of plaintiffs Nos. 1 and 2, and also took ineffectual proceedings to set aside the sale as their guardian.

The Munsif dismissed the suit holding, *inter alia*, that the plaintiffs Nos. 1 and 2 were sufficiently represented by their father although no formal appointment had been made by the Court, inasmuch as the Court had subsequently entertained a petition presented by defendant No. 2 as their guardian.

On appeal the Subordinate Judge, while agreeing with the Munsif that plaintiffs Nos. 1 and 2 had been sufficiently represented by defendant No. 2, reversed his decree and set aside the sale on the ground that plaintiffs Nos. 3 and 4 had not been represented at all in the execution proceedings.

Defendants Nos. 1 and 3 appealed.

Sankaran Nayar and *Govinda Menon* for appellants referred to *Khushrobhai Nasarvanji* v. *Hormazsha Phirozsha*(1).

Ramasami Mudaliar for respondents referred to *Ramasami* v. *Bagirathi*(2) and *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb*(3).

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

JUDGMENT:—It is admitted that the property sold was the property of the mother, and was therefore liable for her debts. After her death, her husband (defendant No. 2) and plaintiffs Nos. 1 and 2 were brought in as her legal representatives. The decree was executed and the property sold. Plaintiffs Nos. 1 and 2 were treated as majors in the application under s. 234 of the Code of Civil Procedure, and no guardian *ad litem* was formally appointed for them, but defendant No. 2 was in fact allowed to resist the execution proceedings as their guardian. The want of a formal order appointing him guardian is not fatal. *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb* and *Hari* v. *Narayan* (4).

Plaintiffs Nos. 3 and 4 were minors under the protection of their father, defendant No. 2. The property left by the mother was in his possession, and s. 234 only requires a legal representative to be brought in for the purpose of following property which has come into his hands. This is not a similar case to *Ramasami* v. *Bagirathi* in which no legal representative had been brought in and the sale was therefore set aside.

(1) I.L.R., 11 Bom., 727. (2) I.L.R., 6 Mad., 180.
(3) I.L.R., 14 Cal., 204. (4) I.L.R., 12 Bom., 427.

KUNHAMMAD v. KUTTI.

We must allow the appeal, reverse the decree of the Lower Appellate Court, and restore that of the Court of first instance. The appellants will be entitled to their costs in this and in the Lower Appellate Court.

APPELLATE CRIMINAL.

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

1888. Oct. 22.

QUEEN-EMPRESS

against

ACHUTHA.*

Criminal Procedure Code, s. 45—Duty to report sudden death—Owner of house distinguished from owner of land.

Under s. 45 of the Code of Criminal Procedure, every owner or occupier of land is bound to report the occurrence therein of any sudden death.

The head of a Nayar family was convicted and fined under s. 176 of the Penal Code for not reporting a sudden death in the family house:

Held, following former decisions of the Court, that the conviction was illegal, because s. 45 of the Code of Criminal Procedure does not apply to the owner of a house.

CASE referred under s. 438 of the Code of Criminal Procedure by J. W. F. Dumergue, Acting District Magistrate of Malabar, as follows:—

"In this case the accused, a karnavan (senior member) of a Nayar tarwad, has been convicted and fined Rs. 3 under s. 176 of the Indian Penal Code for omitting to give information touching the death of his anandravan (junior member) from the effects of a snake-bite.

"The facts are identical with those dealt with in High Court Proceedings, No. 1225, dated 31st July 1880, pages 60 and 61 of the Weir's Code, third edition, and the conviction appears accordingly illegal.

"I do not think that s. 45 of the Code of Criminal Procedure was intended to be applied to such cases as this, but with regard

* Criminal Revision Case No. 469 of 1888.

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to the distinction drawn between the owner of land and the owner of a house, I submit that the exemption in favor of the latter is dangerous. The owner or occupier of a house must be the owner or occupier of the land on which the house stands, and the circumstances of a sudden or unnatural death in a house are more easily concealed than in the case of open land."

The Acting Government Pleader (*Subramanya Ayyar*) in support of the conviction.

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

JUDGMENT.—The accused in this case is the karnavan of a Nayar tarwad, and he omitted to give information touching the death of a member of his family in his house from snake-bite. The sub-magistrate considered that he was the owner of land within the meaning of s. 45 of the Code of Criminal Procedure and fined him Rs. 3 under s. 176, Indian Penal Code. It was held in criminal revision cases Nos. 221, 271, 284, and 311 of 1887 that the owner or occupier of a house within a village was not an occupier or owner of land within the meaning of s. 45. Mr. Justice Kernan made a similar order in criminal revision case No. 136 of 1880 under the corresponding section of the former Code of Criminal Procedure. Though another Divisional Bench considered the acquittal of the accused to be illegal in criminal revision case No. 479 of 1887, the decision proceeded on the ground that the accused was the occupier of land as contradistinguished from the owner or occupier of a house. Having regard to the fact that under the old Regulations in this Presidency, an obligation such as is created by s. 45 was imposed upon zamindars and owners of proprietory estates, we are not prepared to hold that the construction hitherto placed on s. 45 is not correct.

We agree with the District Magistrate that the conviction and the sentence referred to us for revision are illegal, and, setting them aside, direct that the fine, if levied, be refunded.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Parker, and Mr. Justice Wilkinson.

1888. Sept. 7, 26.

QUEEN-EMPRESS

against

MADASAMI.*

Criminal Procedure Code, s. 399—Reformatory Schools Act, 1876, ss. 2, 7.

The Reformatory Schools Act, 1876, provides only for male juvenile offenders being sent to reformatory schools by magistrates of the first class, and s. 399 of the Code of Criminal Procedure, 1882, so far as it authorises a magistrate not of the first class to direct that a male juvenile offender be sent to a reformatory is repealed:

Held, therefore, when a second-class magistrate directed a boy to be sent to a reformatory under s. 399 of the Code of Criminal Procedure that the order was illegal.

CASE referred by C. F. MacCartie, Acting District Magistrate of Tinnevelly, under s. 438 of the Code of Criminal Procedure.

The facts are stated in the judgments of the Full Bench (Kernan, Muttusami Ayyar, Parker, and Wilkinson, JJ.).

The Government Pleader (Mr. *Powell*) for the District Magistrate.

PARKER, J. (Kernan and Wilkinson, JJ., concurring). The second-class magistrate has sentenced a juvenile offender (a boy) to rigorous imprisonment for six months and has directed, under s. 399, Criminal Procedure Code, that he be sent to a reformatory instead of being imprisoned in the criminal jail. The question referred to us is whether the direction that the accused be sent to a reformatory is illegal.

The sentence is clearly within the legal powers of the second-class magistrate under s. 399, Criminal Procedure Code, unless the introduction of the Reformatory Schools Act V of 1876 operates to repeal, or partially to repeal, that section. Act V of 1876 was extended to the Madras Presidency by notification in the official gazette in August 1887.

* Criminal Revision Case No. 581 of 1887.

The Criminal Procedure Code of 1882 was passed subsequently to Act V of 1876. By s. 2 of the latter Act it was enacted that on and from the date in which Act V of 1876 came into force in any province, s. 318 of the then Code of Criminal Procedure should be repealed therein. Section 399 of the present Code is the section corresponding to s. 318 of the old Code, and in s. 3 of the present Code it is enacted: "In every enactment passed before this Code (1882) comes into force in which reference is made to any chapter or section of the Code of Criminal Procedure, Act XXV of 1861, or Act X of 1872 or to any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding chapter or section."

We may, therefore, take it that the introduction of the Reformatory Schools Act repeals the operation of s. 399, Criminal Procedure Code, in this Presidency "so far as may be practicable."

Section 399, Criminal Procedure Code, is a general section, which empowers *any* criminal court to send *any* sentenced person (of either sex) under sixteen years of age to a reformatory instead of sending him or her to a criminal jail. Act V of 1876 on the other hand is a special Act dealing with "Reformatory Schools for male youthful offenders." The legislature apparently contemplated the introduction of "reformatories," and also of "reformatory schools for male youthful offenders only," and provided that, when the latter institutions had been established, the provision of s. 399 should be repealed "so far as may be practicable."

The boy sentenced by the second-class magistrate could only, therefore, be sent to a "reformatory school" by a first-class magistrate under the provisions of s. 7 or 8 of the Reformatory Schools Act, and that part of the order of the second-class magistrate which directs that the accused "shall be sent to a reformatory" must be cancelled.

We may observe that, though the legislature apparently contemplated the institution of reformatories as well as "reformatory schools for male youthful offenders," yet, as a matter of fact, the latter institution only has been established, and, therefore, the order of the second-class magistrate could not have been carried out in the form in which it was passed.

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As the District Magistrate has already taken steps under s. 8, Act V of 1876, to send the accused to a reformatory school, no further orders are necessary.

MUTTUSAMI AYYAR, J.—In this case the second-class magistrate of Tinnevelly sentenced a juvenile offender to suffer rigorous imprisonment for six months and directed, under s. 399, Criminal Procedure Code, that he be sent to a reformatory instead of being imprisoned in a criminal jail. The District Magistrate refers the sentence for revision, on the ground that the direction that the accused shall be sent to a reformatory is illegal. According to s. 399 of the Code of Criminal Procedure it is competent to any criminal court which sentences a person under sixteen years of age to imprisonment for any offence to make the order, to which exception is taken by the District Magistrate. Act V of 1876 was passed specially with reference to reformatory schools, and under s. 7 of that enactment the power to direct that a prisoner shall be sent to a reformatory school cannot be exercised by any magistrate inferior to a first-class magistrate. That Act repealed s. 318 of the Code of Criminal Procedure which was then in force and corresponded to s. 399 of the present Code from such day as the local Government might by notification in the official gazette direct in that behalf. The local Government published a notification as mentioned above on the 20th August 1887 after the present Code of Criminal Procedure came into force. It is provided by s. 3 of the present Code that in every enactment passed before it comes into force in which a reference is made to any section of the Code of Criminal Procedure (Act XXV of 1861 or Act X of 1872) or to any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding section. It is suggested that, under this section, the reference made in Act V of 1876 to s. 318 of the former Code for the purpose of repealing it ought to be treated as a repeal (by reason of s. 3) of s. 399 of the present Code. Act V of 1876 provides only for male juvenile offenders being sent to reformatory schools and s. 399 is repealed by it, so far as it empowers a magistrate, who is not a first-class magistrate, to direct that the male juvenile offender be sent to a reformatory. In the result there are two enactments, both of which are partly in force, but the one is special and the other general. According to the former no male juvenile offender can be admitted into a

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reformatory school except under the order of a first-class magistrate or other officer specially mentioned in s. 7 of Act V of 1876. According to the latter, any criminal court which passes the sentence may do so. The reasonable construction according to which effect may be given to both enactments in force is that the admission of a male juvenile offender into the reformatory school must be made under the order of a first-class magistrate or other officer as provided by s. 7, Act V of 1876, and that any criminal court acting under s. 399 may direct that a female juvenile offender be sent to a reformatory when one is established. It is urged by the Government Pleader that Act V of 1876 expressly repealed s. 318 of the former Code of Criminal Procedure and that the question before us is one of express and not of implied repeal. But the words in s. 3 of the present Code, "so far as may be practicable," appear to me to limit the repeal to cases in which s. 399 is necessarily inconsistent with the provisions of Act V of 1876. No grounds are shown for assuming that Government may not hereafter provide a reformatory for the benefit of female juvenile offenders. In the case before us, however, the accused is a boy and the District Magistrate has taken the necessary steps under s. 8 of Act V of 1876. I also think no further orders are necessary, and it is sufficient to declare that the order made by the second-class magistrate is hereby declared to be illegal.

APPELLATE CIVIL.

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

1888. September 26. November 1.

RAMA (PLAINTIFF), APPELLANT,

and

SUBBA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Pensions Act 1871, *s.* 4—*Grant of villages enabling grantee to receive the land revenue.*

Suit to recover a moiety of two villages granted as a jaghir:

Held, that as the original grant was not of the freehold or full ownership in the soil, the suit was barred by s. 4 of the Pensions Act, 1871.

APPEAL from the decree of J. D. Goldingham, District Judge of Bellary, in Suit No. 2 of 1887.

The facts and arguments sufficiently appear from the judgment of the Court (Collins, C.J., and Muttusami Ayyar, J.).

Mr. *Subramanyam* and *Ramachandra Rau Saheb* for appellant.

Bhashyam Ayyangar and *Sundara Rau* for respondents.

JUDGMENT.—The appellant brought this suit to recover from respondents a moiety of two villages together with mesne profits from 1882. Those villages were granted in 1809 as a jaghir by the late East India Company to one Ramachandra Rao in consideration of good service rendered by him to the Government.

Until 1884 there was no apparent disagreement among the members of the grantee's family. In August 1885 respondents asserted a claim to the sole and exclusive enjoyment of the jaghir. Thereupon the appellant presented a petition to the Collector, under s. 5 of the Pensions Act, complaining that the first respondent was collecting the entire revenue of the jaghir and appropriating it in contravention of a family custom by which the appellant was entitled to an equal share. He asserted further that as the grandson of the grantee and as nearer to him in degree than respondents, he was entitled to be recognized as the sole jaghirdar. The first respondent contended that the custom introduced into the family by the grantee was one of primogeniture, and that as the senior representative of the senior branch, he was the head of the family and the sole jaghirdar. The case was referred for investigation to the Head Assistant Collector who considered that the evidence before him was altogether in favor of the first respondent and recommended his recognition under the standing order of the Board of Revenue, No. 138, as the managing member of the family. The Collector also suggested that the first respondent, Subba Rao, should be recognized as representative of the jaghir and as the managing member of the family; adding, however, that the division of the collections was a separate question, and that the managing member would be liable, if he failed, to provide proper maintenance for the appellant. The Board of Revenue agreed with the Collector, and on the 28th November 1886 the Government approved of the Board's recommendation (Exhibit VI). On 21st January 1887 the appellant applied to the Collector for a certificate under s. 6 of Act XXIII of 1871, declaring his claim to be cognisable by a Civil Court and urged that it was not governed by the Pensions Act. The Collector observed that the jaghir was an unenfranchised inam, and as such came under the Pensions Act, and that the Inam Register stated that as the grant was not enfranchised, parties could only sue with the permission of the Government. He further remarked that he would be prepared to recommend the issue of a certificate to enable the appellant to file a suit with respect to his allegation that the collections were not fairly divided, on receiving *primâ facie* proof that he had sustained any such injustice or even that there was a *bonâ fide* dispute as to the share or amount to which he was entitled. The Collector passed his order on the 3rd February 1887 (Exhibit V), and on the 21st idem the present suit was brought. The preliminary objection was taken for the respondents that the grant being one of land revenue, the suit was not cognizable without a certificate from the Collector under ss. 4 and 6 of Act XXIII of 1871. Thereupon two issues were recorded for decision; viz.: (1) whether the grant was an absolute grant of the two villages mentioned therein or whether it was a mere assignment of the Government revenue on account of services rendered; (2) whether the suit falls within Act XXIII of 1871, and whether a certificate, under s. 6 of that Act, is necessary before plaintiff can proceed with the suit. The

* Appeal No. 173 of 1887.

RAJA v. SUBBA.

judge was of opinion on the first issue that the grant (Exhibit I) was a grant of land revenue coupled with the power of collecting it, and that it did not convey to the grantee any right in the soil; and on the second issue that the suit was governed by ss. 4 and 6 of the Pensions Act of 1871. Accordingly he dismissed the suit with costs, and the contension in appeal is that both issues ought to have been decided in appellant's favor.

We are of opinion that the District Judge is right in considering the claim to be barred by the Pensions Act, s. 4. That section enacts 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; s. 7 exempts from its operation any inam of the class referred to in the first section of Madras Act IV of 1862. The expressions 'inam,' and 'grant of revenue' are obviously used in the same sense, and the natural inference is that s. 4 is applicable, whether the inam tenure exists in conjunction with or apart from the kudivaram right. This was the view taken by this Court in *Peria Kovil Kalavi Appan* v. *A. Pulliah Chetty*(1), and the Court observed in that case that the release of a burden altogether or the lightening of a burden which the land would otherwise bear in the shape of assessment is a gift or grant of revenue to the extent of the relief and therefore that a suit for such land is prevented by s. 4 of the Pensions Act. Again the expression "hereditary or personal grant of land revenue" was also used in Regulation IV of 1831 which was the first Regulation in this Presidency that barred the jurisdiction of Civil Courts to entertain suits regarding inams, except with the previous permission of Government, and Madras Act IV of 1862 which divides such grants of land revenue into enfranchised and unenfranchised inams refers to them as "inam lands." This again suggests the inference that though the suit may be for a piece of land, in respect of which the grant of revenue was originally made, yet it is a suit relating to such grant. This view receives further corroboration when we consider the course of previous legislation on the subject, the nature of Act XXIII of 1871 and the probable intention of the Legislature. As observed already, the first Regulation in this Presidency which barred the jurisdiction of Civil Courts regarding hereditary or personal grant

(1) 1 Ind. Jur., 164.

of land revenue made by the authority of the Go[illegible] in Council [illegible] was Regulation IV of 1831. It was provided b[illegible] enactment that no Civil Court should take cognizance of any claim to such grants, however denominated, unless the complainant was referred to it by an order signed by the Chief or other Secretary to the Government, to seek redress from the established Courts of Adalat." The intention was to give the Government an opportunity to protect the reversionary interest of the Crown. The next step taken to carry out that intention was the framing of rules by Government, under which the title to the inam was scrutinized on the occasion of the inamdar's death and orders were passed as to whether it lapsed to the Crown or whether it was to be continued to his successor, and if so, whether subject to any and what terms. The next change was the removal of the uncertainty in which the recurring scrutiny under the lapse rules involved the title to the inam, and in 1859 rules were framed for enfranchising the inam grants by surrendering the reversionary interests of the Crown for an equivalent quit-rent and placing enfranchised inams on the footing of private property. The outcome of the inam Settlement under those rules was Madras Act IV of 1862. The preamble gives the prior history of the inam tenure and says "whereas by Regulation IV of 1831 of the Madras Code, and Acts XXXI of 1836 and XXIII of 1838, all hereditary and personal grants of land revenue in this Presidency are removed from the cognizance and process of the Courts of Civil Jurisdiction, and the power of deciding on claims to these tenures is reserved to the Government; and whereas, under the inam rules sanctioned by Government under date, the 9th August 1859, the reversionary rights of Government are surrendered to the inamdars, in consideration of an equivalent annual quit-rent, and the inam lands are thus enfranchised and placed in the same position as other descriptions of landed property in regard to their future succession and transmission, it is hereby enacted as follows."

Then s. 1 says "All inams of the classes described in cl. 1, s. 2, Regulation IV of 1831 which have been or shall be enfranchised by the Inam Commissioner and converted into freeholds in perpetuity or into absolute freeholds in perpetuity, shall be exempted from the operation of Regulation IV of 1831, and of Acts XXXI of 1836 and XXIII of 1838 of the Madras Code." This enactment shows, first, that though the inam tenure consisted

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in a grant of land revenue, it might exist in conjunction with the kudivaram right to the land and referred to it as the inam land; 2ndly that the effect of enfranchisement was its exemption from the operation of Regulation IV of 1831, and its conversion into a freehold in perpetuity; 3rdly that the term freehold was used in the sense of full ownership unrestricted as to future succession and transmission, or of a release of the reversionary right of the Crown under the terms of the grant; 4thly that unenfranchised inams continued as before subject to Regulation IV of 1831; and 5thly that the land to which the grant of revenue related was contemplated by the Legislature as either enfranchised or not enfranchised. When the Act of 1871 was passed, there were, therefore, two classes of inam tenures in the case of hereditary grants of land revenue, viz., enfranchised inams and unenfranchised inams, whether those tenures were held in conjunction with or apart from the kudivaram right to the land. Act XXIII of 1871 was intended to consolidate the law on the subject of pensions and grants of land revenue and it repealed Regulation IV of 1831 in respect of enfranchised inams and kept alive Madras Act IV of 1862 in respect of unenfranchised inams. There is no indication of an intention to surrender the reversionary rights of the Crown in the first-mentioned class of inams except for an equivalent annual quit-rent fixed under the inam rules of 1859, as stated in Madras Act IV of 1862. The evident intention was to re-enact Regulation IV of 1831 which it repealed for purposes of consolidation by ss. 4 to 6 with reference to unenfranchised inams. It is therefore immaterial that the inam tenure and the kudivaram right vest in one and the same person, provided that the estate which he has is not a freehold nor private property in the sense in which the expression is used in Madras Act IV of 1862 and does not negative any reversionary interest in Government. The construction suggested for the appellant, viz., that Act XXIII of 1871 does not apply when the exemption from the burden of paying assessment in whole or part co-exists with some interest in land which is not a freehold, involves the anomaly of an involuntary surrender of the reversionary rights of the Government in unenfranchised inams and the inconsistency of placing inamdars who did not choose to enfranchise their holdings on the same footing with those who enfranchised the inam lands and converted their qualified estate into full ownership or freehold in the sense of their release from the reversionary interests of the

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Crown. The course of decisions in Bombay which is referred to by the Judge lends support to this construction. The question considered in them was one of construction of the original grant, and the test adopted in each case was whether the terms in which the grant was made disclosed an intention to grant the freehold of the land or a qualified ownership in unoccupied land in the villages granted in view to the beneficial enjoyment of the land revenue payable to Government from villages forming the subject of the grant. *Ravji Narayan Mandlik* v. *Dadaji Bapuji Desai*(1) an instance in which full ownership or freehold in the soil was granted. The cases of *Vaman Janardan Joshi* v. *The Collector of Thana*(2) and of *Ramchandra* v. *Venkatrao*(3) are instances of a grant of land revenue and of qualified ownership in unoccupied land. The distinction made is sound in principle. When the land revenue is the real subject of the grant and entire villages are granted in order that the grantee may receive the land revenue due thereon to Government and appropriate it to his own use, subject to the terms of the grant, it is clear that no proprietary interest can pass in lands already occupied and in which the kudivaram right is vested in others, for the Government is not competent to grant what does not belong to it and the terms of the grant must be construed with reference to what was intended to be granted. Such being the case, the interest that passes in waste land or land relinquished by the occupant for the time being is such as would enable the grantee to realize the revenue due to Government which was the subject of the grant, unless the terms of the grant show that a larger interest therein was vested in Government and that that interest was intended to be passed. These decisions show that in order that a grant of villages may not fall under the Pensions Act, it must be a grant of the freehold therein or full ownership in the soil, qualified in no way by any reversion suggested by the terms of the grant, in regard to future succession or transmission.

In the case before us the grant is clearly not a grant of the freehold in the soil in the sense already indicated. Exhibit J, which is the grant, mentions in express terms the contingencies in which the villages should revert to Government. Document J, after reciting the grant of the two villages, states: "which said

(1) I.L.R., 1 Bom., 523. (2) 6 B.H.C.R., 191. (3) I.L.R., 6 Bom., 598.

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villages, the said Ramachendra Rao and his heirs shall continue to hold, receive and enjoy all the Circar revenues derivable from the lands belonging to the said two villages so long as the said Ramachendra Rao and his heirs shall continue faithful to his and their allegiance to the British Government and obedient to the Regulations which have been or may be established by its authority for the internal government of the country, for the administration of justice, and for preserving to its subjects the enjoyment of their just rights and privileges." The purpose for which the villages were granted was "subject to the performance of the above duties," that of enabling the grantee to "hold, receive and enjoy all the Circar revenues derivable therefrom." Again the document reserves to other inamdars in possession of land allotted to them in the said villages "in inam tenure" their rights in full. This does not signify that occupancy rights vested in others holding assessed lands were intended to be taken away, nor does it mean that the freehold in any part of the villages was intended to be conferred, for a reversionary right is reserved to Government in certain contingencies. It is not necessary to decide, for the purpose of this appeal, whether until the reversionary right reserved to Government accrues, the grantee has a larger interest in waste land which lay waste at the date of the grant or was since relinquished, than that of cultivating it, such as that of cutting timber, &c.; but it is sufficient to say that so long as the reversionary right exists, the grantee and his heirs do not hold the villages as freeholds or in full ownership as they hold other private property. It is not shown that the villages were exempted from the rules framed under Regulation IV of 1831. On the other hand it appears that the villages were the subject of the enquiry held by the Inam Commissioner and they were not enfranchised. Documents A to F do not carry the case further or show that a freehold was granted.

Reliance was placed by the appellant on the decision of this Court in *Panchanadayyan* v. *Nilakandayyan*(1). The decision in that case proceeded on the ground that the property in the soil was the subject of the grant. The history of inam tenures in this Presidency was not then considered, and the Privy Council case on which that decision rested did not decide that land allotted

(1) I.L.R., 7 Mad., 191.

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in inam tenure, which was not enfranchised, was not within the scope of the Pensions Act, as the question did not arise for decision in that case.

We consider that the appeal cannot be supported and dismiss it with cost.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

RAMACHANDRA (PLAINTIFF), APPELLANT,

and

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*

1888. August 30. December 6.

Madras Forest Act, 1882, *s.* 10—*Procedure—Remedy by ordinary suit barred.*

Where by an act of legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the ordinary jurisdiction of civil courts is ousted and in the case of injury the party cannot proceed by action.

Plaintiff sued in a Munsif's Court to cancel the decision of a Forest officer confirmed by a District Judge under s. 10 of the Madras Forest Act, 1882, and to recover certain land, a claim to which had been rejected under the said section:

Held that the Munsif had no jurisdiction to entertain the suit.

APPEAL from the decree of H. J. Stokes, District Judge of Coimbatore, reversing the decree of P. Narayanasami Ayyar, District Munsif of Coimbatore, in suit No. 387 of 1885.

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

Bhashyam Ayyangar for appellant.

The Government Pleader (Mr. *Powell*) for respondent.

JUDGMENT.—The appellant is the plaintiff in suit No. 387 of 1885 in the Court of the District Munsif of Coimbatore.

The facts are that plaintiff alleges that he is the owner of lands having an area of 822 acres in the village of Vellimalaipattanam. The Forest Range Officer of Coimbatore, acting under the Forest Act V of 1882, notified in the gazette the intention of Government to constitute the said lands forest reserve. The plaintiff under s. 10 of that Act filed a claim to the lands, No. 53 of 1883. On the 18th December 1883 the Forest officer allowed

* Second Appeal No. 54 of 1888.

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the claim to the extent of 233 acres as being the land comprised within Survey No. 363, but rejected the claim to the extent of 589 acres not comprised within Survey No. 363. The Forest officer on the 2nd of December published in the gazette a notification that the land rejected from plaintiff's claim was forest reserve, and took possession of it. The appellant under s. 10, clause 2, preferred an appeal, No. 29 of 1884, in respect of such rejection in the District Court, and that court on the 4th of July 1884 dismissed the appeal. Though a second appeal might have been brought from such decision, the appellant did not bring such second appeal, but he filed this suit in the Munsif's Court, praying to have the decision of the Forest officer and District Judge cancelled and to recover possession of the lands as to which his claim was rejected. The defendant in defence stated that, under the Boundary Act XXVIII of 1860, the lands claimed by the appellant were decided by the Deputy Superintendent of Survey (exhibit No. 1, dated 2nd March 1879) not to be within appellant's boundary or within the village of Vellimalaipattanam, but in the Government village of Narasapuram. The appellant was aware of that inquiry and decision, and though a suit No. 6 of 1879 was brought by the plaintiff to dispute other decisions by the officer of survey, no suit was brought to set aside the decision as regards the lands now claimed. The defendant relied on the decision of the Forest officer and District Judge as a bar to the suit. The Munsif, by decree of the 7th of April 1886, decided that the appellant was not concluded by the boundary decision or by the decision of the Forest officer or of the District Judge—and made a decree setting aside the two latter decisions and awarding possession of the lands claimed.

The District Judge on appeal by decree, dated the 30th of September 1887, declared that the appellant was concluded by the decision of the Forest officer and District Judge and dismissed this suit with costs, holding that the Munsif had no jurisdiction to try this suit after the decision made by the District Judge and that the suit was barred as *res judicata* under s. 13 of the Code of Civil Procedure.

The grounds of appeal now are—

(1) That the Munsif had jurisdiction to hear the suit.

(2) That the suit is not barred by s. 13.

(3) That the decision of the Forest officer is not a decision by a court, and that his decision and that of the District Judge on appeal are not final.

(4) That as there is no express provision in the Forest Act excluding the jurisdiction of the Civil Court, the Munsif had jurisdiction.

(5) That the lower appellate court misconstrued ss. 5, 10, 16, 17, and 40 of the Forest Act.

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The first and fourth grounds of appeal may be taken together, viz., whether the Munsif had jurisdiction. Now a particular procedure before a Forest officer with appeal to the District Judge is provided in the Forest Act for determining the rights of claimants to land intended to be constituted forest reserve.

Section 4(*c*) requires a Settlement Forest officer to be appointed to inquire into and determine the existence, nature, and extent of any rights claimed, and to deal with the same as provided by that chapter.

Section 6 requires notification to be published, specifying the land proposed to be included in the reserve and fixing a time, not less than three months after, for all parties claiming rights to deliver to the office notice of such claim or to appear before him and state their claims and requiring notice to be served on every known or reputed proprietor of land included in or adjoining the land proposed to be taken as reserve.

Section 8 requires the Forest Settlement officer to inquire into all such claims and record the evidence in the same manner as in appealable cases under the Code of Civil Procedure.

Section 9 empowers the Settlement officer to summon parties and compel the production of documents.

Section 10 requires that in case of a claim to a right in land except rights, of way, of water, of pasture, and forest produce to pass an order specifying the particulars of such claim and admitting or rejecting the same in whole or in part; and in case of a claim admitted in whole or in part, the officer may come to agreement with the claimant for surrender of the right, or exclude the land from the limits of the proposed forest or acquire the same under the Land Acquisition Act.

Clause ii of s. 10 provides that if a claim is rejected wholly or in part, the claimant may, within thirty days from the date of the order, prefer an appeal to the District Court in respect of such rejection only.

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Clause iii gives a similar appeal on behalf of Government against an admission.

Section 16 provides that when, *inter alia* all appeals shall have, been disposed of, the Government may publish notification in the gazette specifying the limits of the forest, and declaring the same to be reserved from a date to be fixed in such notification and that the Forest Settlement officer shall, before the date so fixed, publish the said notification, and s. 16 provides that from the date so fixed such forest shall be deemed to be reserved forest.

Thus new powers are given to Government by the Forest Act from the exercise of which individuals may receive injury, and a special mode of redressing such injury is given by the Act and special procedure provided. If such special mode of redress and procedure was not intended to exclude the jurisdiction of the ordinary Courts, most probably, a declaration to that effect would be found in the Act. But the mode of redress given by the Act is as suitable for the redress of the injury as the mode of redress in an ordinary action, and is perhaps more suitable by reason of the nature and extent of the inquiry that may be made in a fixed time, especially where claims may be numerous and speedy ascertainment of claims may be desirable. The remedies and rights of claimants to be decided on appeal by the District Court are questions of fact and of law and from which decision there is a second appeal to the High Court. See *Kamaraju* v. *The Secretary of State for India*(1). It is an established principle that when by an act of the legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the jurisdiction of the ordinary courts is ousted, and in case of injury, the party cannot proceed by action. See *The Governor and Company of the Cast Plate Manufactures* v. *Meredith*(2), *Stevens* v. *Jeacoke*(3), *West* v. *Downman*(4).

Raja Nilmoni Singh Deo Bahadur v. *Ram Bandhu Rai*(5) before the Privy Council was the case of a suit against the Bengal Government made by an alleged owner of land which had been acquired by proceedings taken by Government under the Land Acquisition Act X of 1870. It was decided that it would not be

(1) I.L.R., 11 Mad., 309. (2) 4 T.R., 794. (3) 11 Q.B., 731. (4) L.R., 14 Ch. D., 111. (5) I.L.R., 7 Cal., 388.

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reasonable to permit a person whose claim had been adjudicated on in the manner pointed out by the Act to have that claim reopened and again heard in another suit. That principle applies to this case.

The second and third grounds of appeal fail for the reason given respecting their subject matter by the District Judge.

The fifth ground of appeal also fails as there has been no misconstruction by the District Judge.

We do not see that the ss. 5, 10, 16, 17 or 40 of the Forest Act were any of them misconstrued.

The District Judge did not decide that the adjudication made by the Forest Settlement officer was made in a "Forest Court" under s. 37 to s. 41, nor did the Forest officer purport to adjudicate in "Forest Court" within the meaning of the Forest Act.

We therefore dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

CHATHU (PLAINTIFF), APPELLANT,

and

KUNJAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

1888. August 29. November 16.

Transfer of Property Act, s. 67 (a)—Usufructuary mortgage—Remedy of mortgagee.

A usufructuary mortgagee is not entitled, in the absence of a contract to that effect, to sue for sale of the mortgage property.

SEMBLE:—The construction placed on s. 67 (*a*) of the Transfer of Property Act, 1882, in *Venkatasami* v. *Subramanya* (I.L.R., 11 Mad., 88) that a usufructuary mortgagee can sue either for foreclosure or for sale but not for one or other in the alternative is wrong.

APPEAL from the decree of V. P. deRozario, Subordinate Judge at Palghat, modifying the decree of B. Kamaran Nayar, District Munsif of Betutnad, in suit 415 of 1884.

The facts necessary for the purpose of this report appear from the judgments of the Court (Kernan and Muttusami Ayyar, J.J.).

Sankaran Nayar for appellant.

Sankara Menon for respondents.

* Second Appeal No. 1362 of 1887.

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KERNAN, J. (after disposing of the other grounds of appeal proceeded as follows) :—

The fifth ground of appeal is that the plaintiff is entitled as usufructuary mortgagee to have a decree for sale of the land. Whether the plaintiff is so entitled depends on the provision of the usufructuary mortgage. That mortgage in terms mortgaged to the plaintiff's anandravan Achuta Menon five items of property (the subject of the plaint) which yield 125 paras of paddy for Rupees 400 and 200 paras of paddy valued at Rupees 100. It was thereby provided, "you shall hold the lands in your possession and take from the rent of 125 paras of paddy 93 paras of paddy, made up of 86 paras for interest at 5 paras of paddy per 100 fanams and at 8 paras of paddy per 100 fanams and of 7 paras of paddy on account of allowance for drying, and pay the balance 32 paras of paddy for revenue and michavaram." It was further provided that when the above-mentioned mortgage amount is paid by two instalments and the paddy by one instalment, the same shall be credited in the document, and the lands shall be surrendered. That usufructuary mortgage does not fix any time for payment. It is open to the mortgagor to pay off the mortgage or not as he pleases. The plaintiff cannot compel payment of the mortgage amount, as there is no covenant or agreement express or implied for payment by the mortgagor. The contract of the parties is defined by the instrument. The mortgagee has a right to the produce of the land and to pay himself thereout interest, and apply the balance for allowance for drying and for revenue and michavaram. I am not aware that it ever has been held that a mortgagee under such an instrument could sue for payment of the amount of the principal of the mortgage either by personal action against the mortgagor or by sale of the land. Section 68 of the Transfer of Property Act probably would apply if the facts thereby contemplated occurred in this case, but they do not. There may be various provisions in mortgages partly usufructuary and called usufructuary mortgages though they are not such; and if, according to the terms of such instrument, the mortgagee is permitted to sue for payment or for sale, such terms will form the contract in such cases. The definition given in s. 58, cl. (*d*) is a true definition of a usufructuary mortgage, and it does not fix a time or contain any covenant or agreement

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for payment. *Venkatasami* v. *Subramanya*(1) was cited where it was held that the usufructuary mortgagee was held entitled to a sale.

The provisions of that usufructuary mortgage are not given in the report of the case, and they may not have been the same as in this case. Therefore it is not to be considered as an authority to be followed in this case. If the terms of the mortgage appeared to be in that case similar to those of this case, I would be bound to refer this case to a Full Bench for decision, as I am not able to agree in the construction put in that case on various sections of the Transfer of Property Act, under which construction a mortgagee by usufructuary mortgage would be entitled to a decree for payment or for sale or foreclosure. In the circumstances contemplated by s. 68 of that Act, a decree for payment may be made, and plaintiff contends in his sixth ground of appeal, that as the property was sold in suit No. 518 of 1879, his rights were prejudiced. But such sale was not made or caused by any act of the mortgagor and therefore is not within s. 68. The sale made is the only act alleged to prejudice the plaintiff, and therefore s. 68 does not apply. It is not necessary to decide whether s. 68 applies to a usufructuary mortgage made, as that in this case was, before the Transfer of Property Act came into operation.

The objection that the plaintiff should, on his seventh ground of appeal, be declared usufructuary mortgagee is good and the decree should be modified to this extent.

We therefore modify the decree of the Lower Appellate Court by declaring that the plaintiff is entitled to a usufructuary mortgage on the properties and kanam mortgaged to him, and subject to the above modifications the decree of the Lower Appellate Court is confirmed. Plaintiff failed and the appeal is dismissed with costs.

MUTTUSAMI AYYAR, J.—I took part in *Venkatasami* v. *Subramanya*, and I am convinced on further consideration that the construction placed therein on s. 67 (*a*), so far as it relates to an usufructuary mortgage, is not correct. As stated in that case, the clause does not imply that an usufructuary mortgagee may sue either for sale or for foreclosure; on the other hand the proper interpretation is that he cannot sue for either remedy, whilst the

(1) I.L.R., 11 Mad., 88.

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mortgagor may either redeem or allow his right of redemption to become barred by limitation. In the last-mentioned case, the mortgagee would acquire ownership by prescription, and the limited interest originally created in the mortgaged property by way of security would then ripen into full ownership by the operation of the present Act of Limitation.

The fact was overlooked that s. 58 of Act IV of 1882 defined the three pure forms of mortgage into which mortgages in use in this country might be resolved, and that the definition of a pure usufructuary mortgage contained in clause (*d*) is framed with reference to what is known as the *vivum vadium* or the Welsh mortgage in English Law or the Bhoga Bandukom of Hindu Law, for an indefinite period in which there is no contract express or implied on the part of the mortgagor to repay the debt though he is at liberty to redeem the mortgage. The other sections of Act IV of 1882 to which reference is made in *Venkatasami* v. *Subramanya* are not inconsistent with this view.

Though s. 58 defines the three simple and pure forms of mortgage, yet the particular transaction which may happen to be the subject of litigation may be a combination of two or more of the simple forms, *e.g.*, a mortgage with possession containing a covenant for payment or conferring a power of sale on default of payment. The words in s. 67 "in the absence of a contract to the contrary" are intended to provide for such mixed forms. The decision in that case may be correct in the view that the transaction then before the Court was not a usufructuary mortgage pure and simple, but one in which there was an obligation to repay the mortgage debt. With these remarks, I concur in the judgment proposed by Mr. Justice Kernan.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson.

THAMMIRAJU AND OTHERS (DEFENDANTS), PETITIONERS,

and

BAPIRAJU (PLAINTIFF), RESPONDENT.*

1888. Sept. 21, 25.

Civil Procedure Code, s. 521—Arbitration—Misconduct—Award set aside.

Where a suit was referred to arbitration, and objection was taken to the award on the ground that one of the arbitrators had not attended a meeting when witnesses were examined by the other arbitrators:

Held, that the award was invalid by reason of misconduct on the part of the arbitrators within the meaning of s. 521(*a*) of the Code of Civil Procedure.

APPLICATION under s. 622 of the Code of Civil Procedure to set aside a decree of I. L. Narayana Rau, District Munsif of Rajahmundry, confirming an award.

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

Subba Rau for petitioners.

Biligiri Ayyangar for respondent.

JUDGMENT.—At the request of the parties the suit was referred for decision to three arbitrators. Objection was taken to the award on the ground that one of the arbitrators was absent during the examination of witnesses. The Munsif overruled the objection, being of opinion that the presence of the three arbitrators at a majority of the meetings, and at the final meeting when the award was drawn up, was sufficient to validate the award. The defendants petition this Court to set aside the decree founded on the award as illegal. The question for determination, therefore, is whether the absence of one of the three arbitrators at some of the meetings held amounts to misconduct. It was held in second appeal No. 1316 of 1887 that the word misconduct is used in the sense of neglect of such duties and responsibilities as devolve on arbitrators acting judicially under the Code of Civil Procedure. It certainly was the duty of each and every one of the arbitrators to be present at all the meetings, more especially during the exam-

* Civil Revision Petition No. 70 of 1888.

THAMMIRAJU v. BAPIRAJU.

ination of the witnesses. In Russell, On the power and duty of Arbitrators, the result of the cases now on the point is given thus: "as joint arbitrators must all act, so they must all act together. They must each be present at every meeting, and the witnesses and the parties must be examined in the presence of them all: for the parties are entitled to have recourse to the arguments, experience, and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow judges, so that by conference they shall mutually assist each other in arriving together at a just decision." I have been referred to the case of *Nand Ram* v. *Fakir Chand*(1), where it was held that the presence of all the arbitrators at all the meetings is essential to the validity of the award. I think that it may be gathered from the provisions of s. 510 that such was the intention of the Legislature, for it is provided that if any one of the arbitrators dies or refuses to act, the Court may either appoint a new arbitrator or supersede the arbitration, in other words the remaining arbitrators cannot act alone. One of the arbitrators having been guilty of misconduct in absenting himself from the meetings, and the other two arbitrators having been guilty of misconduct in examining witnesses in the absence of the third arbitrator, the award should, on the application of the defendants, have been set aside.

I reverse the decree of the District Munsif and direct him to readmit the suit to his file and dispose of it according to law.

The petitioners are entitled to their costs in this Court.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

1888. Sept. 9, 20.

QUEEN-EMPRESS

against

KUNJU NAYAR.*

Penal Code, ss. 417, 463, 464, 465, 511—*Forgery—False document—Fraudulent entry in a book of account.*

Prisoner was requested to make an entry in a book of account belonging to the complainant to the effect that he was indebted to the complainant in a certain sum found due on a settlement of accounts: instead of making this entry as requested,

(1) I.L.R., 7 All., 523. * Criminal Appeal No. 283 of 1888.

QUEEN-EMPRESS v. KUNJU NAYAR.

prisoner entered in a language not known to complainant that this sum had been paid to complainant. He was convicted of forgery under s. 465 of the Penal Code.

Held, that the offence was not forgery but an attempt to cheat.

APPEAL from the conviction and sentence passed by the Sessions Judge of South Malabar (L. Moore) in case No. 23 of 1888.

The prisoner sent his petition of appeal from jail and was not represented.

The Court (Muttusami Ayyar and Shephard, JJ.) delivered the following

JUDGMENT:—The prisoner has been convicted of forgery under the following circumstances:—

The complainant, a timber merchant, had been advancing money to the prisoner to supply him with timber, and accounts had to be settled between them.

The parties met, and the complainant handed to the prisoner the account book kept by him to see how the account stood. The prisoner, after looking at the book, said that he owed Rs. 33-5-3 to the complainant and was thereupon asked by him to make an entry to that effect in the book. Although the book was kept in Tamil, complainant being a Tamil man not knowing Malayalam, prisoner made an entry in Malayalam to the effect that Rs. 33-5-3 had been received on the 5th April, and all previous accounts settled by timber supplied on the 16th April. The Sessions Judge, with the assessors, finds that the entry is false in fact, and the Sessions Judge is of opinion that the making such false entry constitutes an offence under s. 465 of the Indian Penal Code. We are unable to agree in this opinion. In order that a document should be a false document within the meaning of s. 464 of the Indian Penal Code, it must appear that it was made with the intention of inducing the belief that such document was made by or by the authority of one who did not make it or give such authority. There is nothing on the face of this entry in the complainant's book to make it appear that the writing was made or authorized by him. The entry was not signed by the complainant and contained no indication that he acknowledged it as his own statement. We cannot, therefore, say that the entry is a document which was made by the prisoner with the intention denoted by the first clause of s. 464 or caused by him to be signed or executed within the meaning of the third clause of that section. Being of opinion that the prisoner was wrongly con-

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victed of forgery, we must set aside the conviction under s. 465. But, as the finding is that the prisoner intended to defraud the complainant by means of the false entry, we convict him of an attempt to cheat, ss. 417 and 511 of the Penal Code, and reduce the sentence to one of six months' rigorous imprisonment.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

1888. August 3.

AITHALA (DEFENDANT No. 2), APPELLANT,

and

SUBBANNA (PETITIONER), RESPONDENT.*

Civil Procedure Code, s. 586, applies to orders in execution of decrees in Small Cause Suits.

No second appeal lies from an order passed in execution of a decree in a suit of the nature cognizable by a Small Cause Court where the subject matter of the suit does not exceed 500 Rs.

APPEAL from an order of J. W. Best, District Judge of South Canara, reversing an order of K. Krishna Rau, District Munsif of Udipi, in execution of the decree in suit No. 115 of 1876.

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

Ramachandra Rau Saheb for appellant.

Subba Rau for respondent.

JUDGMENT:—The preliminary objection is taken that no second appeal is allowed by the Code of Civil Procedure from the order made by the District Judge. It is provided by s. 586 that no second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes when the amount or value of the subject matter of the original suit does not exceed Rs. 500. It is conceded that the decree under execution directed the defendant to pay the plaintiff a sum of money less than Rs. 500, and that it contained no direction for the sale of any immovable property. It is clear, therefore, that it was a decree passed in a suit

* Appeal against Appellate Order No. 4 of 1888.

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cognizable by a Court of Small Causes. It was held by the High Court in Bengal that no second appeal would lie from orders made in execution of decrees passed in suits of the nature cognizable by Courts of Small Causes—*Debee Pershad Singh* v. *Syud Delawar Ali*(1). Although the decision was one passed *ex parte*, yet it appears to recognize the principle that such orders are orders made in proceedings in suits of the nature of small causes and do not stand upon a higher footing than decrees made in those suits. As regards cases in which decrees of Small Cause Courts are executed against immovable property, s. 228 specially provides that orders passed in executing such decrees shall be subject to the same rules in respect of appeals as if the decrees had been passed by the courts which execute them. Though our attention was drawn to *The Collector of Bijnor* v. *Jafar Ali Khan*(2) and *Mahadev Narsinh* v. *Ragho Keshav*(3), we do not consider that they are in point. The question decided by them was that an order of remand made by the District Court was appealable to the High Court, and it proceeded on the view that the orders contemplated by s. 586 are specially provided for by s. 588. Though the District Judge appears to have considered that the decree under execution was substantially a decree passed against the estate of the joint family of which the appellant before us is a member, still the construction adopted by him cannot, in our opinion, operate to alter the real nature of the decree, and can no more give us a jurisdiction which we do not possess than an erroneous order made in an appeal preferred to him from a decree passed by a District Munsif in the exercise of his ordinary jurisdiction in a suit of the nature cognizable by a Court of Small Causes.

We are of opinion that this appeal cannot be maintained and we dismiss it with costs.

(1) 12 W.R., 86. (2) I.L.R., 3 All., 18. (3) I.L.R., 7 Bom., 292.

APPELLATE CIVIL.

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

GURUSAMI (PLAINTIFF), APPELLANT,

and

SUBBARAYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1888. August 7. November 26.

Champerty—Bonâ fide litigation—Absence of corrupt motive—Inadequacy of price.

In consideration of a loan of Rs. 30 made by plaintiff to defendant to enable defendant to recover from strangers certain land, defendant sold to plaintiff a portion of the said land, the value of which was about Rs. 100. The District Court held that the transaction was champertous and dismissed a suit by plaintiff to enforce his rights:

Held, that the inadequacy of the price was not of itself sufficient to invalidate the transaction.

APPEAL from the decree of S. T. McCarthy, District Judge of Chingleput, reversing the decree of C. Suri Ayyar, District Munsif of Chingleput, in suit No. 485 of 1885.

The facts appear from the judgment of the Court (Muttusami Ayyar and Parker, JJ.).

Desikacharyar for appellant referred to *Abdool Hakim* v. *Doorga Proshad Banerjee*(1), *Damodhar Madhavji* v. *Kahandas Narandas*(2), *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*(3), *Chedambara Chetty* v. *Renga Krishna Muthu Vira Puchaiya Naickar*(4), *and Fischer* v. *Kamala Naicker*(5).

Ramachandra Ayyar for respondents.

JUDGMENT.—Two pangus of land belonged to respondent No. 1, but they were in the possession of respondent No. 3 and others. In order to file a suit against the latter for their recovery, the former executed document A in favor of the appellant. By this document respondent No. 1 reserved for himself a quarter kani of land out of two pangus, conveyed a moiety of the remainder to the appellant for Rs. 30, and agreed to place him in possession if the respondent No. 1 obtained a decree for the recovery of two pangus and possession under process of Court. The appellant's case was that respondent No. 1 instituted a suit with the aid of

* Second Appeal No. 1280 of 1887.

(1) I.L.R., 5 Cal., 4.
(2) 8 Bom. H.C.R., 1.
(3) L.R., 4 I.A., 23.
(4) L.R., 1 I.A., 241.
(5) 8 M.I.A., 170.

Rs. 30 paid by him and obtained a decree for, and possession of, two pangus, that from 1883 appellant and respondent No. 1 shared the produce of the land, and that as it was inconvenient to hold joint possession, he claimed partition and separate possession of the land to which he was entitled under document A. The District Munsif considered that document A was true, that the consideration money was paid, and that though the land was worth Rs. 200 and Rs. 30 was an inadequate price, it was due to respondent No. 1, being out of possession at the time of the sale in appellant's favor and to the understanding that the sale was to take effect only in the event of respondent No. 1 succeeding in the suit which he desired to institute. On appeal, the Judge was of opinion that the transaction was of a champertous character and dismissed the suit on that ground, though he incidentally made some remarks against the genuineness of document A. The contention in second appeal is that the transaction is neither champertous nor opposed to public policy.

What the Courts have to consider in deciding whether a transaction is champertous in this country is, to quote the words of the Judicial Committee in the case of *Chedambara Chetty* v. *R. K. Naickar*(1) "whether the transaction is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or an illegitimate transaction got up merely for the purpose of spoil or of litigation, disturbing the peace of families and carried on from a corrupt or improper motive." Again, in *Fischer* v. *Kamala Naicker*(2) the Judicial Committee observed: "The Courts seem very properly to have considered that the champerty or more properly the maintenance into which they were inquiring was something which must have the qualities attributed to champerty or maintenance by English Law; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that is in a legal sense immoral and to the constitution of which a bad motive is, in the same sense, necessary." Applying the test to the case before us, we do not see our way to saying that the transaction is tainted with any of the corrupt motives mentioned above. Judging from the result of the litigation which the transaction was intended to originate or aid, we see no reason to infer

(1) I.L.R., 1 I.A., 241. (2) 8 M.I.A., 170.

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any improper motive. The only fact referred to by the Judge is that the consideration for document A was Rs. 30, whilst the price of the land is at present Rs. 200. The present price of a moiety would be Rs. 100 and a deduction must be made from it on account of the land reserved for the vendor. But in deciding whether the transaction was *bonâ fide* or otherwise with reference to inadequacy of price, regard should be had to the state of things as it might have appeared to the contracting parties at the time when the transaction was entered into; for, even a *bonâ fide* purchaser who takes upon himself the risk of litigation and consents to lose what he pays in a specified event, would ordinarily hesitate to pay the price which the property would fetch when the litigation proves successful. We are unable to concur in the opinion of the Judge that the transaction is champertous because the respondent No. 1 accepted an inadequate price on account of his need, and we shall therefore ask him to return a finding on the first issue, and, if it is in the affirmative, also to return findings upon the evidence on record on the other questions raised by the memorandum of appeal filed in his Court within six weeks from the date of the receipt of this order, when ten days will be allowed for filing objections.

ORIGINAL CIVIL.

Before Mr. Justice Kernan.

1889. February 20.

SHANKS *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Civil Procedure Code, s. 257—Practice—Order for payment of costs of day—Payment into Court or to party.

Where a party to a suit was directed by the High Court to pay the costs of the day, and his solicitor paid the money into Court under s. 257 of the Code of Civil Procedure.

Held, that section was not applicable as the order was not a decree:

APPLICATION made on 20th February 1889 before Mr. Justice Kernan in Chambers for leave to execute an order passed on 18th October 1888 that defendant should pay the plaintiff the

* Civil Suit No. 174 of 1887.

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costs of the day. The defendant, instead of paying the amount to the plaintiff, paid it into Court under s. 257 of the Code of Civil Procedure.

The plaintiff's attorney (*Champion*) contended that plaintiff was entitled to have the money paid to him direct, and that the money ought not to have been paid into Court, and that plaintiff was not bound to go to the expense of applying for payment out of Court.

The Acting Advocate-General (Mr. *Spring Branson*) for the defendant contended that the course adopted by the defendant's solicitor was correct, as the order of the Court amounted to a decree within the meaning of s. 257 of the Code of Civil Procedure.

KERNAN, J.—An order was made, under s. 218 of the Civil Procedure Code on the 18th of October last, that the defendant should pay the costs of the day. The taxed costs, including Rs. 45 for costs of execution, amounted to Rs. 189-8-0. The defendant's attorney lodged the amount in Court, treating the order as a decree under s. 257. Section 257 provides that all moneys payable under a decree should be paid as follows: 1st into the Court whose duty it is to execute the decree, &c. The present is an application to me in Chambers to decide whether payment into Court was the proper course for the defendant's attorney to adopt. A decree is defined by s. 2 of the Code to mean the general expression of an adjudication upon any right claimed or defence set up in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal. Certain orders are in that section specially referred to as within the definition. But the order made in this case is not one of those included in the definition. Amongst the orders excluded from the definition are orders mentioned in s. 588, several of those excluded orders are marked under sections of the Code mentioned in s. 588, which enable the Court to award costs. The result is that orders for payment of costs under the following sections are clearly not decrees, viz., 47, 53, 103, 108, 116, 294, 366, para. 2, 370, 371, 454, 455, 458, 473*a*, 475, 476, 558, and 560. The order for payment of costs was awarded, in disposing of an application, under s. 218. It was not an expression of adjudication on any right claimed or defence set up, when such adjudications decided the suit. That definition in s. 2 must be applied as the

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test to the meaning of the word decree whenever it occurs in the Code. Therefore the word decree in 257 does not include the order in this case. The distinctions between orders and decrees are preserved throughout the Code. Section 254 provides that every decree or order directing a party to pay money as compensation or costs may be enforced by the imprisonment of the judgment-debtor, or by attachment of his property as after provided. But s. 257 mentions money payable under a decree. It does not refer to an order, which I cannot but think would have been referred to if it was intended that s. 257 should apply to orders. They make mention in s. 254 of an order, and this absence of reference to an order in s. 257 following so immediately seems to me not to be accidental. I think the omission of the usual "order" in 257 was introduced, having regard to the intention of the Code to provide evidence of the discharge or adjustment of decrees. It is argued, however, that as the person in whose favor the order for costs is made can, under s. 220, 3rd para., execute it as if it was a decree; and as he is within the meaning of s. 2 a decree-holder, and as s. 257, in clause (b), enables the money to be paid to the decree-holders, therefore an order for costs should be treated as a decree so as to come within s. 257, and that the party subject to such order shall have this relief contemplated by s. 257. But, although such orders are executed as decrees, I do not see that s. 257 applies to them. The amount of costs awarded on an application under any of the sections of the Code is generally a small matter, and of small amount, probably contemplated by the Code to be disposed of without the necessity of formal adjustment and certificate of payment into Court. But decrees for payment of money are contemplated as being of more importance, and a record of the adjustment or of the payment of them is therefore provided; for, if the same formality as to adjustment and certificate or payment into Court should be applied to the amount of costs of application awarded under the Code, the result might be that the award of costs of the day or other small sums of costs awarded by the Court on applications, under any section of the Code (most frequently only a few rupees), would be nugatory or nearly so. The costs, if paid into Court, could not be paid out without an order of the Court—the expense of which might be more in many cases than the small amount of costs awarded. Though the Code provides that the orders for costs of application may be executed

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as if they were decrees, it does not provide that the amount of such an order should be paid in any of the ways mentioned in s. 257. As an instance, if at Chambers, an order for costs will be Rs. 7, Rule 44, 24th July 1874. Is that sum to be paid into Court, and to be drawn out at the expense of Rs. 5, provided by the Rules on the order to draw it out, or was it intended to burden the party needlessly with that fee on such a small amount? In my judgment the course taken on behalf of the defendant in paying the amount of the costs awarded by the order of the 18th of October was not correct. I think that s. 257 does not apply to the amount of costs awarded in applications, or under orders which are not decrees within the definition of s. 2 of the Code. The Court has, of course, power to make a special order in a fit case for payment of any moneys into Court. I do not recollect having heard, before this case, in practice of costs under mere orders which are not decrees, having been paid into Court under s. 257. Payment to the party authorised to receive costs on getting a receipt is usual. The plaintiff, therefore, is entitled to enforce payment in the usual way unless the money is paid to him. The question is a new one, and the plaintiff has got costs of execution, and therefore I will give no costs of this application.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

against

BHARMAPPA.*

1888. October 24.

Evidence—Confession, retracted—Corroboration, deposition of witnesses before magistrate read under Criminal Procedure Code, s. 288, insufficient.

Where a prisoner was convicted of murder on a confession, retracted at the trial, corroborated by depositions read under s. 288 of the Code of Criminal Procedure, and also retracted at the trial:

Held, that the prisoner should not have been convicted on such evidence.

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* Criminal Appeal No. 336 of 1888.

QUEEN-EMPRESS v. BHARMAPPA.

APPEAL from the conviction and sentence of the Sessions Judge of Bellary (J. D. Goldingham) in case No. 25 of 1888.

Prisoner was convicted of murder and sentenced to transportation for life.

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

The Acting Public Prosecutor (*Subramanya Ayyar*) in support of conviction.

JUDGMENT.—The Sessions Judge has convicted the prisoner upon the depositions given by prosecution witnesses 1—3 before the committing magistrate, which depositions were read in evidence under s. 288 of the Criminal Procedure Code. The statements made before the magistrate were retracted at the sessions. The only other evidence against the prisoner was his confession before the magistrate, which was also retracted at the sessions.

According to the rulings of this Court a retracted confession must be supported by independent reliable evidence corroborating it in material particulars—*Queen-Empress* v. *Rangi*(1); but we do not think depositions read under s. 288 of the Criminal Procedure Code and retracted at the trial are by themselves material corroboration. In this case they are the only corroboration and a conviction cannot be grounded upon such evidence only (*vide* The *Queen v. Amanulla*) (2). We are constrained, therefore, to hold that the prisoner should not have been convicted and that the sentence of the Sessions' Court should be set aside and the prisoner discharged.

(1) I. L.R., 10 Mad., 295. (2) 12, B.L.R., App. 15.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

PAPAYYA (PETITIONER) APPELLANT,

and

CHELAMAYYA (DEFENDANT), RESPONDENT.*

1888. August 30.

Civil Procedure Code, ss. 244, 588, 629—Review of judgment—No second appeal against an order under s. 629.

When a Munsif set aside on review an order rejecting an objection to the execution of a certain decree, and the District Court on appeal refused to interfere: *Held*, that no second appeal lay to the High Court.

APPEAL from an order of A. L. Lister, District Judge of Godávari, rejecting an appeal from an order of the District Munsif of Tanuku in execution of the decree in suit No. 39 of 1879 passed under s. 623 of the Code of Civil Procedure.

V. Chelamayya was made party to the proceedings in execution of a decree which was passed against his deceased son Venkatachalam and which directed the sale of certain mortgaged property. On July 14, 1883, he objected to the decree being executed against the property directed to be sold by the decree on the ground that that property was his own and not the judgment-debtor's. This objection was overruled by the Munsif, who held that the remedy was by separate suit. A suit was accordingly brought, but dismissed on the ground that the remedy was not by separate suit and this decree was confirmed on appeal. Upon this he applied for a review of the order of the Munsif dated 14th July 1883, and this application was granted and the order was set aside.

The judgment-creditor appealed, but the appeal was rejected. Against this order the present appeal was brought.

Rama Rau for appellant.

Subba Rau for respondent.

* Second Appeal No. 1371 of 1887.

PAPAYYA v. CHELAMAYYA.

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

JUDGMENT.—The Munsif allowed after notice a review of an order under s. 629 and fixed a day to hear the case. There was an appeal to the Judge, and he confirmed the order under s. 629. Section 588 does not allow a second appeal against an order under s. 629. The order is not itself a decree. *Than Singh* v. *Chundun Singh* (1). We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

1888. Feb. 24. Aug. 30 Nov. 16.

ALAMI (DEFENDANT No. 2), APPELLANT,

and

KOMU AND ANOTHER (PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS.*

THE SECRETARY OF STATE FOR INDIA (DEFENDANT No. 1), APPELLANT,*

and

KOMU (PLAINTIFF), RESPONDENT.

Malabar Law—Will—Testamentary dispositions of tarwad property by last surviving member of tarwad, valid.

The last surviving member of a Malabar tarwad can make a valid testamentary disposition of the tarwad property.

APPEALS from the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in suit No. 21 of 1885.

Plaintiff Palatholathil Komu Menon sued (1) The Secretary of State for India in Council and (2) Pullayil Mommath for a decree declaring that a will, dated 24th November 1878, executed by Chindarama Pisharodi, was genuine and valid, and that under the said will plaintiff was entitled to the lands mentioned in schedules A and B of the plaint.

It was alleged that some of the lands were in plaintiff's possession, and that defendant No. 2 was in possession of the rest under a lease obtained from the Collector of Malabar, who had

(1) I.L.R., 11 Cal., 296. * Appeals Nos, 80 and 105 of 1886.

taken possession thereof on the death of the testator under a claim of escheat.

The defendants pleaded, *inter alia*, that the testator who was governed by the Marumakkatayam law could not make a valid will.

The Subordinate Judge decreed in plaintiff's favor.

Appeal No. 80 was preferred by Pullayil Alami, the representative of defendant No. 2, and appeal No. 105 by the Secretary of State.

One of the principal questions argued was as to the right of the testator, the last surviving member of his tarwad, who died on the 8th November 1883, to dispose of the tarwad property by will.

The Acting Government Pleader (*Subramanya Ayyar*) for appellant in No. 105 and *Mahadeva Ayyar* for appellant in No. 80.

Bhashyam Ayyangar, *Sankaran Nayar* and *Sankara Menon* for respondents.

On this question the judgments of the Court (Kernan and Muttusami Ayyar, JJ.) were as follows :—

The next question necessary to be considered on the second issue is, had the plaintiff's father a legal right to dispose of the tarwad property by his will. The Hindu Wills Act passed on the 19th July 1870 does not apply in Madras except within the town of Madras. It is, therefore, necessary to see what was the legislation on the subject affecting the mufassal. The second sub-section of section III of the Regulation 16 of 1802 recognized the right of a Hindu to make a will of his property. But by Regulation 5, 1829, the prior regulation was modified as regards wills made by Hindus by declaring (section 4) that wills left by Hindus should have no legal force whatever except so far as their contents should be in conformity with the provisions of the Hindu Law according to the authorities prevalent in the respective provinces of the Presidency.

Upon these regulations and having regard to the decisions of the Privy Council in *Mulraz Lachmia* v. *C. V. R. Jaganadha Rau* (1) and in *Nagalatchmee Ammal* v. *Gopoo Nadaraja Chetty* (2), it was held in *Vallinayagam Pillai* v. *Pachche* (3), on appeal from Tinnevelly, that a Hindu without male issue might dispose of his

(1) 2 M.I.A., 54. (2) 6 M.I.A., 309. (3) 1 M.H.C.R., 326.

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property by will. That was a case of a Hindu governed by the ordinary Hindu Law.

In this case the parties are Hindus but subject to the special law of Marumakkatayam prevalent in South Malabar, under which the property of the tarwad is in the members jointly with right of survivorship. According to that law, the plaintiff's father could not dispose of the tarwad property or any part of it by will, nor could he make a gift of it *inter vivos* while there was any other member of the tarwad in existence, and such gift or will would in such circumstances be invalid.

Even of his own self-acquired property, though he might dispose of it *inter vivos*, he could not dispose of it by will against the tarwad, while any other member existed (*Ryrappan Nambiar* v. *Kelu Kurup*(1.)

But upon the death of all the other members of the tarwad the property of the tarwad vested in plaintiff's father as the only survivor of the tarwad. There was no other tarwad or person who had community with him, and the property became absolutely his. It is not doubted that if the property was his absolutely, he might have disposed of it, by act *inter vivos*, during his lifetime. It seems to me that the property was his absolutely. The law empowered the plaintiff's father to make a will subject to the limitation that its contents should be in conformity with the provisions of the Hindu Law according to the authorities prevalent in South Malabar. The Subordinate Judge has pointed out that in 1802 within a few years after South Malabar was taken possession of by the British, Major Walker, an eminent authority on the customs of South Malabar, reported to Government "that a Jemmakkaren (proprietor) having no legal heir may by his will leave his jenmam to such of his friends or acquaintances he may think proper; but if he should die intestate, the property becomes forfeited to the Rajah. In disposing of his jenmam by will, the testator, whether of high or low caste, may select his heir from any caste he pleases" (page 62, Edition of 1870, Cochin). The Subordinate Judge has referred to many cases which have from time to time been before the Courts in South Malabar and on appeal to this court, in which the question has been whether a member of a Malabar tarwad could by will dispose of property of a Malabar tarwad and also as to the

(1) I.L.R., 4 Mad., 150.

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effect to be given to and the construction of such will. (See the document J, a will on which suit No. 268 of 1839 was brought). K is the petition and evidence and judgment in that suit.

L is another will, and M is the record of a suit No. 519 of 1875 in respect of the property given thereby to a devisee. N is record of an appeal suit No. 308 of 1876 in respect of a will.

O is the judgment of the District Judge in that appeal, 22nd August 1876.

P is a document called a deed of settlement, dated 12th Kanni 1015 (26th September 1839).

Although the document is called a deed of settlement, it is in effect a will as it was not to operate until after the death of the executant.

Q is another document similar to R which is a will, dated 23rd April 1871, by a Vakil of the Munsif's Court at Calicut.

F is a will, dated 21st Medom 1031 (15th May 1856.)

G is a suit involving a question in respect of a will.

I is a judgment in suit G. I do not doubt that wills were well known to and used in South Malabar from the beginning of the century, although from the nature of the Malabar tarwad they could not be in such general use as amongst Hindus following the ordinary Hindu Law. I am unable to see that any of the provisions of the will in question in this suit are contrary to any provisions of Hindu Law prevalent according to the authorities in South Malabar, and I agree with the Subordinate Judge that it is a valid will according to the law by whichthe parties are bound.

MUTTUSAMI AYYAR, J.—The substantial question for decision in this appeal is whether document A is a will, and if so, whether it is valid. That it is a will, there is no room for doubt. It is designated to be a will, and the dispositions which it embodies, whether they are all valid or not, are clearly testamentary. The appellant's pleader questions its validity on two grounds, viz., (i) that according to Marumakkatayam usage by which the testator's tarwad was governed, he was not at liberty to make a will, and (ii) that the testamentary dispositions mentioned in document A are legally inoperative. With reference to the Marumakkatayam usage, it was urged further that testamentary power was unknown to it, and that if it were not regarded as inconsistent with such usage, it could not, at all events, include a power to disinherit

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attaladakam heirs or divided kinsmen. I now proceed to deal with these questions, and I take the last question first.

Assuming for a moment that a person governed by Marumakkatayam usage can make a will when he can alienate his tarwad property by gift *inter vivos*, I do not think that the existence of attaladakam heirs or divided kinsmen will make any difference. They might be entitled to succeed as divided kinsmen if the last survivor of a tarwad died intestate, and they might also stand between him and the Crown seeking to interfere by right of escheat; but as they have no community of interest with the testator, they are not entitled to question his alienation *inter vivos*. So early as 1855, Mr. Justice Holloway considered the question when he was the Subordinate Judge of Malabar, and said "If the deceased was the sole remaining direct heir of the common ancestor in the preferable line, the whole joint tenancy merged in her person, and she would be as to the right of alienation in precisely the same position as the absolute acquirer of the property, seeing that she is the final legal representative of such acquirer (Wigram on Malabar Law and Custom, page 84)."

The real question then is, whether as divided kinsmen, attaladakam heirs take by right of survivorship or of succession, and in *Katama Natchier's* case(1) it was held by the Privy Council, that when the property in dispute was self-acquired and as such separate property, there was no right of survivorship, that such right was the result of joint tenancy or coparcenary as regards the property in dispute and that self-acquired property, therefore, devolved on the widow or daughter in preference to the coparcener under the Mitakshara law. Again, in *Ryrappan Nambiar* v. *Kelu Kurap*(2) the self-acquired property of a person governed by Marumakkatayam usage was held to be liable for the debts of the deceased acquirer in the hands of the members of his tarwad. That decision proceeded on the view that self-acquired property was taken by the tarwad as the acquirer's heirs, because during his life it was at his absolute disposal, and I see no reason why the same principle is not applicable to the separate property of the sole surviving member of a Malabar tarwad. The only ground on which the appellant's pleader can rest his contention is that tarwad property is a perpetual entail and that there is no

(1) 9 M.I.A., 543. (2) I.L.R., 4 Mad., 150.

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disposing power either *inter vivos* or testamentary except for the necessity, or the preservation of the tarwad, or for its benefit. There was an allusion made to such theory in regular appeal No. 10 of 1884. The denial of disposing power as the incident of a perpetual entail and of absolute property either in the collective tarwad, or in its sole surviving representative cannot be recognized as it introduces a theory of perpetuity in its most objectionable form. Though the appellant contends that the members of the Andale house are members of the testator's tarwad, yet the contention was negatived by the decision in appeal suit No. 49 of 1879 in which it was held that there was no community of interest between them. The conclusion then I come to is that the Subordinate Judge was right in not raising an issue as to whether the Andale people were attaladakam heirs.

* * * * *

The next question is whether a testamentary power can be recognized under the Marumakkatayam usage. That such a power has been recognized in the case of those who follow Hindu Law is clear from the course of legislation and of decisions in this country. I do not see my way to decline to recognize a similar power in Malabar subject to conditions similar to those prescribed with reference to Hindu wills, viz., first, that there is power to give *inter vivos* according to Marumakkatayam usage, secondly, that there is evidence of usage showing that testamentary power has long been exercised in Malabar, and, thirdly, that it does not override the right of survivorship which takes effect at once on the testator's death.

It appears from exhibits J, P, L, F and R that wills have been made in Malabar from 1826. There is an allusion to the practice in Major Walker's report in 1802. There is a similar allusion to wills in the 5th report of the Select Committee on the affairs of the East India Company, Volume II. In 1840 Mr. Strange thought the acquirer might alienate his self-acquisitions by will, but the Provincial Court objected to his decision and referred the matter to the Court of Sadr Adalat. The Sadr Court observed that the disposition could not be set aside unless some title was proved to the testator's property during his life, and that the mere circumstance of death could not originate a title which had previously no existence. (See Proceedings of the Sadr Court, dated the 25th September 1843).

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In original suit No. 467 of 1837 a will bequeathing self-acquired property to near heirs to the exclusion of the more remote was upheld on the strength of the opinion expressed by the law officer attached to the Court of Sadr Adalat. (See new document admitted in appeal.)

In 1854 the late Sadr Court admitted a special appeal from the decree in the Civil Court of Tellicherry in appeal suit No. 247 of 1852 on the ground that a karnavan had no authority to will away property to other than his heirs. (See Proceedings of the Sadr Court, dated 13th February 1854.)

In second appeal No. 534 of 1878, Mr. Justice Innes and myself held that self-acquired property which was not validly disposed of by the acquirer during his lifetime was not validly disposed of by will. In *Kallati Kunja Menon* v. *P. E. Menon*(1) it was contended by eminent Counsel that the self-acquisitions of land by a member of a Malabar tarwad were his separate property, that after his death, they lapsed into the tarwad, but if accepted by the members, they carried their obligations along with them. The Court, consisting of Sir Colley Scotland, Chief Justice, and Mr. Justice Holloway, observed that "when it is once established that the property was self-acquired, we are perfectly satisfied that an alienation, charge or other disposition *to take effect at once* will be perfectly valid." Though the validity of a testamentary alienation was not then in question, the decision was considered to contain a dictum that it could not take effect after the acquirer's death (if it was so intended) on the ground that the property was then merged in the tarwad. Though this dictum was followed in second appeal No. 534 of 1878, it was held that the self-acquired property remained in the hands of the tarwad liable for the debts of the deceased acquirer and thereby suggested that the tarwad took as heir and not by survivorship.

In second appeal No. 628 of 1884, a will made by the last owner of a tarwad in favor of an attaladakam heir was upheld in 1885.

Passing on to the documentary evidence in this case, five documents are referred to by the Subordinate Judge. The first of them is exhibit J. It purports to be a will, dated 28th March 1826, and it bequeaths what is said to be self-acquired property to one

(1) 2 M.H.C.R., 162.

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branch of the acquirer's tarwad in preference to another, and the decision K upheld it against the disinherited branch. I am unable to accede to the suggestion made by the appellant's pleader that the document simply expressed the wish of the founder of a new tarwad as to how it was to be managed after his death. If it is intended to convey the impression that it was not a binding transaction, exhibit K sufficiently repels such inference.

The second document is exhibit P, dated the 26th September 1839. It is called a settlement, but it gives directions as to the management of acquired property after the testator's death. It states (paragraph 10) that "after my death, my brother Raman will have the same power that I now have in respect of properties mentioned in the fifth paragraph." Though it is called a settlement, it evidences an arrangement made in regard to management after the testator's death. The plaintiff's fifth witness proved that the provisions of the documents were accepted by the family.

The third document is exhibit L, dated the 26th May 1851. It purports to be a will, gives the testator's acquired property to the children of his sister's daughters, and contains directions in regard to its future management. It was upheld in 1876 when it was impugned by a person who claimed to be related to the testator.

The fourth document is exhibit F, dated the 1st May 1856. It purports to be a will and gives the property including his self-acquisition to his sisters and their issue and contains directions as to future management. It was recognized in exhibits G, H, I.

The fifth document R is dated the 23rd April 1871. It purports to be a will made by a vakil and states that "although it is not customary among Hindus to execute wills, as the wills of Hindus are considered valid by the Legislative Council, I make this will in regard to my self-acquired property." It then sets forth the testamentary arrangement made by him.

The foregoing documents show that from 1826 wills were made in Malabar in regard to self-acquired property generally regulating its future management and occasionally giving it to one class of heirs in preference to another. With these documents before me and with the opinions of writers on Malabar and the dicta of Courts of Justice, it is difficult to say that as a form of alienation, the practice of making a will was not in vogue at least from 1826. Although opinions have varied as to its validity,

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I do not see my way to holding that a will is not operative in Malabar unless some one of the conditions necessary to the validity of Hindu wills does not exist. Having regard to the decision of this Court in *Vallinayagam* v. *Pachche*(1), I also think that if the testator is the sole owner of the property in suit, if he is competent to alienate it by gift *inter vivos*, and if no right of survivorship exists in any one else, and if all these requirements are satisfied as they are in the case before us, a testamentary power must be recognized. I come to this conclusion, not in the view that a testamentary disposition is the necessary logical extension of a power to give *inter vivos*, but on the ground that the leading case on Hindu wills is an authority for the application of the principle it embodies to the people of Malabar, a section of Hindus, though they follow a special usage, when there are traces in the evidence of the practice of making wills for more than fifty years.

APPELLATE CIVIL.

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

1888. October 16. November 2.

NURDIN (PLAINTIFF), APPELLANT,

and

ALAVUDIN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Cause of action—Suit to cancel patta.

Plaintiff sued in a Civil Court to cancel a patta which he alleged was incorrect and fraudulently antedated by the defendant with a view to prevent plaintiff from taking steps to cancel it in a revenue court: a copy of the patta had been affixed to plaintiff's house:

Held, that the plaintiff had no cause of action cognizable by a Civil Court.

APPEAL from the decree of C. Venkoba Rau, Subordinate Judge of Madura (West), confirming the decree of P. S. Gurumurthi Ayyar, District Munsif of Madura, in suit No. 413 of 1886.

Plaintiff sued to cancel a patta which he alleged was not a proper one and was fraudulently antedated by the defendants with a view to prevent plaintiff from taking summary proceedings before the Revenue Courts under Act VIII of 1865 to compel

(1) 1 M.H.C.R., 326.

*Second Appeal No. 1271 of 1887.

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his landlord to execute a proper patta. A copy of the patta was affixed to the outer wall of plaintiff's house by defendant No. 2, the agent of defendant No. 1, the landlord.

The suit was dismissed on the ground that plaintiff had no cause of action in a Civil Court.

Plaintiff appealed.

Ramachandra Rau Saheb for appellant.

Subramanya Ayyar for respondents.

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

JUDGMENT:—The plaintiff sued to cancel a patta, a copy of which defendant No. 1 had caused to be stuck on the outer wall of his house. Plaintiff alleged that the patta was antedated and purported to charge an excessive amount of kist.

The question is whether such a suit will lie in the ordinary courts. Plaintiff does not demand that a proper patta should be granted him by defendant No. 1, in which case he would have a cause of action, nor does he allege that the affixing of the copy on his house has caused him any damage; he merely wants to have the patta cancelled, lest it should at some future time be used as evidence against him: in short, he wants practically a declaration that defendant has been making evidence against him.

It was urged that the decision of this court in second appeal No. 430 of 1885(1) was inconsistent with *Karim* v. *Muhammad Kadar*(2), but we do not think it is. The latter was a suit to

(1) "There is of course no doubt that a person aggrieved by any proceedings taken under colour of Act VIII is at liberty to file his suit for damages either before the Collector (s. 49) or in ordinary tribunals (s. 78), but the present suit is not one for damages and the right to resort to the ordinary tribunals is at least limited by the general principle that there must be a cause of action shown, an injurious act producing damage.

"Here there is no cause of action alleged. All that is stated is that the landlord sent a notice under s. 39 that he intended to move the Collector to sell certain land unless certain arrears claimed were paid within a month. Section 40 allows a month's grace within which the alleged defaulter may either pay the money or show cause before the Collector why the sale should not be held. In a certain sense, therefore, the notice gives a cause of action before the Collector, for it enables the defaulter to come into the Collector's court and indeed requires him to do so within a month, if he has any objection to make. But it gives no cause of action before the ordinary courts. The courts are strictly judicial; but the Collector combines judicial and executive functions being both bound to sell if no objection is raised and the proceedings appear regular, and bound to adjudicate on such objections as may be raised."

(2) I.L.R., 2 Mad., 89.

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enforce a substantial right, the former to cancel a mere notice. Neither the notice nor the affixing of an antedated patta amounts to more than a mere assertion on the part of the defendant, and we do not think either would give rise to a cause of action maintainable in an ordinary court of law. There is no infraction of any right.

On this ground, we think the decision of the courts below was right and dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

1888. August 13. October 3.

GOVINDA (PLAINTIFF), APPELLANT,

and

PERUMDEVI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Specific Relief Act, s. 42—Civil Procedure Code, s. 53—Amendment of plaint—Suit to declare alienation by Hindu widow invalid,—Death of widow pending appeal by plaintiff,—Right of appellant to proceed with appeal—Plaint not to be amended by claim for possession.

The proviso to s. 42 of the Specific Relief Act that "no Court shall pass a declaratory decree where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so" refers to the position of plaintiff at the date of suit:

Where a suit was brought for a declaration that certain alienations of land made by a Hindu widow to the defendants were not binding on plaintiff, her reversionary heir, and pending appeal by the plaintiff, the widow died:

Held, (1) that the plaintiff was entitled to proceed with his appeal:

(2) that plaintiff could not be permitted to amend his plaint and claim possession.

APPEAL from the decree of Venkata Rangayyar, Acting Subordinate Judge of Godavari, in suit No. 2 of 1885.

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

Parthasaradhi Ayyangar and Biligiri Ayyangar for appellant.

Subba Rau for respondent.

JUDGMENT.—Defendant No. 1 in this suit was a Hindu widow, and the property in litigation devolved on her on the death of her

* Appeal No. 125 of 1886.

GOVINDA v. PERUMDEVI.

only son. The appellant claimed to be the reversionary heir of that son, and instituted the present suit under s. 42 of the Specific Relief Act to have it declared that certain alienations made by her were made in excess of her power as a childless widow, and were, therefore, not binding on the reversion. The Subordinate Judge considered that the right asserted was a contingent, and not a vested, interest, and, holding that no declaratory decree could be made in respect of such right, dismissed the suit and directed the plaintiff to pay the costs of defendant No. 4. The decision of the Subordinate Judge proceeded solely on the ground mentioned above, and no finding was recorded on any of the other issues raised for decision. The plaintiff appealed to this Court, but his appeal came on for disposal together with another appeal (Regular Appeal No. 83 of 1886) preferred by one Komandur Vedanta Desikacharlu, who had also claimed a declaratory decree as the real reversioner, and whose suit had also been dismissed by the Subordinate Judge for the like reason. The present appellant was a party, defendant, in that suit, and this Court set aside the decree of the Subordinate Judge passed therein and remanded it for disposal on the merits. With reference to the appeal now before us, this Court then adjourned it, and directed that if appellant in the other case succeeded in the Court below, it should be reported. Whilst the other case was pending on remand in the Subordinate Judge's Court, the widow died, and the reversionary right asserted, in whomsoever it vested, became an estate vested in possession. The Subordinate Judge referred to s. 361 of the Code of Civil Procedure and made an order that the suit abated, and no appeal has been preferred from that order. In this state of facts, this appeal is posted again for disposal. It is urged for the appellant that there is a decree in force against the appellant and that the appeal cannot abate. It is also contended for him that he should be permitted to amend the plaint so as to treat his right as a vested interest and to claim possession as consequential relief.

Our attention is drawn, on the other hand, to s. 42 of the Specific Relief Act and to the decision in *Gosaien Shiva Ram* v. *Rugho Rai*(1). The proviso to s. 42 of Act I of 1877 directs that "no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title,

(1) 2 Agra Rep., 44.

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omits to do so." But this direction obviously refers to the position of the plaintiff when he commenced the suit and cannot be treated as taking away a right of suit which had already accrued. We do not consider that the proviso is applicable to this case, for "when the Court once acquires jurisdiction it cannot be divested of it except under some provision of law." The Appellate Court has only to see as a Court of error that the decree under appeal was correct or otherwise when it was passed. Nor is s. 361 applicable to this case, for the appellant may insist on proceeding with the appeal in regard to his liability to pay costs to defendant No. 4 though defendant No. 1 is dead. He may also say that the alienees are the substantial defendants and that they are alive. The decision of the Subordinate Judge on the preliminary ground which is at variance with illustration (*e*) of s. 42 cannot be supported and must be set aside.

The next question for consideration is whether in the event that has arisen, the original plaint may be amended. The right disclosed by the plaint was a right to sue for a mere declaration of title, and it has now ceased and is replaced by a right to sue for possession by reason of the reversion having become an estate vested in possession. The amendment would substantially alter the original cause of action and rest on an event which did not occur until after the suit had been instituted and been dealt with by the Court of first instance. We are of opinion that the amendment asked for cannot be made at this stage of the suit.

We therefore reverse the decree of the Lower Court and remand the suit for determination on merits. The respondents will pay the appellant's costs in this Court, and the costs in the Lower Court will be provided for in the revised decree.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Parker, and Mr. Justice Wilkinson.

1887. December 15. 1888. October 23.

NARASINGA AND ANOTHER (DEFENDANTS), NOS. 2 AND 3, APPELLANTS,

and

SUBBA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 586—Mofussil Small Cause Court Act (XI of 1865) s. 6—Suit against sons of Hindu debtor, on a bond executed by father, not cognizable by Small Cause Court—Hindu law—Liability of son for debt of living father.

In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's sons defendants along with their father, and a decree was passed against the father and sons jointly for payment of the debt:

Held, by the Full Bench that the suit as against the sons was not a suit of the nature cognizable in Court of Small Causes within the meaning of s. 586 of the Code of Civil Procedure.

Held, further, by the Divisional Bench that the decree against the sons was bad.

APPEAL from the decree of H. R. Farmer, Acting District Judge of Kurnul, modifying the decree of M. Madhava Rau, District Munsif of Kurnul, in suit No. 290 of 1885.

The facts of this case are set out in the following order of reference to a Full Bench made by (Kernan and Wilkinson, JJ.). on the 15th December 1887:—

"The defendants Nos. 2 and 3 are sued on a bond executed by their father on 26th November 1882. The father is still alive. He and these defendants, his sons, have been sued in the District Munsif's Court of Kurnul on the regular side.

"The bond was proved and that defendant No. 1 received the amount of it.

"There is no finding by the District Judge on appeal whether the money was borrowed on the bond for purposes binding on the family. Nor is there any finding that it was for illegal or immoral purposes.

"The question is whether, under such circumstances, the suit

* Second Appeal No. 260 of 1887.

NARASINGA v. SUBBA.

was in its nature a small cause suit within s. 586 of the Civil Procedure Code so as to bar an appeal; or in other words, was it such a suit, as against the 2nd and 3rd defendants, the sons, as the Judge of a Small Cause Court would not have jurisdiction to try.

"The decision in *Gopal Kristna Sastri* v. *Ramayyangar*(1) by a Division Bench is an authority that the Small Cause Court has jurisdiction to entertain such a suit, and it refers to the Full Bench decision in *Ponnappa Pillai* v. *Pappuvayyangar*(2) in which the nature of the son's obligation is fully discussed by Mr. Justice Muttusami Ayyar.

"The decree in the small cause suit, if such suit is maintainable, is a personal decree against the sons even though they may have no assets, ancestral or otherwise, of their father and family. If the sons are liable as sons only to the extent of assets of the father or family, then the decree of the Small Cause Court should not be *in personam*, but to the extent of the assets, a decree which that Court apparently has not the power to make.

"The questions then are—

i. Is this a suit in which a second appeal lies?

ii. Has a Small Cause Court jurisdiction to entertain such a suit against the defendants Nos. 2 and 3, who are only sued as sons of their father who is still alive?

iii. Is the obligation of the sons, one arising on contract or implied contract, or only a moral obligation not enforcible in civil law except against assets of the father and family?"

Ramachandra Rau Saheb for appellants.

The questions are, are the sons of a Hindu father, who is alive, liable to satisfy the debts of the father, it appearing that the debt was not beneficial to the family? secondly, whether the suit is of a small cause nature? Here the suit is not of a small cause nature. By s. 6 of Act XI of 1865 only contract debts could be sued for in a Small Cause Court. There is no contract of any kind here either implied or express, nor has the conduct of the parties led them to believe that there was an implied contract. There is no theory of law to support a contract either implied or express, and hence the Small Cause Court has no jurisdiction. See *Gopal Kristna Sastri* v. *Ramayyangar* which purports to follow the case

(1) I.L.R., 4 Mad., 236. (2) I.L.R., 4 Mad., 1.

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in *Govinda Muneya Tiruyan* v. *Bapu*(1), see also *Harihara* v. *Subramanya*(2), and *Karuppana* v. *Virabadra*(3). In all these cases it was held that the Small Cause Courts had no jurisdiction. In analogous cases also it has been held to the same effect as in maintenance cases. *Savitribai* v. *Luximibai* and *Sadasiv Ganoba*(4), *David* v. *Grish Chunder Guha*(5). On the question of the son's liability see s. 283 of Mayne's Hindu Law, 4th Edition. It is there said that sons are not bound to pay the father's debt when he is alive. The decreein this case is a personal decree and it does not by the force of the provisions of the Code of Civil Procedure bind the sons.

Rama Rau for respondent.

The Small Cause Court had jurisdiction. If the father dies, a suit lies in a Small Cause Court on the promissory note executed by the father. The question whether the suit is of a small cause nature is determined by seeing whether this suit could have been brought in a Small Cause Court if there had been such a Court in existence. If it can be so instituted, then, there is no second appeal. The case in *Karuppana* v. *Virabadra* is exactly in point. The principle of decision in that case applies exactly to this case. See *Kunhali Beari* v. *Keshava Shanbaga*(6) and *Ponnappa Pillai* v. *Pappuvayyangar*.

The Full Bench (Kernan, Muttusami Ayyar, Parker and Wilkinson, JJ.) delivered the following judgment:—

"We are of opinion that this suit was not one of a small cause nature so far as it relates to the 2nd and 3rd defendants, and that there is a second appeal from the judgment of the Lower Appellate Court by them. The case is remitted to the Division Bench."

The Divisional Bench (Kernan and Wilkinson, JJ.) on the 23rd October 1888 delivered the following

JUDGMENT:—On return of the Full Bench decision we reverse the decree of the Lower Appellate Court against the 2nd and 3rd defendants, and dismiss the suit as against them with costs throughout, including the costs of this appeal.

(1) 5 M.H.C.R., 200. (2) I.L.R., 9 Mad., 250.
(3) I.L.R., 6 Mad., 277. (4) I.L.R., 2 Bom., 622.
(5) I.L.R., 9 Cal., 183. (6) I.L.R., 11 Mad., 67.

PRIVY COUNCIL.

P.C.
1888.
Nov. 1.

MINAKSHI NAYUDU (DEFENDANT),

and,

IMMUDI KANAKA RAMAYA GOUNDAN (PLAINTIFF).

[On appeal from the High Court at Madras.]

Execution sale—Hindú Law—Ancestral zamindári sold in execution of decree for money against the father, including the son's right of succession—Debt not immoral.

A sale in execution of a decree against a zamindar, for his debt, purported to comprise the whole estate in his zamindári. In a suit brought by his son against the purchaser, making the father also a party defendant, to obtain a declaration that the sale did not operate as against the son as heir, not affecting his interest in the estate, the evidence did not establish that the father's debt had been incurred by him for any immoral or illegal purpose:

Held, that the impeachment of the debt failing, the suit failed; and that no partial interest, but the whole estate, had passed by the sale, the debt having been one which the son was bound to pay:

Hardi Narain Sahu v. *Ruder Perkash Misser*(1) (where the sale was only of whatever right, title, and interest the father had in property), distinguished.

APPEAL from a decree (7th April 1884) of the High Court varying a decree (14th April 1883) of the Subordinate Judge of Madura (West).

The question here was whether the whole estate of inheritance in an ancestral zamindári had passed to a purchaser at a sale in execution of a money decree against the zamindar, or only such right as he held in the estate, as distinguished from his son's right of succession.

The suit was brought by the son of the zamindar of Velliyakundam against his father, and the present appellant, for a declaration that a promissory note for Rs. 2,000, made by the zamindar and held by the latter, was given for a debt contracted by the zamindar for an immoral purpose; that, thus, the sale of the zamindári in execution of a decree, obtained upon the promissory note, was invalid as against the plaintiff, who, it was alleged, was

Present: Lord FITZGERALD, Lord HOBHOUSE, and Sir RICHARD COUCH.

(1) L.R., 11 I.A., 26; I.L.R., 10 Cal., 626.

entitled to succeed on the death of the present zamindar notwithstanding the sale.

For the defence it was denied that the debt was incurred for any immoral purpose, and an issue was fixed to that effect.

The decree against the father was obtained on 20th August 1879; the zamindári was sold on 30th August 1880; the son filed his objection on 4th November 1880, and brought this suit on 15th November 1882.

The acting subordinate judge (C. Purushotham) dismissed the suit on the ground that the evidence had failed to show that the debt was incurred for any immoral purpose. He cited *Gopalasami Pillai* v. *Chokalingam Pillai*(1).

On an appeal to the High Court, this decree was varied by a Division Bench (Turner, C.J., and Muttusámi Ayyar, J.). Their judgment, after referring to the circumstances under which the note was made, proceeded thus:

"That consideration was paid for the promissory note was proved by the first defendant who was called as a witness by the second defendant; but, although general evidence was given that the first defendant was immoral and kept a concubine, the evidence as to the purpose for which the loan was taken was discrepant, and the subordinate judge, while he was not convinced it was taken for a family purpose, was also not satisfied that it had been taken for an immoral purpose. On this finding, in view of rulings to which he alluded, he held that the claim failed.

"We agree with the subordinate judge that the suit is not barred by limitation. There was no inquiry whether the plaintiff was entitled to resist the sale. We also agree that the evidence offered by the plaintiff was too unreliable to warrant a finding that the first defendant had contracted the debt on which the decree was obtained for an immoral purpose.

"We see no reason to think that the lease was not created for good consideration, and it is not denied that two sums of Rs. 6,000 and Rs. 3,000, respectively, have, in fact, been applied for the satisfaction of the decree in original suit No. 16 of 1863.

"The income which remained for the support of the family was not large, and although the first defendant may have been extravagant in his expenditure in proportion to his fortune and

(1) I.L.R., 4 Mad., 320.

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have indulged immorality, it is not shown that the loan was taken with the intention that it should be expended in immoral purposes, or that it was so expended; the lender, looking to the necessitous circumstances of the family, may well have believed the money was required for family purposes, though there is no evidence that any representation of this kind was made to him or that he lent his money on the faith of such a representation. All that is shown is that the first defendant contracted a debt. We have then to consider whether the plaintiff is entitled to the whole or any portion of the relief sought by him. He is not entitled to a declaration that the debt was contracted for immoral purposes, nor is he entitled to a declaration that the judgment-debt is not, under any circumstances, binding on him; but, in view of the recent ruling of the Privy Council that a sale in execution of a money-decree of the right, title, and interest of a Hindu father will affect only the interests of the father, the plaintiff is entitled to a declaration that the sale in execution of the decree of 1879 has affected the interests of the first defendant only and not those of the plaintiff.

"The court cannot make any order directing or prohibiting mutation of names in the revenue register. To the extent indicated, the decree of the subordinate judge is reversed and the claim in part decreed, and, in modification of the order of the subordinate judge, it will be ordered that the parties do bear their own costs in both courts."

This appeal was thereupon preferred by the purchaser.

Mr. J. D. Mayne, for the appellant, argued that the decree of the first court dismissing the suit should be restored. By the concurrent findings of two courts, the son's suit had failed to show that the father's debt had been contracted for any immoral purpose. The debt having been contracted for no immoral purpose, the court which executed the decree of 1879 was competent to sell, and had sold, on 30th August 1880, the whole estate. As to the quantity of interest sold, the procedure in execution sales no longer restricted, since Act X of 1877 came into operation, the thing sold to the right, title, and interest of the judgment-debtor, as did Act VIII of 1859, s. 259 (sale certificate). The corresponding sections in the amended procedure of Act X of 1877, in XII of 1879, and in XIV of 1882 were adapted to the sale of all such

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interest in the estate itself as might be legally sold. He referred to ss. 287 and 316 of the latter Acts.

The interest of the son was liable to be sold in satisfaction of his father's debt, and the High Court Judges had apparently meant to refer to the then recent case of *Hardi Narain Sahu* v. *Ruder Perkash Misser*(1), where, however, the sale was only of the father's right, title, and interest, with the result that, for that reason, the son's interest was held not to have been sold. The general rule being that one member of a joint family could not be made liable by another member for a debt, not for the family benefit; there were exceptions, of which one was that the son was bound to pay the father's debt, and the grandson, the grandfather's, if not incurred for any immoral purpose. He referred to *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree*(2), *Girdharee Lall* v. *Kantoo Lall*(3), *Suraj Bunsi Koer* v. *Sheoproshad Singh*(4).

He referred also to *Deendyal Lal* v. *Jugdeep Narain Singh*(5) as applying the principle of the above exception to the case of executions of decree against the father binding the son's interest, unless restricted to the father's interest, where the debt was of the proper character; this being the development of the principle that the father had power, for a lawful and moral purpose, to anticipate against his son, by action taken in his own life-time; in other words to bind his interest by sale or mortgage.

He referred also to *Nanomi Babuasin* v. *Modhun Mohun*(6), *Simbhunath Panday* v. *Golab Singh*(7), *Pettachi Chettiar* v. *Sangili Vira Pandia Chinnathambiar*(8), *Bhagbut Pershad* v. *Mussumat Girja Koer*(9), and he distinguished the effect of sales of the father's right, title, and interest only from that of the sale in the present case.

In regard to the character of the property sold, he referred to *Sartaj Kuari* v. *Deoraj Kuari*(10).

(1) L.R., 11 I.A., 26; I.L.R., 10 Cal., 626.
(2) 6 Moore I.A., 393.
(3) L.R., 1 I.A., 321.
(4) L.R., 6 I.A., 88; I.L.R., 5 Cal., 148.
(5) L.R., 4 I.A., 247; I.L.R., 3 Cal., 198.
(6) L.R., 13 I.A., 1; I.L.R., 13 Cal., 21.
(7) L.R., 14 I.A., 77; I.L.R., 14 Cal., 572.
(8) L.R., 14 I.A., 84; I.L.R., 10 Mad. 241.
(9) L.R., 15 I.A., 99; I.L.R., 15 Cal., 717.
(10) L.R., 15 I.A., 51; I.L.R., 10 All., 272.

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The respondent did not appear. Their Lordships' judgment was delivered by Lord FITZGERALD.

JUDGMENT.—In this case the appellant was the decree creditor. The note for Rs. 2,000 was not originally passed to him, but he became the *bonâ fide* holder, and upon that note he obtained a money decree against the zamindar. An attempt has been made to impeach that decree which their Lordships will presently refer to. The decree creditor then took the ordinary proceedings to have the zamindári attached and sold. The son of the zamindar, who was the plaintiff in the suit now before their Lordships, intervened, and he first sought by petition an order that his interest in the zamindári should be excluded from the sale, and that the sale should be made subject to his right. It does not appear from any document before their Lordships what order, if any, was made on that petition; but their Lordships assume that the petitioner failed before the court below in obtaining that protection which he sought. Notwithstanding that petition, proceedings towards a sale went on, and upon the documents before their Lordships they must come to the conclusion that the thing professed and intended to be sold, and actually sold, was not the father's share, but the whole interest in the zamindári itself. Throughout this case the son does not appear to have ever contended that no more than his father's interest was sold. His case was that the whole zamindári was sold out and out; he impeached the debt which led to the sale, and asserted that the decree founded on it could not bind his interests. That impeachment of the debt has failed. It was said to have been for illegal and immoral purposes, and if it had been in its inception illegal and immoral, the son would not be liable to pay the debt, and the zamindári would not be the subject of sale. But that ground has entirely failed. The subordinate judge, who examined the evidence with the greatest care, correctly came to the conclusion that there was no satisfactory evidence that the debt was contracted for illegal or immoral purposes, and there is no doubt in the case that the original creditor advanced the Rs. 2,000 *bonâ fide*, and that it was a debt contracted by the father and coming within the ordinary rule of Hindú law with reference to an estate such as is now before their Lordships, that the son would be liable for the debt contracted by the father to the extent of the assets coming to him by descent from the father, and that his

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interest in the zamindári was liable and might be sold for the satisfaction of that debt. The son, having failed to get the protection which he sought by his petition, instituted this suit impeaching the debt and seeking to be absolutely relieved from it. He has failed entirely in that, and their Lordships quite agree with the judgment of the subordinate court that, failing in that, his whole suit failed. The plaintiff based his case upon the impeachment of the debt and upon that alone, and failing in that allegation and that impeachment, the whole suit fails. That being the case, there might have been a sale of this estate under this decree, including the whole interest or of so much as was necessary. Upon the documents their Lordships have arrived at the conclusion that the court intended to sell, and that the court did sell, the whole estate, and not any partial interest in it.

Their Lordships do not intend in any way to depart from principles which they have acted upon in prior cases. The High Court, in dealing with the case, entirely agrees with the subordinate judge in the view which he took of the evidence, and would so far confirm his ruling; but it says, "but in view of the recent ruling of the Privy Council that a sale in execution of a money decree of the right, title, and interest of an Hindu father will affect only the interests of the father, the plaintiff is entitled to a declaration that the sale in execution of the decree of 1879 has affected the interests of the first defendant only and not those of the plaintiff." The "recent ruling" referred to is probably that to be found in *Hardi Narain Sahu* v. *Ruder Perkash Misser*(1).

The High Court seems to have acted on the rule so laid down as a rigid rule of law, apparently applicable to this particular case. But the distinction is obvious. In *Hardi Narain's* case all the documents showed that the court intended to sell and that it did sell nothing but the father's share—the share and interest that he would take on partition, and nothing beyond it—and this tribunal in that case puts it entirely upon the ground that everything showed that the thing sold was "whatever rights and interests the said judgment debtor had in the property" and nothing else.

Their Lordships are of opinion that the decision of the sub-

(1) L.R., 11 I.A., 26; I.L.R., 10 Cal., 626.

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ordinate judge was entirely right, and that the decision of the High Court was wrong in holding that less than the entirety of the estate was sold.

Their Lordships therefore will humbly advise Her Majesty that the decision of the High Court varying the decision of the subordinate judge be reversed, that the appeal to the High Court be dismissed with costs, and that the decree of the subordinate judge be reinstated, and their Lordships give the appellant the costs of this appeal.

Solicitors for the appellant, *Messrs. Rowcliffes, Rawle & Co.*

APPELLATE CRIMINAL.

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

1888. Nov. 15, 20.

QUEEN-EMPRESS

against

RAMASAMI.*

Penal Code, ss. 95, 477—Destruction of a valuable security—Unstamped document purporting to be a valuable security—Act causing slight harm.

A, having had certain transactions with B, wrote out a rough account showing his indebtedness to B and signed the total. The paper was not stamped. B afterwards presented it to A and demanded payment of the total amount. A paid part only and after an altercation tore up the paper:

Held, that the act of tearing up the paper constituted the offence of destroying a valuable security, and the harm caused was such that a person of ordinary sense and temper would complain of it.

APPEAL against the conviction and sentence of C. Ramachandra Ayyar, Acting Sessions Judge of Nellore, in Sessions case No. 26 of 1888.

The appellant was a sub-overseer on the Nellore Railway and the complainant was a contractor employed by him on railway work. The appellant having become indebted to the complainant to the amount of Rs. 164, wrote a rough account containing figures only with no particulars, and signed the total. This document he handed to the complainant, and promised to pay the money due on

* Criminal Appeal No. 447 of 1888.

QUEEN-EMPRESS v. RAMASAMI.

the receipt of final bills for the work done. The document was not the stamped. The complainant some time afterwards presented this document to the appellant for payment; but the appellant paid only Rs. 25, saying that that was all that was due on it. The complainant then asked him either to pay the whole debt or return the paper, whereupon an altercation took place and the appellant tore the paper into four fragments and threw them down. Three of these fragments were produced in court: they contained the appellant's signature to the total of Rs. 164, but not the name of the complainant.

The appellant was convicted by the Sessions Court of the offence of destroying a valuable security and sentenced to one year's simple imprisonment and a fine of Rs. 200.

Mr. *Grant* for appellant argued that by reason of the document in question being valueless for want of a one anna stamp the offence charged had not been committed, and that in any case the harm caused was so slight as to render s. 95 of the Indian Penal Code applicable to the case.

The *Acting Government Pleader* (*Subramanya Ayyar*) for the Crown *contra*, referred to *ex-parte Kapalavaya Saraya*(1) and High Court Proceedings 5th August 1873(2).

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

JUDGMENT:—The appellant has been found guilty under s. 477, Indian Penal Code, and sentenced to simple imprisonment for one year, and a fine of Rs. 200. The Judge finds that the accused tore up an account in the handwriting of the accused and signed by him, which showed a balance of Rs. 164 in favor of the complainant, the first witness, and that he did so with the intention of defrauding the first witness.

On behalf of the appellant it is contended that the document which appellant tore up is not a valuable security, inasmuch as it was not stamped as required by law, and therefore was inadmissible for the enforcement of any legal claim. It appears to us, however, that the document, though not a valuable security, is one which purports to be a valuable security. It is in the handwriting of the accused and shows, according to the evidence of the first witness, which the Judge accepted, that a sum of Rs. 164 was

(1) 2 M.H.C.R., 247. (2) 7 M.H.C.R., App. XXVI.

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due by defendant to the first witness. All that we have to consider here is the document in its present state. Though unstamped and therefore inadmissible in evidence in support of a legal claim, it undoubtedly purports to be a valuable security, that is, a document whereby the accused acknowledged that he lay under a legal liability. It has been laid down in England (see 2 East's Pleas of the Crown, p. 955) that forgery may be committed of a promissory note on unstamped paper even though the law prohibits the affixing of the stamp afterwards. All the Judges agreed that it was not necessary to constitute forgery that the instrument should be available in support of a claim in a court of law: that though a compulsory payment by course of law could not have been enforced for want of the proper stamp, yet a man might equally be defrauded by a voluntary payment being lost to him. The principles there laid down are equally applicable to cases falling under s. 477 in consequence of the use of the words "purports to be." To show the fallacy of the argument we may take the case of a duly stamped and executed deed of sale or mortgage torn up while the party was on the way to the registration office. It could hardly be maintained that because the document for want of registration did not create any legal right therefore the wanton destroyer of it could not be held liable under s. 477.

It is then argued that the act of the accused was intended to cause such slight harm that no person of ordinary sense and temper would complain of it. We are unable to accede to this argument. Section 95, Indian Penal Code, was only intended to provide for those cases which fall within the letter, but not within the spirit of the penal law. The tearing up by the prisoner of an account in his own handwriting and signed by him, showing advances made by the first witness, repayments made by him, and the balance due by him to the first witness, he having just made a payment to first witness of a sum far short of the amount actually due, cannot in our judgment be considered to be an act to which the provisions of s. 95 apply.

On the merits we consider that the charge was amply made out by the evidence for the prosecution, and we therefore confirm the finding of the Judge. We do not, however, consider that the case was one which called for such a severe sentence as that pronounced by the Judge.

The appellant has been on bail since the 11th October. We

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therefore alter the sentence of imprisonment to one of simple imprisonment for one month from this date, and we confirm that part of the sentence which imposes a fine of Rs. 200, but direct that only 139 of the sum, if paid, be given to the complainant, and we further direct that, if such fine be not paid, the appellant be further simply imprisoned for one month.

APPELLATE CRIMINAL.

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

1889. Jan. 18.

QUEEN-EMPRESS

against

APPASAMI.*

Penal Code, ss. 415, 419, 463—*Cheating by personation—Forgery.*

A falsely represented himself to be B at a university examination, got a hall ticket under B's name, and headed and signed answer papers to questions with B's name:

Held, that A committed the offences of forgery and cheating by personation.

APPEAL against the conviction and sentence of R. Sewell, Sessions Judge of Bellary, in Sessions case No. 47 of 1888. The Sessions Judge recorded the following findings on the evidence:—

"That the appellant falsely represented himself to be one Vellore Absalom David at the University Matriculation and First in Arts examinations held at Bellary in December 1887, got a hall ticket under that name, sat under that name in the hall, and for three-and-a-half days wrote answer papers to questions, signing his name 'V. A. David' and attesting the papers in the heading provided as being the papers of Vellore Absalom David."

Upon these findings the Sessions Judge following the decision of the High Court of Madras under similar circumstances in criminal appeal No. 103 of 1871, in preference to that of the High Court of Allahabad in *Empress* v. *Dwarka Prasad*(1), convicted the appellant of personation and forgery under ss. 415 and 463 of the Penal Code.

* Criminal Appeal No. 525 of 1888.

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

QUEEN-EMPRESS v. APPASAMI.

Mr. *Nelson* for appellant argued that the facts alleged did not constitute an offence, that no harm or loss was attempted to be caused, and that no unlawful intent was proved.

Mr. *Wedderburn* and Mr. *Grant contra.*

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

JUDGMENT :—We see no reason to doubt the appellant's identity with the person who appeared at the examination at Bellary under the name of Vellore Absalom David. The attention of the witnesses who identified him was specially directed to the candidate, and we see no reason for distrusting either the honesty of their testimony or the accuracy of their recollection.

The question then arises whether the appellant has committed the offences defined in sections 415 and 463 of the Indian Penal Code. By falsely pretending to be one Vellore Absalom David he induced an officer of the university to deliver to him certain property, i.e., a ticket, entitling him to enter the examination room, and be there examined for the Matriculation test of the University, which ticket would not have been given had the superintendent not been so deceived. Then by writing the examination paper (exhibit I) the appellant made a false document with the intention of causing it to be believed that that document was made by one Vellore Absalom David. These acts will respectively constitute the offences of cheating and forgery if they were done fraudulently. We are of opinion that the acts of the appellant in obtaining by personation a ticket from the superintendent, and in signing the name of Vellore Absalom David on the examination papers, clearly indicate an intention on his part to lead the University authorities to believe that the examination papers were answered by Vellore Absalom David, and by this means to endeavour to procure the grant of a certificate to the effect that Vellore Absalom David had passed the Matriculation examination of the Madras University. The certificate, if granted, would have a certain recognized value, and we hold it would have been obtained by means of fraud.

We are fortified in this opinion by the fact that in 1871 a Bench of this Court (Holloway and Kindersley, JJ.) came to a similar conclusion on similar facts. (Criminal appeal No. 103 of 1871.)

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We hold, therefore, that the appellant was rightly convicted under ss. 419 and 465 of the Indian Penal Code and dismiss this appeal.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

against

COMMER SAHIB.*

1888. Nov. 23.

Evidence Act, ss. 26, 27—Confessional statements made in the custody of police—Test of admissibility.

The test of the admissibility under s. 27 of the Evidence Act of information received from an accused person in the custody of a police officer, whether amounting to a confession or not, is :—"was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact?"

THIS was a case of which the records were called for by the High Court under s. 439 of the Code of Criminal Procedure.

The prisoner was charged with the offences of theft in a building and house-breaking by night under ss. 380 and 457 of the Penal Code, and was tried by H. H. O'Farrell, Acting Sessions Judge of Tanjore, and a jury. There was evidence tracing the stolen property to the possession of the prisoner, and also evidence of certain statements with reference to it made by him while in the custody of the police. Upon the latter point the Acting Sessions Judge directed the jury in paragraph 7 of his charge as follows :—

"There is no doubt that the prisoner was taken to the village of Kasapuram on the 10th and 11th August, and there this property was produced on his demand by the prosecution witnesses Nos. 3 to 8. Any statements made by the prisoner that these cloths had been previously deposited with the witnesses are confessional statements made while the prisoner was in the custody of the police, and you must entirely dismiss them from your minds. They are entirely inadmissible as against the prisoner, and only so much of them is admissible for the purpose of corroborating the

* Proceedings of the High Court, No. 1079, Judicial.

QUEEN-EMPRESS v. COMMER SAHIB.

fact that the property was found with these witnesses as distinctly alleges that matter. In other words you must take the bare fact that the prisoner said that certain articles were found with certain persons; not that he said that he had himself left them with these persons."

With regard to these directions the Acting Sessions Judge referred to *Adu Shikdar* v. *Queen-Empress*(1) and *Empress of India* v. *Pancham*(2).

The High Court (Muttusami Ayyar and Parker, JJ.) passed the following

PROCEEDINGS.—The High Court is of opinion that the law was not correctly laid down to the jury by the Acting Sessions Judge in paragraph 7. The general rule applicable to confessions made by prisoners whilst in the custody of a police officer is contained in s. 26 of the Indian Evidence Act, and the proviso contained in s. 27 refers to an exception to that rule. The material words are "so much of such information, whether it amounts to a confession or not as relates distinctly to the fact thereby discovered may be proved." The reasonable construction is that in addition to the fact discovered, so much of the information as was the immediate cause of its discovery is legal evidence.

The statement made by the prisoner in this case, viz., that he had deposited the cloths produced with the witnesses who delivered them up on demand was the proximate cause of their discovery and was admissible evidence. If he had proceeded further and stated that they were cloths which he stole on the day mentioned in the charge from the complainant, that statement would not be evidence, for it would be only introductory to a further act on his part, viz., that of leaving the cloths with the witnesses, and on that ground it would not be the immediate cause of, or the necessary preliminary to, the fact discovered. The test is: "was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact." This appears to us substantially the principle on which the cases reported in *Adu Shikdar* v. *Queen-Empress*, *Empress of India* v. *Pancham*, and *Reg* v. *Jora Hasji*(3) were decided.

(1) I.L.R., 11 Cal., 635. (2) I.L.R., 4 All., 198.
(3) 11 Bom., H.C.R., 242.

APPELLATE CIVIL.

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

SETHURAMA (PLAINTIFF No. 2), APPELLANT,

and

PONNAMMAL AND OTHERS (DEFENDANTS), RESPONDENTS.*

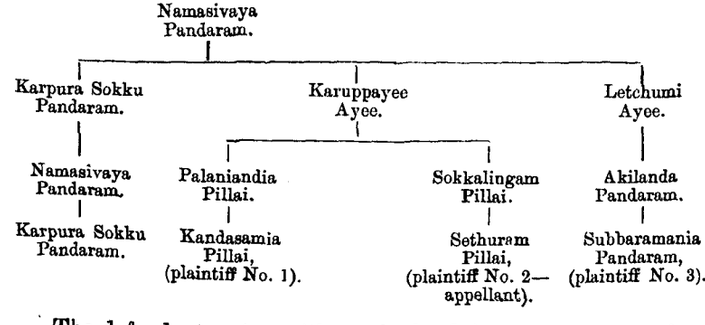
1888. Dec. 4, 18.

Hindu Law—Succession—Bandhu—Paternal great aunt's grandson.

According to the Hindu Law of Succession in force in the Madras Presidency, the grandson of a paternal great aunt of the deceased inherits to him as a bandhu.

SECOND appeal against the decree of S. Gopalacharyar, Subordinate Judge of Madura (East), in appeal suit No. 139 of 1887, affirming the decree of P. S. Gurumurthi Ayyar, District Munsif of Madura, in original suit No. 77 of 1886.

This was a suit to declare the plaintiffs entitled to receive Rs. 2,300, the amount of compensation awarded under the Land Acquisition Act, Act X of 1870, on the assumption of certain land by Government. The plaintiffs claimed as heirs to one Karpura Sokku Pandaram the younger, with whom they were connected in the manner displayed by the following pedigree:—



The defendants set up title to the land in question on various grounds and pleaded, *inter alia*, that even if the plaintiffs were related to the last holder as alleged they could not succeed as his heirs under Hindu Law. The District Munsif adopted this

* Second Appeal No. 133 of 1888.

SETHURAMA v. PONNAMMAL.

view of Hindu Law and dismissed the suit. On appeal the Subordinate Judge affirmed the decree of the District Munsif, saying:

"The preliminary point argued before me is whether the plaintiffs are the heirs to the alleged last male-holder. As already stated, plaintiffs' relationship to him is that of son's son of father's paternal aunt. The father's paternal aunt's son is no doubt a *bandhu*, but his son is not. See Mayne on Hindu Law(1), West and Bühler's Digest of Hindu Law, p. 488; Sarvadhikari's Hindu Law of Inheritance (Tagore Law Lectures for 1880), pp. 696 to 706. *Kissen Lala* v. *Javallah Prasad Lala*(2). The plaintiffs have therefore no title."

Plaintiff No. 2 preferred this second appeal to the High Court.

Kalianaramayyar for appellant.

Subramanya Ayyar for respondents.

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

JUDGMENT:—The only question raised in this appeal is whether the appellant is, according to Hindu Law, the heir of the last male-holder, Karpura Sokku Pandaram. The relationship between the latter and the appellant is as follows:—

The deceased Karpura is great-grandson in the male line of the common ancestor, Namasivaya, while the appellant is the daughter's grandson of the same person. In other words he is a grandson of the paternal great aunt of the deceased Karpura. The Sub-Judge has held that standing in this relation to the deceased he is not his *bandhu*. We are of opinion that the appellant, being within seven degrees of the deceased on his father's side, was his sapinda. He does not belong to the same *gotra*, because a female intervenes, viz., the appellant's grandmother, but he is what is called a *bhinna gotra sapinda* or *bandhu*. The contrary opinion, maintained by the Subordinate Judge and contended for by the respondents, is based on the assumption that the examples of *bandhus* given in the commentaries are exhaustive and not merely illustrative. It is now clearly established that this assumption is erroneous, and that if any one comes within the definition of *bandhu*, though not specially named, he is entitled to succeed as such. It is sufficient to refer to a case which was not cited—*Ratnasubbu* v. *Ponnappa*(3), in which referring to the Privy Council decision(4) this Court

(1) See 4th ed. §§ 464 *et seq.* (2) 3 M.H.C.R., 346. (3) I.L.R., 5 Mad., 69.
(4) *Girdhari Lall Roy* v. *The Bengal Government*, 12 Moo. I.A., 448.

held that the grandson of the maternal uncle of the deceased's mother was entitled to succeed as a bandhu *ex parte materna*. The decree of the Subordinate Judge must be reversed and the case remanded to be disposed of according to law. Costs to be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

NARASIMHA AND ANOTHER (PLAINTIFFS), APPELLANTS,

AND

AYYAN CHETTI (DEFENDANT), RESPONDENT.*

1888. Dec. 10, 11, 12.

Civil Procedure Code, s. 539—Interest necessary to support a suit under—Suit to remove a trustee.

The plaintiffs, having an interest as the managers of a temple in seeing to the due performance of the religious part of the administration of a certain charity endowed for the sustenance of Brahmans and connected with the temple, and being further interested in its administration as Brahmans entitled under certain circumstances to share in the benefits of the charity; sued under s. 539 of the Code of Civil Procedure to remove defendant from the trusteeship of the charity on the ground of fraudulent mismanagement:

Held, that the plaintiffs' interest did not support the suit.

Quære: Whether a suit for the removal of a trustee will lie under the above section.

APPEAL against the decree of J. A. Davies, Acting District Judge of Tanjore, in original suit No. 2 of 1885.

This was a suit by the plaintiffs praying for the removal of the defendant from the office of trustee of a certain charity endowed by one Kuthan Chetti for sustenance of Brahmans, and for the appointment of the plaintiffs as trustees.

The plaintiffs, who are Brahmans, stated that they were the hereditary adhinakartas of the temple in question, and had by inheritance a certain precedence in the temple ceremonies; that the charity referred to above was dispensed in a choultry attached to the temple and that the defendant who was appointed trustee by the deeds of endowment had been guilty of fraudulent mis-

* Appeal No. 160 of 1887.

NARASIMHA v. AYYAN.

management; and that the Collector had accorded to them sanction to institute this suit.

The defendant denied the above allegations of fact and contended that the suit did not lie as framed.

The following issues were framed (among others):—

(1) Whether the suit falls under s. 539 of the Code of Civil Procedure, or under Act XX of 1863, so far as the religious endowment is concerned, and under Madras Regulation VII of 1817 so far as the charitable endowment is concerned, and whether, if under these special enactments, the jurisdiction of this Court under s. 539 of the Code of Civil Procedure is ousted?

(2) Whether the plaintiffs have such interest in the trust as to entitle them to sue?

On the above issues the District Judge said—

"*First issue.*—It is admitted by the parties, as well as proved by exhibits G and I (the deeds of endowment,) that the object of Kuthan Chetti's endowment in this case was twofold, first, to supply a daily offering to the deity in the Srinivasa Perumal Covil of Thogur and designated the 'kuruni ariseikattalai' of one marcal of rice to be cooked and mixed with curds and afterwards distributed as 'prasada,' and, secondly, to build an annachattrum in the said village to feed Brahman travellers. The first must be considered a religious purpose, and the second a charitable one. To give this Court jurisdiction under s. 539 of the Code of Civil Procedure, it is necessary that the purposes of the trust besides being charitable or religious should be public. It is contended for the defendant that this is not a public trust, inasmuch as the scheme was started by a private individual who retained the management of it in his own hands, and made no dedication of it to the public by a valid trust-deed. But I overrule this objection, as I consider that exhibit G clearly creates a trust which is further vested by exhibit I in the defendant, and that the purposes of it may be decided public, as they are generally for the benefit of a whole section of the community, namely, the travelling Brahman population. The next contention for the defence, so far as the religious part of the endowment is concerned, is that while there exists the special enactment Act XX of 1863 for the proper appropriation of endowments of lands relating to temples, the words 'religious purposes' in s. 529 of the Code should be considered as

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referring only to cases where the endowments do not relate to temples. If, however, the Legislature had intended this, they would surely have expressed their intention by the insertion of a saving clause to the desired effect. The fact that the words 'or religious' are an addition made by Act XIV of 1882 to the section as it originally stood, makes it appear that they were purposely added in order to admit a suit of this kind against a trustee, who is not one of the class of trustees contemplated by Act XX of 1863 which refers to trusts already in existence and not to such as might subsequently be created. And so with regard to the other contention in connection with the charitable part of the endowment that it is governed by Madras Regulation VII of 1817, and its superintendence being vested by s. 2 of the said regulation in the Board of Revenue they should also have been made parties to this suit,—it may be assumed that the regulation referred only to endowments then existing, for its language speaks of only what is and what has been and not of what will be; not a single provision is made therein for what is to be done in the case of future endowments—the only future it deals with is in regard to escheats. But if this interpretation is wrong and the Regulation is applicable to this case, it has been held in *Ponnambala Mudaliyar* v. *V. R. Pandia Chinnatambiar*(1) that it merely provides supplementary remedies and does not deprive the ordinary Courts of their jurisdiction. So that on the first issue I find that this Court has jurisdiction over the case under s. 539 of the Code of Civil Procedure.

"*The second issue* is whether the plaintiffs have such a 'direct interest' in the trust as to enable them to bring the suit. The case they set up is that they are the present managers of the temple, and as such have a direct interest in seeing to the due performance of the religious part of the trustee, *i.e.*, the daily offerings to the Perumal in the temple which yield the 'prasada,' in which they further claim a right to share first in their capacity as managers and then as Brahmans of the agraharam, should the remainder of the 'prasada' not all be required for distribution among travellers. Although I consider the plaintiffs have not proved by their evidence that they are the actual managers of the temple, for they keep no accounts, or that the managers, *quâ* managers, have a right to share in the 'prasada'—the evidence on

(1) 7 M.H.C.R., 117.

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the point being contradictory, yet I find they have a right to interfere in the management, as well as to take a portion of any cooked rice that may be left after travellers have been fed. It is proved that Rangayyan, the father of the first plaintiff and uncle of the second, was the joint manager of the temple with Kuthan Chetti, the defendant's predecessor, and while I believe the defendant is now, as he states, the sole manager, it is admitted by him that the Brahmans of the village assist him in the management, and that they have been accustomed to take the 'Prasada' that is left over. I think that these admitted privileges give the plaintiffs such a direct interest in the trust as is contemplated by s. 539 the terms of which do not state and do not seem to imply that the interest required should necessarily be a beneficial one. I therefore find this issue in plaintiffs' favor."

The decree of the District Judge dismissed the suit so far as it prayed for the removal of the defendant, but contained certain directions as to the management of the charity.

The plaintiffs appealed and the defendants preferred a memorandum of objections against the above decree so far as it was not in accordance with their respective cases.

Seshagiri Ayyar for appellants.

Pattabhirama Ayyar for respondent.

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

JUDGMENT:—We are of opinion that the plaintiffs had not a direct interest in the trust within the term of s. 539 of the Civil Procedure Code and that the suit was not, therefore, maintainable. See *Jan Ali* v. *Ram Nath Mundul*(1).

Again we think that it is not at all clear that a suit to remove a trustee can be maintained under s. 539.

It has been pointed out by Mr. Pattabhirama Ayyar that s. 539, in most parts of it, follows the provisions of Romilly's Act(2), which enabled trusts of certain classes to be carried out by summary procedure and not by suit; amongst the objects of that Act one was to appoint a new trustee and it was held that under the Act, a trustee could not be removed hostilely. No doubt, s. 539 provides that a suit may be brought to appoint the trustee and for other purposes, and it contains a proviso that further relief may be

(1) I.L.R., 8 Cal., 32. (2) 52 Geo. 3, c. 101.

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given according as the nature of the case required. Such grounds of relief would be some matter consequent on the relief, which the section enables to be granted.

We dismiss this appeal, and, as the Judge had not jurisdiction to try the case, we reverse the decree, so far as it gave any directions for the performance of the trust, or gave the plaintiffs any relief or decided any rights therein of either plaintiffs or defendant.

Appellant is to pay the costs of this suit throughout, including this appeal.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

NANJAPPA (PLAINTIFF), APPELLANT,

and

NANJAPPA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1888. Nov. 20. Dec. 10.

Contract Act, ss. 63, 74—Penalty—Stipulation for enhanced interest—Interest on decree amount up to date of payment—Remission of part performance of contract—Sum accepted on account of interest.

A hypothecation bond provided for payment of interest on the principal sum at the rate of 9 *per cent.*, and contained a further provision, that on default being made in payment of interest accruing due, interest should be paid from the date of the bond at the rate of 15 per cent. Default was made when the first and second payments of interest became due. After the second payment had become due, the creditor accepted payment on account of interest of a sum a little more than the arrears calculated at 9 per cent. In a suit by the creditor:

Held, (1) that the plaintiff had not waived any right under the bond by accepting the payment on account of interest:

(2) that the provision for enhanced interest calculated from the date of the bond on default, was of the nature of a penalty under s. 74 of the Contract Act.

(3) that the plaintiff was entitled to interest on decree amount from date of decree to date of payment at 6 per cent.

Balkishen Das v. *Run Bahadur Singh*(1) discussed and distinguished; *Baij Nath Singh* v. *Shah Ali Hosain*(2) dissented from.

SECOND appeal against the decree of J. D. Irvine, Acting District Judge of Coimbatore, in appeal suit No. 138 of 1887, modifying

* Second Appeal No. 251 of 1888.

(1) I.L.R., 10 Cal., 305; s.c. L.R., 10 I.A., 162. (2) I.L.R., 14 Cal., 248.

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the decree of T. Ramasami Ayyar, District Munsif of Udumalpet, in original suit No. 28 of 1887.

This was a suit to recover the sum of Rs. 2,313-12-0 due on a registered hypothecation bond, dated 23rd February 1882.

The portions of the bond which are material for the purposes of this report ran as follows:—

"We have hypothecated to you the undermentioned properties consisting of well, lands, and house, &c., for Rs. 1,500, which sum we have received from you in cash . . . . We shall therefore pay, on the 13th Masy of each year, the interest on the said amount at $\frac{3}{4}$ per cent. per mensem, and pay the principal amount in the fifth year, *i.e.*, 13th Masy of Viyaya year, together with the interest of that year. In case of default to pay the interest on the dates on which they may be due, and in case of default to pay the principal amount on the date it is due, we shall pay on demand the interest accruing on the said amount for the period of default at $1\frac{1}{4}$ per cent. per mensem from the date of the document and the principal. If interests or the principal amount be paid towards this document, we shall endorse the payments on this."

The following endorsement appeared on the document, signed by the debtors:—

"Paid on 17th June 1884 Rs. 285 on account of the interest in respect of this bond. This sum of Rs. 285 was paid."

No payment other than that referred to in the above endorsement was made in respect of the bond.

The District Munsif passed a decree for the full amount claimed, which was calculated according to the terms of the document quoted above. The defendants, however, appealed on the ground that the stipulation for an enhanced rate of interest should be construed as a penal clause, since it related back to the date of the bond. The District Judge on appeal modified the decree of the District Munsif expressing his decision as follows:—

"The bond was executed in February 1882. In 1883, defendants made default and again in 1884 plaintiffs took no action on this, but in June 1884 accepted payment by defendants of Rs. 285 on 'account of interest.' The actual amount of interest then due at 9 per cent. was Rs. 270. At the enhanced rate it would have been Rs. 450. It appears to me that the acceptance by plaintiff of this sum of Rs. 285 was in effect a condonement by him of the previous default and evinced an intention on his part not to

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press for the enhanced rate. Under these circumstances, I consider that, although the subsequent default gave plaintiff a right to enforce the terms of the bond, the enhanced rate for the first two years should not have been allowed. Taking this view, plaintiff is entitled to receive the principal Rs. 1,500 + interest for three years at the enhanced rate, Rs. 675, total Rs. 2,175. This sum, with proportionate costs, I award him; but, inasmuch as he has received this large sum as interest, I disallow further interest."

The plaintiff appealed to the High Court. No memorandum of objections or cross-appeal was preferred by defendants.

Mr. *K. Brown* for appellants.

There was no waiver or relinquishment of his rights under the bond by reason of the plaintiff's acceptance of the sum of Rs. 285 in June 1884 by virtue of s. 63 of the Contract Act or any other provision of law. The District Judge should have decreed interest up to the date of payment to the plaintiff, and otherwise should have confirmed the decision of the District Munsif who was right in enforcing the terms of the agreement. *Balkishen Das* v. *Run Bahadur Singh*(1), explained and applied in *Baij Nath Singh* v. *Shah Ali Hosain*(2).

Sankaran Nayar for respondents.

The terms of the agreement come within the purview of s. 74 of the Contract Act. *Jaganadham* v. *Ragunadha*(3), *Mackintosh* v. *Crow*(4), and other authorities referred to in these cases. The Privy Council decision cited related to a decree and not a contract and is inapplicable. *Shirekuli Timapa Hegda* v. *Mahablya*(5).

Mr. *K. Brown in reply.*

The Privy Council case is an authority on the rule of public policy in s. 74 of the Contract Act. Moreover the case arose on a decree by consent; the distinction drawn by West, J., in the passage cited was disapproved in *Baij Nath Singh* v. *Shah Ali Hosain*(2), and is not sound. Here there is no sum fixed within the meaning of s. 74 of the Contract Act.

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

JUDGMENT:—The action is brought to recover from the defendants the principal and interest due under a bond executed by the defendants on the 23rd February 1882. According to the

(1) I.L.R., 10 Cal., 305; s.c. L.R. 10 I.A., 162.
(2) I.L.R., 14 Cal., 248.
(3) I.L.R., 9 Mad., 276.
(4) I.L.R., 9 Cal., 289.
(5) I.L.R., 10 Bom., 435.

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terms of the bond, the defendants became bound to pay on the 23rd February in each year interest on the principal sum at 9 per cent. and the principal sum, Rs. 1,500, on the 23rd February 1887, together with interest then due: in case of default in paying interest or principal on the due dates, the defendants were bound to pay on demand the interest accruing on the principal amount "for the period of default at 1¼ per cent. per mensem from the date of the document and the principal." Default was made in 1883 and again in 1884, and after June 1884 no payment was made by the defendants. The suit was brought in January 1887. The District Judge, giving the defendants credit for Rs. 285, paid in June 1884 as a complete satisfaction for the two years' interest then actually due and payable, gave the plaintiff a decree for the principal sum and interest upon it at the enhanced rate for three years. Without deciding the question raised on the appeal he disallowed the claim for such interest accruing due on the first default, on the ground that the plaintiff had excused it by accepting the sum of Rs. 285 in June 1884. Seeing that the sum paid was greater than what was due for interest at the original rate, it is difficult to understand how the defendants can have supposed that the plaintiff had remitted any part of his claim, and anyhow there is no sort of evidence of any release given by the plaintiff or of any other discharge of the obligation to pay the whole sum of Rs. 450. Although the defendants' vakil was unable to support the decree on the reason given by the District Judge, it was open to him to support, and he did support it on the ground that the Court ought to have treated the stipulation for interest at 15 per cent., payable from the date of the bond as penal, and therefore only to have allowed reasonable interest by way of compensation. It has been held by this Court in several cases—*Vengideswara Putter* v. *Chatu*(1), *Vythilinga* v. *Sundarappa*(2), *Jaganadham* v. *Ragunadha*(3)—that such a stipulation as is found in the present bond should be treated as penal and should not be enforced by the Court; and the same view has been taken in several cases by other High Courts, see cases collected in *Sungut Lal* v. *Baijnath Roy*(4), *Bansidhar* v. *Bu Ali Khan*(5), *Khurram Singh* v.

(1) I.L.R., 3 Mad., 224. (2) I.L.R., 6 Mad., 167.
(3) I.L.R., 9 Mad., 276. (4) I.L.R., 13 Cal., 164.
(5) I.L.R., 3 All., 261.

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Bhawani Baksh(1). The question raised by the learned Counsel for the plaintiff was whether, since the decision of the Privy Council in *Balkishen Das* v. *Run Bahadur Singh*, this view of the law can still be considered to be correct, and reliance was placed on *Baij Nath Singh* v. *Shah Ali Hosain* as an authority for the position that the cases above referred to must be treated as overruled by the Privy Council decision. In the Privy Council case the question arose with regard to a decree made on the footing of a compromise according to which the plaintiff was to receive interest on the decretal sum at the rate of 6 per cent. and the defendants were to pay principal and interest by instalments of Rs. 30,000 a year. Provision was made for substituting interest at 12 per cent. on default in payment of the instalment in several contingencies, and the particular provision which is material related to the contingency of the first instalment not being duly paid. On such default being made the decree-holder was entitled to interest at 12 per cent. from the date of the decree; and default was made, the instalment not being paid till after due date. It was also provided that, in case of default which was construed as meaning on default in payment of any instalment except the first, interest should be paid at the higher rate on the entire decretal money from the date of default. It was argued that this latter provision for enhanced interest payable upon the whole decretal money was of a penal character; but the Judicial Committee observed, "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." In their opinion the decree-holder was entitled to the whole decretal sum and interest at 6 per cent. from date of decree or so much thereof as might remain due after giving credit for all payments made on account, together with additional interest at the same rate on the first instalment from the date of the decree to the payment of such instalment, and also additional interest upon the principal sum for the period between the day on which the second or any subsequent instalment became due and the day on which it was paid. While it must be admitted that by this decision the enhanced interest was allowed on the first instalment from the date of decree, it does not appear from the report that any special

(1) I.L.R., 3 All., 440.

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argument was directed against the particular stipulation. According to the report it was the other stipulation, viz., that for payment of enhanced interest on the whole decretal money that was impugned in the argument, and this stipulation was not open to the objection that it made the higher rate of interest payable from the date of decree. It is further to be observed that the Judicial Committee were not dealing with a contract having regard to the provisions of the Contract Act, but with a decree, and as West, J., has pointed out "the principles which govern the enforcement of contracts and their modification when justice requires it do not apply to decrees which as they are framed embody and express such justice as the Court is capable of conceiving and administering," *Shirekuli Timapa Hegda* v. *Mahablya*(1). For these reasons we are of opinion that we are not bound by the decision of the Judicial Committee to treat the cases decided by this Court as overruled.

In our opinion there is a substantial distinction between a stipulation in a bond to pay enhanced interest from the date of default and a stipulation to pay such interest from the date of the bond. It is clearly established by the English cases that, whereas there is nothing in the nature of a penalty in an arrangement under which a debtor on failure to pay a smaller sum than that actually due within a given time is remitted to his obligation to pay the larger sum, a stipulation for the payment of a sum exceeding the actual debt, if that debt is not paid at the time when it is due, is regarded as a penalty against which equity will relieve. *Thompson* v. *Hudson*(2). *The Protector Endowment Loan Co.* v. *Grice*(3). By the cases in this country it is well established that an agreement to pay a sum of money on a given day with interest at a certain rate with a stipulation that in default the debtor shall thenceforward pay a higher rate of interest is strictly enforceable. In such an agreement no question of penalty arises because it imposes an obligation on the debtor to pay a larger sum than what was originally due. In the words of s. 74 of the Contract Act no sum is named as the amount to be paid in case of such breach. At the moment of the breach no larger sum can be exacted by the creditor, but from that date the terms on which the debtor holds the money became less favorable. By

(1) I.L.R., 10 Bom., 438. (2) L.R., 4 H.L., 1.
(3) L.R., 5 Q.B.D., 121.

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the default he accepts the alternative arrangement of paying a higher rate of interest for the future. On the other hand where the stipulation is that on default the higher rate shall be payable from the date of the original obligation, the debtor does on default become immediately liable for a larger sum, viz., the difference between the enhanced and the original rate of interest already due, *Mackintosh* v. *Crow*(1).

This liability cannot be regarded as the price paid for the further enjoyment of the money allowed to him, because the amount is fixed and bears no relation to the time during which the money may continue unpaid. In the present case, the difference amounts to 6 per cent. on Rs. 1,500, viz., Rs. 90. On default, the debtor became obliged to pay that sum in addition to the principal and interest originally due under the bond. If a stipulation is penal which entitles a creditor, on his debtor's default in paying an instalment due, to demand double the amount of that instalment or 100 per cent., why is not the provision in the present case, by which 6 per cent. on the original debt is claimed, open to the same objection? It is said there is in the present case no sum *named* within the meaning of s. 74 of the Contract Act and that therefore that section is not applicable. To that argument we would reply that though no sum is named in rupees the extra sum payable is fixed and ascertainable beforehand, or at any rate at the time when default is made. To hold that more than this is required, and that it is necessary that the exact sum should be mentioned in the bond is in our judgment to countenance an easy mode of avoiding the effect of the section altogether. If regard is had to the date of default when the liability to payment of the extra sum accrues, it is clear that the objections taken by Mitter, J., in *Baij Nath Singh* v. *Shah Ali Hosain* to Wilson, J.'s, position in *Makintosh* v. *Crow* lose all their force. Mitter, J., argues that, because besides this liability another liability to pay higher interest in the future accrues, the whole stipulation cannot be brought within the terms of s. 74, but surely the addition of this obligation to pay in the future does not make the obligation to pay for the past any the less an obligation to pay a certain sum.

For these reasons and upon the authority of the cases decided by this Court, we hold that the provisions of s. 74 ought to have

(1) I.L.R., 9 Cal., 689.

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been applied to the present case, and that therefore the decree of the District Judge, though passed on wrong grounds, may be sustained. We modify the decree by allowing the plaintiff further interest at the rate of 6 per cent. from date of decree till date of payment, and otherwise dismiss the appeal with costs.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Wilkinson.

1888. Sept. 7. Oct. 23.

VENKATA (PLAINTIFF), APPELLANT IN S.A. 1140 OF 1886,

and

CHENGADU AND OTHERS (DEFENDANTS), RESPONDENTS.

MUNUSAMI (PLAINTIFF), APPELLANT IN S.A. 1141 OF 1886,

and

MUNIGADU AND OTHERS (DEFENDANTS), RESPONDENTS.

VENKATA (PLAINTIFF), APPELLANT IN S.A. 1142 OF 1886,

and

RAUTHU REDDI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, *s.* 6, *sch. II, arts.* 12, 95—*Revenue Recovery Act (Madras)—Madras Act II of* 1864, *s.* 59—*Suit to set aside a sale for arrears of revenue—Fraud—Limitation.*

Suit, in July 1885, to set aside a sale of land of the plaintiff, sold in July 1884 as if for arrears of revenue under Act II of 1864 (Madras), on the ground that the sale had been brought about by fraud and collusion between the purchaser and the village officers; the plaintiff had knowledge of the alleged fraud more than six months before suit:

Held, that the law of limitation applicable to the case was s. 59 of Act II of 1864, and not s. 95 of the Limitation Act, and that the suit was therefore barred.

Venkatapathi v. *Subramanya* (I.L.R., 9 Mad., 457) explained, *Baij Nath Sahu* v. *Lala Sital Prasad* (2 B.L.R., Full Bench., 1), and *Lala Moharuk Lal* v. *The Secretary of State for India* (I.I.R., 11. Cal., 200) considered.

SECOND appeal, No. 1140 of 1886, against the decree of H. T. Knox, Acting District Judge of North Arcot, in appeal suit

* Second Appeals Nos. 1140 to 1142 of 1886.

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No. 97 of 1886, affirming the decree of T. Sami Rau, District Munsif of Chittore, in original suit No. 273 of 1885.*

This was a suit to set aside a sale for arrears of revenue under Madras Revenue Recovery Act, Act II of 1864.

The plaintiff's brother acquired the land in question from the first defendant and died. After his death the plaintiff succeeded to his brother and entered into enjoyment of the land and paid the Government kist thereon, but the patta remained in the name of defendant No. 1. On the 18th July 1884 the land was sold for arrears of revenue accrued due in respect of other lands of defendant No. 1, and purchased by defendant No. 2, who obtained a certificate of sale on 1st September. According to the allegations of the plaintiff, the sale was fraudulently brought about by defendant No. 2 in collusion with the karnam and monigar of the village; there was at the date of the sale no arrear of revenue due on the land, and neither the plaintiff nor defendant No. 1 was served with notice to pay any sum by way of revenue. It was further alleged that the sale was not duly proclaimed and various irregularities were committed with reference to it.

The plaintiff took proceedings under s. 38 of the Revenue Recovery Act, and the sale was set aside by the Deputy Collector on 28th January 1885. The Collector, however, reversed this decision on 26th March 1885.

The plaint in the suit was filed in the District Munsif's Court on 10th July 1885, the Secretary of State being joined as defendant No. 3. Defendant No. 1 was *ex-parte*. Defendant No. 2 pleaded, *inter alia*, that the plaintiff's suit was barred by s. 59 † of Madras Act II of 1864, that the Deputy Collector had no authority to cancel the sale, that the plaintiff's application to cancel the sale was of no effect, and that s. 14 of the Limitation Act XV of 1877 had no application to this suit. It was contended for defendant No. 3 also, that the suit was barred by s. 59 of Madras Act II of 1864; that the Deputy Collector's action in annulling the sale

* Second Appeals Nos. 1141 and 1142 were similar to Second Appeal No. 1140 of 1886.

† "Nothing contained in this Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under this Act, except as hereinbefore provided, from applying to the Civil Courts for redress: provided that Civil Courts shall not take cognizance of any suit instituted by such parties for any such cause of action, unless such suit shall be instituted within six months from the time at which the cause of action arose."

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was *ultra vires*, and that his decision was rightly reversed by the Collector on appeal.

Both the District Munsif and the District Judge held that the suit was barred by the law of limitation in s. 59 of the Revenue Recovery Act.

The District Judge observed:

"It is no doubt the case that the plaintiffs and the Revenue Officers, who first dealt with the application, and the defendants, who appealed to the Collector, had an erroneous idea that the Collector had power to set the sale aside, and that the plaintiffs were doing their best to bring their grievance before the proper tribunal. Still the defendants cannot be prevented from pleading the limitation which has arisen in their favor by the common mistake of the parties, which has resulted in the discovery by the plaintiffs of the proper Court, when it is too late for that Court to investigate their case."

The plaintiff preferred this second appeal.

Mr. *Kernan* for appellant relied on *Venkatapathi* v. *Subramanya*(1), and argued that the limitation bar was saved by s. 95 of the Limitation Act, which was not excluded by the Revenue Recovery Act, and cited *Golap Chand Nowluckha* v. *Krishto Chunder Dass Biswas*(2), *Nijabutoola* v. *Wazir Ali*(3), and *Guracharya* v. *The President of the Belgaum Town Municipalities*(4).

The Government Pleader (Mr. *Powell*) and *Bhashyam Ayyangar* for respondents.

The Court (Parker and Wilkinson, JJ.) made the following Order of Reference to the Full Bench:

The plaint lands were acquired by plaintiff's undivided brother, Kristna Reddi, but the patta was allowed to remain in the name of defendant No. 1. After the death of Kristna Reddi, the plaintiff continued to pay kist for the lands, but for an arrear which accrued upon other land in the patta of defendant No. 1 these lands were attached and sold under the Revenue Recovery Act. There can be no doubt as to their liability to be so sold, standing as they did in the patta of defendant No. 1, but plaintiff seeks relief on the ground that defendant No. 2, the purchaser, has colluded with defendant No. 1, and the monigar and karnam of the village in order to deprive him of the land.

(1) I.L.R., 9 Mad., 457. (2) I.L.R., 5 Cal., 314.
(3) I.L.R., 8 Cal., 910. (4) I.L.R., 8 Bom., 529.

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The sale took place on 18th July 1884; the sale certificate was granted the defendant No. 2 on 1st September 1884; the Deputy Collector purported to set aside the sale on 28th January 1885, but his order was reversed by the Collector on 25th March 1885. Notice of suit under s. 424 of the Civil Procedure Code was given to the Collector on 10th April 1885, and the suit was finally brought on 16th July 1885.

The Courts below found that the suit was barred under s. 59, Act II of 1864, and that the time ran from the date of the sale (18th July 1884). Appellant's counsel contends that the suit is to set aside the sale on the ground of fraud; that the suit is governed by art. 95, sch. II of the Limitation Act and refers to *Venkatapathi* v. *Subramanya* as a conclusive authority.

The facts of that case appear to have been exactly similar to the present, but the point argued before the Bench which decided that second appeal seems to have been whether art. 12 or art. 95 of the Limitation Act applied. It appears to have been assumed in second appeal that the provisions of the general Limitation Act were applicable, and there is nothing to show that the point was taken that the shorter limitation provided by the special law was the one which would apply. The point was, it is true, taken in the Courts below; the District Munsif holding that even if the limitation of s. 59 of the Revenue Recovery Act did not apply, the suit was barred under art. 12, while the Subordinate Judge was of the same opinion and considered it unnecessary to decide whether s. 59 of the Revenue Recovery Act barred the suit. The plaintiff appealed, but there is nothing to show that the respondent in second appeal relied upon s. 59, Act II of 1864, or that the point was argued.

We do not feel any doubt that the plaintiff is a "party deeming himself aggrieved by proceedings under the Revenue Recovery Act," and therefore under the provisions of s. 59 should sue within six months from the time at which the cause of action arose.

Act II of 1864 is a local law applicable to the recovery of arrears of revenue in the Madras Presidency, and s. 6 of the general Limitation Act declares that when a period of limitation is specially prescribed by such a law for any suit, appeal or application, nothing in the general Limitation Act shall affect or alter the period so prescribed. The cases that have been quoted

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at the Bar merely go to show that the provisions of the general Limitation Act are to be applied in computing such period, but are not authorities for the *alteration* of such period. *Reference under Forest Act V of* 1882(1), *Golap Chand Nowluckha* v. *Krishto Chunder Dass Biswas, Nijabutoola* v. *Wazir Ali, Guracharya* v. *The President of the Belgaum Town Municipalities.*

Were it not for the decision in *Venkatapathi* v. *Subramanya*, we should have had no hesitation in dismissing this second appeal, especially as we find that in a later case, *Yellaya* v. *Viraya*(2), a suit to redress a grievance caused by proceedings under Act II of 1864 has been held to be barred under s. 59, but the point is an important one, and inasmuch as the decision in *Venkatapathi* v. *Subramanya* lays down in terms that such suits such as the present are governed by art. 95, sch. II of the general Limitation Act, we will refer to the Full Bench the question "Is the suit governed by the special limitation prescribed in s. 59, Act II of 1864, or by the provisions of the general Limitation Act?"

Mr. *Kernan* for appellant.

The case is governed by art. 95, sch. II of the Limitation Act. See *Venkatapathi* v. *Subramanya*, which governs the present case. The cases cited before the Division Bench show that notwithstanding the special period of limitation prescribed by special Acts the Courts have applied the provisions of the Limitation Act so as to extend the period beyond the specified time; similarly the Court should apply the general provisions of the Limitation Act relating to fraud to the Revenue Recovery Act. Section 59, Revenue Recovery Act, does not apply to the case because the plaintiff was not a "party" within this section. The word party denotes a plaintiff or defendant and present before the Court in the proceeding—such as a defaulter, see s. 6, Revenue Recovery Act —a destrainer or tenant paying arrears, s. 11, or claimant under s. 17. The legislature would have used the word 'persons' if its intention was to give the section the more general scope.

Section 59, Revenue Recovery Act, does not apply because the proceedings were not taken under the Act. No notice was given to plaintiff or first defendant. No proclamation of sale was made. The steps to be taken under the Revenue Recovery Act were not taken. The sale was held secretly. See also *Baij*

(1) I.L.R., 10 Mad., 210. (2) I.L.R., 10 Mad., 62.

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Nath Sahu v. *Lala Sital Prasad*(1), *Lala Mobaruk Lal* v. *The Secretary of State for India*(2), *Sadhusaran Singh* v. *Panchdeo Lal*(3), *Bhoobun Chunder Sen* v. *Ram Soonder Surma Mozoomdar*(4), in which it was held that non-compliance with s. 6, Act XI of 1859, was not a mere irregularity but that sale was *null* and *void*. See also distinction between s. 59 and s. 60 of Revenue Recovery Act. The former refers to proceedings under the Act, the latter to anything done or *purporting to be* done under the Act; from which it should be inferred that Legislature in s. 59 contemplated proceedings validly and regularly held under Act and not to colorable proceedings as in s. 60. See also Standing Order of the Board of Revenue, No. 109.*

The Government Pleader (Mr. *Powell*), and *Bhashyam Ayyangar* for the respondents *contra*.

The further arguments adduced in this case appear sufficiently for the purpose of this report from the judgment of Muttusami Ayyar, J.

Muttusami Ayyar, J.—This is a reference to the Full Bench, and the facts which have given rise to it are shortly these. The land, forming the subject of this litigation, originally belonged to the plaintiff's undivided brother, Krishna Reddi, and upon his death it vested in the plaintiff by right of survivorship. The patta relating to it, however, stood in the name of the first defendant, Mala Chengadu, and the land was sold under Act II of 1864 for arrears of revenue which accrued upon some other land included in the same patta but belonging to Chengadu.

The sale took place on the 18th July 1884, and the present suit to set it aside was brought on the 16th July 1885. The ground of claim was that the second defendant, the purchaser, colluded with the karnam and the monigar of the village and fraudulently brought about the sale, in order to deprive the

(1) 2 B.L.R., Full Bench, 1. (2) I.L.R., 11 Cal., 200.
(3) I.L.R., 14 Cal., 1. (4) I.L.R., 3 Cal., 300.

* It is undesirable that lands transferred by a registered holder, however informally, to another party, and on which no arrears are due, should be sold for arrears of revenue due by the registered holder on other lands which are not brought to sale. Collectors are directed not to sell lands in possession of alienees, until all the other lands and property in possession of the registered holder are first sold unless the arrear due is caused by the default of the alienee. Whether the lands to be sold are in the possession of the registered holder or not, and whether the arrear is due by the registered holder or by the alienee on the portion alienated, should be ascertained by local inquiry.

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plaintiff of his land. The plaint stated that the second defendant was the plaintiff's enemy, that the assessment due on the land in dispute for fasli 1291 was not in arrear, that it was sold for arrears amounting to Rs. 4-6-2 due by the pattadar on some other land, and that it was purchased for Rs. 12-4-0, whilst it was worth Rs. 200. It was alleged further that neither the pattadar nor the plaintiff was served with notice to pay the arrears, that the sale was not duly proclaimed, that it was held secretly, and that the provisions of Act II of 1864 were not duly complied with. The defendants pleaded, *inter alia*, limitation in bar of the claim and relied on s. 59 of the Revenue Recovery Act. The District Munsif, and on appeal, the District Judge upheld the contention and the plaintiff preferred a second appeal from their decision. The Divisional Bench that heard the second appeal alluded to the decision in *Venkatapathi* v. *Subramanya*, and observing that it laid down in terms that such suits as the present were governed by art. 95, sch. II of the general Limitation Act, referred to the Full Bench the following question :—

"Is the suit governed by the special limitation prescribed in s. 59, Act II of 1864, or by the provisions of the general Limitation Act ?"

It is contended for the appellant that s. 59 of Act II of 1864 is not applicable to cases of fraud, and it can only apply when the procedure prescribed by the Act has been duly followed and when the sale can properly be termed to be a sale held under it. Our attention is drawn to Act XI of 1859, to the decisions in *Baijnath Sahu* v. *Lala Sital Prasad*, *Lala Mobaruk Lal* v. *The Secretary of State for India in Council*, *Sadhusaran Singh* v. *Panchdeo Lal*, *Venkatapathi* v. *Subramanya*, *Yellaya* v. *Viraya*, and to the Standing Order of the Board of Revenue, No. 109. On the other hand it is argued for respondents that the suit is governed by s. 59 of Act II of 1864, and reliance is placed on ss. 5 and 6 of the general Limitation Act and on the decisions reported in *Raj Chundra Chuckerbutty* v. *Kinoo Khan*(1), *Reference under Forest Act V of 1882*, *Behari Loll Mookerjee* v. *Mungolanath Mookerjee*(2), *Golap Chand Nowluckha* v. *Krishto Chunder Dass Biswas*.

I have no hesitation in holding that the suit before us is governed by s. 59 of Act II of 1864. That section saves the

(1) I.L.R., 8 Cal., 329. (2) I.L.R., 5 Cal., 110.

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right of parties deeming themselves aggrieved by any proceedings under that Act to apply to the Civil Courts for redress and provides that such Courts "shall not take cognizance of any suit instituted by such parties for any such cause of action unless such suit shall be instituted within six months from the time at which the cause of action arose." The sale impugned by the appellant was a proceeding under Act, and as it had taken place more than six months before the suit, it would be clearly barred but for the alleged fraud. Does fraud then make any difference? The answer to this question is that suggested by Mr. Bhashyam Ayyangar, the Pleader for the second respondent, viz., that the cause of action would then arise from the date on which the fraud was discovered, but that the period of limitation would still be six months. It is provided by s. 18 of Act XV of 1877 that "when any person having a right to institute a suit has, by means of fraud, been kept from the knowledge of such right, the time limited for instituting a suit shall be computed from the time when the fraud first became known to the person injuriously affected by it." Though this provision is contained in the general Act of Limitations, and Act II of 1864 is a special law applicable to Revenue sales, yet it applies to the case before us, as s. 6 of Act XV of 1877 directs only that the period of limitation, prescribed by the special Act, shall not be affected by that enactment. This view however does not help the plaintiff; for the District Judge observes that the plaintiff had knowledge of the alleged fraud more than six months before suit. I am unable to accede to the suggestion of the appellant's Counsel that the sale in the case before us is not a proceeding under Act II of 1864 within the meaning of s. 59. The true import of the expression "Aggrieved by any proceedings under the Act" is not that the proceedings should be in accordance with the Act and therefore perfectly legal, but that the proceedings, though defective and irregular and therefore not in strict conformity to the provisions of the Act, should be taken professedly under it. If the suggestion of the appellant's Counsel were to prevail, there would be no grievance at all to be redressed by a Civil Court. The section presupposes that certain proceedings were professedly taken under the Act, and that there might possibly be a valid claim to redress on the ground that they were not in accordance with the provisions of the Act and then directs that the claim shall not be adjudicated upon the

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merits, unless it is preferred within six months from the time when the cause of action arose.

It may be an open question whether the proceedings contemplated in s. 59 are those which are vitiated by mere errors of procedure or include those taken without jurisdiction and, therefore, not within the purview of the Act. For instance, there may be a sale when there are no arrears of revenue, or the land sold may not be included in the patta or holding liable to be sold for the purpose of liquidating them. Though in the case before us there was no arrear of revenue on the plaintiff's land, yet there was an arrear on other land included with it in one patta, and it has already been held that one part of a holding is liable to be sold for the arrear due on another portion of the same holding. It is therefore not necessary for the purposes of this reference to determine the question whether, when there are no arrears for which the land in dispute is liable to be sold under Act II of 1864, the sale is a proceeding under the Act.

Another point pressed upon us is that neither the pattadar nor the plaintiff had, according to the plaint, a demand served upon him, and that neither of them was a party to the proceedings held under the Act. It is true that the Collector is bound under s. 25 to cause a written demand to be served on the defaulter and that he can only proceed to recover the arrears under s. 26 by the attachment and sale of the land after the demand has been served on the defaulter, and he has neglected to pay the arrears pursuant to the terms of the demand; but, under s. 5, the Collector has power to sell the land when there is an arrear due upon it, and ss. 25 and 26 only regulate the mode in which that power is to be exercised. The omission to conform to the prescribed procedure is certainly always an irregularity and may also at times be a material irregularity, but I see no sufficient reason to say that the proceeding, however irregular it may be, is not a proceeding under the Act. A distinction should be made for purposes of limitation between a sale in fact and a valid sale; and whenever there has been a sale in fact and it has been made in the professed exercise of the power conferred by the Act, the provision inserted for the limitation of suits must be taken to refer rather to the *factum* than to the validity of the sale, and the sale, however irregular, must be considered to be a proceeding under the Act.

It is then said that the plaintiff was not a party to the proceedings held under the Act, and that he could not be bound by the sale; but I am unable to accede to this suggestion either. It is provided by s. 38 that when land is purchased at a Revenue sale, the certificate of sale shall be conclusive evidence of the fact of the purchase, and by s. 39 that the legal effect of such sale is the lawful succession of the purchaser to all the rights and property of the former land-holder in the land sold. It is further enacted by s. 40 that any Court of competent jurisdiction shall put the purchaser in possession in the same manner as if the purchased land had been decreed to the purchaser by a decision of the Court. It is therefore clear that the intention of the Legislature is to treat the former land-holder as if he was a party, when a sale is held under the provisions of the Act.

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The next contention is one founded on the Standing Order of the Board of Revenue, No. 109; construing it together with the provisions of Act II of 1864, I hold that it was designed to give a discretion to Collectors and thereby regulate departmental practice, but that it was not the intention to deprive them of the statutory power vesting in them under Act II of 1864, or to create a right to set aside a Revenue sale after it has been concluded, for the reason that it was held contrary to the terms of the departmental order.

With reference to the decisions cited on behalf of the appellant, none of them appear to me to support this appeal. Act XI of 1859 has no application in this Presidency, and the Full Bench decisions of the High Court at Calcutta in *Baijnath Sahu* v. *Lala Sital Prasad*, and in *Lala Mobaruk Lal* v. *The Secretary of State for India in Council* are founded upon that enactment.

In the first case a sale was professedly made for arrears of revenue, and it was shown that there were no arrears; and the Court held that the Collector had no right to sell and that it could not really be said to have been a sale under the Act, if the Collector had no right to make it. In the case before us, however, there was an arrear for which the plaintiff's land was liable to be sold.

The question raised for decision in the second case was whether non-compliance with the provisions of s. 6 of Act XI of 1859 was one of the errors of procedure intended to be cured by s. 8 of Bengal Act VII of 1868.

Mr. Justice Mitter and Mr. Justice Tottenham differed in opinion, the former holding that it was not an irregularity that

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could be so cured, and the latter holding the contrary view. The Full Court held that the error was not a mere irregularity, nor one of those errors of procedure, which were intended to be cured by s. 8 of Bengal Act VII of 1868. The learned Chief Justice delivering the judgment of the majority of the Court observed that the sale was professedly held under the Act, but that the question was whether it was a sale under the Act, if the Collector had no right to sell, and that the principle laid down in *Baijnath Sahu* v. *Lala Sital Prasad* applied. It is therefore argued for the appellant before us, that whenever it can be shown that some material error of procedure negatives the Collector's right to sell, the sale, though professedly made under Act II of 1864, is not in law a sale or proceeding under the Act. The scheme of Act XI of 1859 and of Bengal Act VII of 1868 appears to differ from that of Madras Act II of 1864, and the decisions cited proceed, with reference to that scheme, on the view that the Civil Court is at liberty to entertain a suit to set aside the sale for arrears of revenue, if it can be shown that the Collector had no power to sell, either because there were no arrears, or because there was some material irregularity, which would invalidate the sale. If we were at liberty to enter on the merits, we might come to the same conclusion, but what we are concerned with is the question of limitation, which refers, as already observed, to the *factum* rather than the validity of the sale. (Compare Act XI of 1859 and the cognate Acts with Act II of 1864.) I do not see my way to hold that, for purpose of limitation, material error of procedure stands on the same footing with the absence of power to sell. A sale, without jurisdiction to sell, may, on general principles, be said to be void *ab initio*, and therefore, legally non-existent; but a sale, where there is power to sell, but the power is not properly exercised, is only voidable and cannot be said, it seems to me, to have no legal basis nor legal existence until it is set aside by a suit instituted within the time prescribed for such suits. As for the decision in *Sadhusaran Singh* v. *Panchdeo Lal*, it affirms the ruling in *Lala Mobaruk Lal* v. *The Secretary of State for India in Council* that s. 33 of Act XI of 1859 does not bar the Civil Courts from taking cognizance of suits in which it can be shown that the Collector has no right to sell.

The next case relied on is that of *Venkatapathi* v. *Subramanya*. In that case there was really no arrear of revenue. The plaintiff

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had paid the assessment to the village officers who appropriated it to their own use, and making it appear that there was an arrear, when there was none, fraudulently brought the plaintiff's land to sale and purchased it for their own benefit, though in the name of the brother-in-law of one of them. The decision rests on the ground that the plaintiff was entitled upon the facts of that case to assume that the Revenue sale was valid as against the Collector and to claim relief against the parties in possession on the ground of fraud. There the purchaser at the Revenue sale did not buy the land for himself, but bought it benamee for the village officers, who first defrauded the plaintiff by converting the assessment paid to them on account of Government to their own use, then deceived the Collector first by making him believe that there was an arrear and that he had jurisdiction to sell the land and next by putting forward the brother-in-law of one of them as the purchaser, while they really bought the land for their own benefit. On those facts the plaintiff's claim, it was considered, might be treated as one to treat the village officers as holding the land in trust for him by reason of their fraud and not as one brought to set aside the sale under s. 59 of Act II of 1864. On this view art. 95 of the general Limitation Act was considered to be applicable. It is therefore an authority for the position that if the plaintiff's claim can be decreed, in the special circumstances of a case, on the ground that the real purchaser, by virtue of his fraud in creating a jurisdiction to sell, when there is none, can be regarded as holding the land purchased in trust for the real owner, notwithstanding the Revenue sale, it is not a claim under the special Act, but a claim to relief on the ground of fraud governed by art. 95 of Act XV of 1877. It is clearly no authority in support of the contention that a Revenue sale is no proceeding under the Act, when there was an arrear for which the land might be sold under the Act.

The other cases cited are in favor of the respondents' contention.

For these reasons I would hold that the suit before us is governed by the special limitation prescribed in s. 59 of Act II of 1864, subject to the provisions of s. 18 of Act XV of 1877.

Kernan, J.—I would add to the last paragraph "and that the suit should have been brought within six months from the discovery of the fraud."

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Parker, J.—I agree that the suit is governed by the spe The limitation prescribed by s. 59, Madras Act II of 1864, for th reasons expressed by us in making the order of reference. Th suit is therefore barred.

Wilkinson, J.—I concur.

APPELLATE CIVIL.

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

1888. Nov. 26. Dec. 18.

ABBOY (PLAINTIFF), APPELLANT,

and

ANNAMALAI AND ANOTHER (DEFENDANTS Nos. 3 and 4), RESPONDENTS. *

Lis pendens—Transfer of Property Act—Act IV of 1882, s. 52—When a suit becomes contentious—Priority of registered mortgage.

As soon as the filing of the plaint is brought to the notice of the defendant, the proceeding becomes contentious, and any alienation subsequent to that is subject to the doctrine of *lis pendens*.

A mortgage was executed on 25th June and was registered. On the same day, prior mortgagees filed a suit against the mortgagors on an unregistered mortgage of the same land: they obtained a decree and attached the mortgage property:

Held, that the registered mortgagee was entitled to priority and his mortgage was not affected by the rule of *lis pendens*.

APPEAL against the decree of E. C. Johnson, Acting District Judge of South Arcot, in appeal suit No. 209 of 1887, affirming the decree of V. Malhari Rau, District Munsif of Chidambaram, in original suit No. 553 of 1886.

This was a suit to recover Rs. 196-8-0 due on a registered mortgage-deed executed to the plaintiff by defendants Nos. 1 and 2 on 25th June 1884. Part of the consideration for the execution of this mortgage to the plaintiff was the discharge by him of a previous encumbrance. On the 4th September 1878 defendants Nos. 1 and 2 had executed a mortgage of the same lands to the father of defendants Nos. 3 and 4. This mortgage was unregistered. On the date of the execution of the registered mort-

* Second Appeal No. 647 of 1888.

to the plaintiff, defendants Nos. 3 and 4 filed a suit—original No. 231 of 1884—on the unregistered mortgage of 4th ember 1878; and subsequently having obtained a decree, ached the mortgage property in execution. The present plaintiff ntervened in execution, but his objections were overruled. He ccordingly filed the present suit against the mortgagors and the prior mortgagee.

Defendants Nos. 1 and 2 were *ex-parte*.

Defendants Nos. 3 and 4 pleaded, *inter alia*, that the plaintiff and defendants Nos. 1 and 2 had fraudulently colluded together to defeat their rights under the prior mortgage, that the plaintiff's mortgage had been executed *pendente lite*, and that they were accordingly entitled to priority in respect of their prior mortgage though unregistered.

The District Munsif observed:—"defendants Nos. 3 and 4 made no attempt . . . . to show there was any fraud in the transaction. On the other hand there is enough to make out that the plaintiff acted *bonâ fide* and with great circumspection . . . . . I hold there was no collusion between plaintiff and defendants Nos. 1 and 2 to defraud defendants Nos. 3 and 4." The District Munsif, however, held that the rule of *lis pendens* was applicable and passed only a personal decree against defendants Nos. 1 and 2 and dismissed the suit as against defendants Nos. 3 and 4.

The Acting District Judge affirmed the decree of the District Munsif.

The plaintiff preferred this second appeal.

Krishnasami Ayyar for appellant.

Pedroza for respondents.

The arguments adduced on this second appeal appear from the judgment of the Court (Collins, C.J., and Wilkinson, J.).

JUDGMENT.—Three questions have been argued in second appeal. First, it is argued that the doctrine of *lis pendens* does not apply, as the suit does not become contentious until summons is served on the defendant; secondly, it is maintained that the plaintiff's suit as against defendants 3 and 4 should not have been dismissed, as even if defendants 3 and 4 have priority, the plaintiff would be entitled to a decree declaring his lien on the property subject to the mortgage of defendants 3 and 4. It is further argued that plaintiff is entitled to priority as he stands in the

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shoes of a prior mortgagee. Both the Lower Courts have held that as the plaintiff's mortgage-deed, exhibit A, was executed on the day on which defendants 3 and 4 presented their plaint in original suit No. 231 of 1884, the plaintiff took subject to the decree passed in that suit. The question we have to decide is when does a suit or proceeding become contentious? The doctrine of *lis pendens* is that no alienation during suit can be allowed to affect the rights of those claiming under the decree in the suit. But in order that third parties should be bound by the decree passed in the suit it is, it appears to us essential that they or that the parties through whom they claim should have had notice, for as remarked by Couch, C.J., in *Kailas Chandra Ghose* v. *Fulchand Jaharri*(1) practically there is no substantial difference between *lis pendens* and having notice of the suit. Until therefore defendants 1 and 2 had notice of the suit filed by defendants 3 and 4 to recover the amount due on the mortgage to their father, they were at liberty to transfer or create a further encumbrance on the property. It was apparently on this ground that a Bench of the Calcutta Court recently held in *Radhasyam Mohapattra* v. *Sibu Panda*(2) that a suit did not become contentious until the summons was served on the defendant. It may, of course, happen that the defendant will not contest the claim, but that does not really affect the question. So soon as the filing of the plaint is brought to the notice of the defendant, the proceeding becomes contentious, and any alienation subsequent to that is subject to the doctrine of *lis pendens*. In the present case, therefore, the plaintiff was not affected, and as his mortgage is registered, it has priority over the unregistered deed of defendants 3 and 4.

The decrees of the Lower Courts are, therefore, modified so far as the defendants 3 and 4 and the property comprised in their mortgage is concerned, and plaintiff will obtain a decree rendering the mortgaged property liable for the sum of Rs. 196-8-0 with further interest and costs in all Courts.

(1) 8 B.L.R., 474. (2) I.L.R., 15 Cal., 647.

APPELLATE CIVIL.

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

VENKANNA AND OTHERS (DEFENDANTS), APPELLANTS,

v.

AITAMMA (PLAINTIFF), RESPONDENT.*

1888. August 30. 1889. Jan. 15.

Civil Procedure Code, s. 13—res judicata—Declaratory decree—Maintenance suit, ecree in—Annual payments.

A Hindu widow obtained a decree in 1876 which provided that she should receive future maintenance annually at a certain rate, but did not specify any date on which it should become due. In 1887 she filed the present suit claiming arrears of maintenance at the rate fixed in the decree of 1876:

Held, that the suit did not lie. *Sabhanatha* v. *Lakshmi* (I.L.R., 7 Mad., 80) distinguished.

SECOND appeal against the decree of J. W. Best, District Judge of South Canara, in appeal suit No. 249 of 1887, affirming the decree of A. Venkataramana Pai, District Munsif of Mangalore, in original suit No. 25 of 1887.

This was a suit by a Hindu widow against the brother and nephews of her late husband to recover Rs. 392-2-0 as arrears of maintenance due up to December 14, 1886, at the rate of Rs. 110 per annum.

The above rate of maintenance had been determined in the decree passed by consent in a previous suit—original suit No. 39 of 1876. In that suit the plaintiff had claimed future maintenance as well as arrears of maintenance already accrued, and obtained a decree which provided that she should receive future maintenance at the above rate annually, but did not specify any particular date on which the annual payments were to be made. An application made by the plaintiff some years afterwards for the execution of this decree was rejected as being barred by limitation. In the present suit it was pleaded that the claim was barred by the law of limitation, and also that the claim was *res judicata* under s. 13 of the Code of Civil Procedure.

* Second Appeal No. 28 of 1888.

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The District Munsif held that the suit was not barred by the law of limitation, on the ground that twelve years had not elapsed since any part of the arrears became payable (Limitation Act, 1877, sch. II, art. 128), and that it was not affected by s. 13 of the Code of Civil Procedure. As to the latter point he said:—

"The claim for future maintenance was made and allowed by mutual consent of the parties, but the wording of the decree was defective in that it did not specify a 'certain date' (*vide* art. 179 (6) of the Indian Limitation Act, 1877), for payment, and it was decided that the execution was barred. The omission to specify a date for payment deprived the plaintiff of the right to enforce such payment by process of execution upon the decree, but the right to maintenance has not been lost and may be enforced by a fresh suit *Sabhanatha* v. *Lakshmi*(1). This right was never denied, but has been established by the decree on the defendant's admission.

"Further, the decree was passed in terms of the compromise effected between the parties, and the fact that by those terms the parties did not choose (as since finally decided) to give the plaintiff the right to enforce annual payments on account of her maintenance *in the same suit*, does not amount to a determination by the Court on the merits negativing the existence of such right. Even when after trial of a suit, the Court declines to grant a decree for recovery of annual payments in execution in the same suit, but declares that the claimant possesses the right to such payments, there would be nothing to prevent a fresh suit for each year's amount."

The District Munsif accordingly passed a decree for the amount claimed and his decree was affirmed on appeal by the District Judge.

The defendants preferred this second appeal.

Mr. *Subramanyam* for appellants.

This suit being a suit for arrears of maintenance, is not governed by *Sabhanatha* v. *Lakshmi*(2). The widow is precluded by the decree in original suit No. 39 of 1876 from suing a second time in respect of the same relief: that decree was not a declaratory decree. *Sanjeeviyah* v. *Nanjiyah*(3).

Ramachendra Rau Saheb for respondent.

(1) I.L.R., 7 Mad., 80. (2) I.L.R., 7 Mad., 80.
(3) 4 M.H.C.R., 453.

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The lower Courts were right in regarding the decree of 1876 as a declaratory decree. *Vijaya* v. *Sripathi*(1), *Ruka Bai* v. *Ganga Bai*(2). The proper way to enforce the plaintiff's right to future maintenance established by that decree was to bring a fresh suit. *Vishnu Shambhog* v. *Manjamma*(3).

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

JUDGMENT:—The defendants appeal against a decree allowing the plaintiff a sum of Rs. 454 on account of arrears of maintenance, which are claimed at a rate fixed by the decree in a former suit between the parties (original suit No. 39 of 1876). It is objected on behalf of the defendants that the plaintiff was precluded from bringing the present suit, because in the former suit, she had prayed not only for arrears of maintenance, but also for maintenance at the same rate in the future; and it was argued that whether or not relief in respect of future maintenance was granted, the present suit would not lie, because in accordance with her prayer in the suit of 1876, she might have obtained a decree which she might have put in execution as regards future arrears as they became due. It seems clear that in the former suit she did ask for relief as to future maintenance and that it was intended to give her such relief, but unfortunately the decree was so drawn up, no date of payment being given, that it has been held that it is incapable of execution. It is contended for the plaintiff that the principle on which the defendants rely is inapplicable, because a Court trying a maintenance suit can only settle the rate of maintenance payable under the then existing circumstances, and cannot make a decree fixing the amount for ever afterwards. It is true that the decree in a maintenance suit is not final in the sense, that the rate fixed can never be altered. If there is a change in the circumstances of the family and the persons obliged by the decree, it may be that they are entitled to have the rate of maintenance reduced; but does not follow that a decree for future maintenance cannot be made, or that it is not final until the circumstances of the family are proved to have altered for the worse.

We think there is no doubt that such a decree may be made,

(1) I.L.R., 8 Mad., 94. (2) I.L.R., 1 All., 594.
(3) I.L.R., 9 Bom., 108.

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and that when a person entitled to maintenance not contented with asking for a declaratory decree has asked for a decree relating to future maintenance, he cannot thereafter bring a separate suit to recover arrears of maintenance. If his former decree has provided for payment periodically and is properly drawn up, he can recover arrears in execution. If his former decree has made no such provision or is not regularly drawn up, it must be either because the relief asked for has been refused or because some mistake has been made. In the former case his remedy is by appeal; in the latter, which is the present case, he can obtain redress by review. The present case differs from *Sabhanatha* v. *Lakshmi* (1), for there it was a declaratory decree only that the plaintiff had obtained in the former suit, and the point now under discussion did not arise. We think the appeal must be allowed. The decrees of the Courts below must be reversed and the suit must be dismissed but without costs.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

1888. Nov. 23.

LUIS AND OTHERS (DEFENDANTS IN O.S. No. 11 OF 1888), PETITIONERS,

v.

LUIS (PLAINTIFF IN O.S. No. 11 OF 1888), RESPONDENT.*

Civil Procedure Code, ss. 494, 588, 622—No appeal lies against an order for issue of notice made under s. 494—Revision by High Court of an order purporting to be made on appeal from such an order.

A petition praying for a temporary injunction in a suit was presented by the plaintiff in a Subordinate Court.

The Judge refused to pass orders on it without hearing the defendants, and ordered notice to issue to them. The plaintiff appealed to the District Judge who granted the injunction prayed for:

Held, that no appeal lay from the Subordinate Court, and that the District Judge had purported to exercise a jurisdiction not vested in him by law.

PETITION under s. 622 of the Code of Civil Procedure, praying the High Court to revise the order of J. W. Best, District Judge

(1) I.L.R., 7 Mad., 80.

* Civil Revision Petition No. 204 of 1888.

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of South Canara, dated 17th April 1888, and made on civil miscellaneous appeal No. 19 of 1888, presented against the order of C. Gopala Nayar, Subordinate Judge of South Canara, dated 7th April 1888, and made on civil miscellaneous petition No. 126 of 1888.

The plaintiff in original suit No. 11 of 1888 on the file of the Subordinate Court of South Canara preferred a petition, civil miscellaneous petition No. 126 of 1888, under s. 493 of the Civil Procedure Code, praying for the issue of a temporary injunction against the defendants in that suit. The Subordinate Judge on 7th April 1888 made the following order on the petition:—

"The case seems to be one of importance. I am disinclined to pass orders without hearing the other side. Notice for hearing on the 11th June."

The petitioner preferred an appeal to the District Court.

The District Judge on the 7th April 1888 made an order granting the temporary injunction, which was subsequently varied by an order made by him on the 17th April 1888.

The respondents preferred this petition to the High Court under s. 622 of the Code of Civil Procedure.

Mr. *Subramanyam* for petitioners.

Subba Rau for respondent.

The Court (Wilkinson and Shephard, JJ.) delivered the following

JUDGMENT:—We are of opinion that the Judge exercised a jurisdiction not vested in him by law, in that no appeal lay from the order of the Subordinate Judge. The Subordinate Judge, as required by s. 494, resolved, before granting the temporary injunction, to issue notice to the defendants. Such order was one made under s. 494, and there is no provision under s. 588 for an appeal from such an order. It is argued that, inasmuch as the plaintiff stated that the object of granting the injunction would be defeated by the delay, the order of the Subordinate Judge was virtually an order refusing the prayer for an injunction and that therefore an appeal lay. We are unable to concede this. The order made by the Subordinate Judge was not the formal expression of his decision on the question, whether an injunction should be granted or not. A discretion is vested in the Court by s. 494 of refusing to grant a temporary injunction if satisfied

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that the object of granting an injunction will not be defeated thereby, and no appeal is provided in case of his refusal. The orders of the Judge were, therefore, *ultra vires*, and we set them aside.

Petitioners will have their costs in both Courts.

APPELLATE CIVIL.

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

1888. Nov. 27. Jan. 15.

VENKATANARASIMHA (PLAINTIFF), APPELLANT,

v.

SURYANARAYANA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Regulation XXV of 1802 (*Madras*), *s.* 11—*Regulation XXIX of* 1802 (*Madras*), *ss.* 5, 7, 10, 16, 18—*Suit for dismissal of a zamindari karnam—Jurisdiction.*

A suit by a zamindar for the dismissal of a zamindari karnam cannot be entertained by a District Munsif.

The Subordinate Court, and the District Court where there is no Subordinate Court, is the tribunal that has taken the place of the Court of Adawlut of 1802.

APPEAL against the order of G. T. Mackenzie, Acting District Judge of Kistna, made in original suit No. 22 of 1887, directing that the plaint be returned to the plaintiff for presentation in the Court of the District Munsif.

This was a suit filed by a zamindar to obtain the dismissal of defendants who are karnams on his zamindari. The District Judge was of opinion that the Madras Regulations XXV and XXIX of 1802 contained nothing to oust the jurisdiction of the District Munsif within the meaning of s. 11 of the Code of Civil Procedure and observed:—

"I consider that the power to try such suits as this is given to Courts of Judicature generally, and that if the phrase Adawlut of the Zilla is used elsewhere in connection with the subject, it was not intended to restrict this jurisdiction to the District Court, but that the phrase is used merely as a synonym for Court of Judicature."

He accordingly made an order to the effect stated above.

Plaintiff preferred this appeal.

Mr. *Shaw* for appellant.

* Appeal against Order No. 96 of 1888.

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The District Court and not the District Munsif's Court is the successor of the Court of Adawlut, *Ramakistnam* v. *Ragavachari* (1), *Ramachandra* v. *Appayya* (2).

Narayana Rau for respondents.

The suit should have been instituted in the District Munsif's Court under s. 15 of the Code of Civil Procedure. Such Courts are Courts of Judicature within the meaning of Madras Regulation XXIX of 1802, s. 5, which provides for the dismissal of karnams "by the sentence of a Court of Judicature"; and Madras Regulation VI of 1816, s. 12, did not affect their jurisdiction to entertain suits for dismissal of karnams. There is a decision of the Sudder Court precisely in point. *Cottaysami Taver* v. *Darasimaya* (3); *Ramachandra* v. *Appayya* (4) was a second appeal from a District Munsif, and the jurisdiction of the Munsif was taken for granted, as also in *Venkayya* v. *Subbarayudu* (5). *Ramakistnam* v. *Ragavachari* (6) only related to the infliction of fines on karnams, and *Ponnusami* v. *Krishna* (7) turned on the construction of a different Regulation, Madras Regulation IV of 1816.

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

JUDGMENT:—The appellant, the zamindar of Nuzvid, sued for the dismissal of the respondents, karnams in his zamindari. He brought the suit in the District Court of Kistna, but the District Judge held that he had no jurisdiction to entertain it and ordered the plaint to be returned for presentation in the Court of the District Munsif. It is contended for the appellant that the District Court is the Court of competent jurisdiction. The contention appears to us to be well-founded, whether regard is had to the course of legislation or of judicial decisions in this Presidency. The first Regulation on the subject is Regulation XXV of 1802. On referring to s. 11,* we see no reason to doubt that the Court designated as

(1) I.L.R., 3 Mad., 405. (2) I.L.R., 7 Mad., 128.
(3) Sudder Court Rulings, 1853-1855, p. 108. (4) I.L.R., 7 Mad., 128.
(5) I.L.R., 9 Mad., 283. (6) I.L.R., 3 Mad., 405. (7) I.L.R., 5 Mad., 222.

* *Section* 11. "The zamindars or landholders shall support the regular and established number of karnams in the several villages of their respective zamindaris.

"The karnams shall be appointed from time to time by the zamindars, and shall obey all legal orders issued by them; but the karnams shall not be liable to be removed from their offices, except by the sentence of a Court of Judicature.

"Where a zamindar, or his under-farmers, tenants or raiyats, may have cause of complaint against a karnam for breach of his duty, such zamindar shall be free to

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competent to dismiss a zamindari karnam was the Adawlut of the Zilla or the Zilla Court. It is true that in two places in the same section the expression "A Court of Judicature" is used, but the sense in which that expression is to be understood is controlled by the direction contained therein as to the procedure to be followed by a zamindar when he has a cause of complaint against a karnam for breach of duty. The material words are: "The "zamindar shall be free to institute a suit in the Adawlut of the "Zilla for the purpose of bringing such karnam to trial and "punishment, but where a zamindar may deprive a karnam of "his office without such previous regular process, the zamindar "shall be liable to make such satisfaction for the injury as the "Adawlut of the Zilla may decree." Reading, again, ss. 5, 7, 10, 16 and 18 of Regulation XXIX of 1802, the Adawlut of the Zilla appears to be the Court thereby intended to deal with the punishment or dismissal of karnams. We are unable to attach weight to the observation of the Judge that "the old Madras Regulations are loosely drawn, and it is doubtful whether any expression used in those regulations was used designedly, and that the draftsman appears to have varied his phrases or to have used synonyms without intending to convey an altered meaning." Observations such as these are at variance with the rules of judicial interpretation, which must govern the construction of enactments so long as they are in force, however loosely they may have been drawn. The next enactments to which we may refer are Regulations I and VII of 1827, which constituted auxiliary Courts and Courts of Native Judges and invested them with the same power and authority within the limits assigned to their local jurisdiction, subject to the condition that they were not to try original suits of more than Rs. 5,000 in value, and subject also to

"institute a suit in the Adalut of the Zila for the purpose of bringing such karnam "to trial and punishment; but where a zamindar may deprive a karnam of his "office without such previous regular process, the zamindar shall be liable to make "such satisfaction for the injury as the Adalut of the Zila may decree.

"Where a karnam may be dismissed from his office by the sentence of a Court "of Judicature, the zamindar shall in the first instance select a successor from the "family of the last incumbent, provided any member of that family be found capa-"ble of performing the duty of karnam; but where no member of the family may "be capable of discharging the duty of karnam, in that case the zamindar shall "exercise his discretion in the appointment of a proper person. The name of the "person appointed to succeed to the office of karnam shall be reported to the "Collector of the Zila by the zamindar."

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certain other restrictions in the case of Native Judges, which it is not necessary to mention for our present purpose.

By Madras Act VII of 1843, Zillah Courts were established under the designation of Civil Courts, and they were authorized to exercise the same civil jurisdiction as was exercised by the Provincial Courts of Appeal, which were then abolished, except that they were directed not to try original suits of less than Rs. 10,000 in value. In every district in which a Court was constituted under Regulation I or VII of 1827, it was authorized to take the place of the old Zillah Court in regard to suits for an amount or value less than Rs. 10,000, and there was no restriction placed upon its jurisdiction or power to entertain special suits, such as those for the dismissal of karnams, which had until then been cognizable by the Court of Adawlut or the former Zillah Court. Neither the Civil Courts Act nor s. 11 of the Code of Civil Procedure introduced any change in this respect. The conclusion to which we come is that the Subordinate Court and the District Court, where there is no Subordinate Court, is the tribunal that has taken the place of the Court of Adawlut of 1802.

In *Ramakistnam* v. *Ragavachari*(1) it was held that under Regulations XXV and XXIX of 1802 the Adawlut of the Zillah (now District Court) in the district of Trichinopoly was the Court competent to fine a zamindari karnam for breach of duty. The power to dismiss and to fine rests on the same provision of law. In *Ponnusami* v. *Krishna*(2) it was held by the Full Bench of this Court that it was the Subordinate Court that was competent to exercise the special jurisdiction conferred on the old Zillah Courts by Regulation IV of 1816, s. 35, cl. 1. The decision in *Ramachandra* v. *Appayya*(3) is not in point, the question decided by it being that a shrotriemdar is not a zamindar or a proprietor within the meaning of Regulations XXV and XXIX of 1802. Nor is the case of *Venkayya* v. *Subbarayudu*(4) on all fours with this case, the object of that suit being a declaration that a particular appointment made by a proprietor was invalid. The case of *Chandramma* v. *Venkatraju*(5) was also a suit for a declaration that an appointment made by a zamindar was in excess of his

(1) I.L.R., 3 Mad., 405. (2) I.L.R., 5 Mad., 222.
(3) I.L.R., 7 Mad., 128. (4) I.L.R., 9 Mad., 283.
(5) I.L.R., 10 Mad., 226.

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authority. The course of decisions therefore does not support the opinion of the Judge.

We set aside his order and direct him to readmit the plaint and deal with it in accordance with law. The costs of this appeal will be costs in the cause.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

1889. Jan. 28. Feb. 6.

NAGAPPA (PLAINTIFF),

v.

ISMAIL (DEFENDANT).*

Limitation Act—Act XV of 1877, sch. II, art. 75—Bond payable by instalments—Default in payment of an instalment—Waiver of a condition of forfeiture on default in payment of one instalment—Acceptance of an instalment overdue.

A bond, payable by instalments, provided that if default was made in paying one instalment the whole debt should become due. The amount of the third instalment was paid five days after it became due. The Lower Court found that this payment was accepted by the obligee as a payment made on account or in satisfaction of the third instalment, and not as a mere part payment in reduction of the whole debt, and that the circumstances indicated an intention to waive the forfeiture though there was no express waiver:

Held, that the acceptance of the amount of the third instalment constituted a waiver within the meaning of art. 75, of sch. II, of the Limitation Act, 1877.

CASE stated for the decision of the High Court under s. 617 of the Code of Civil Procedure by V. Subramanyam, District Munsif of Penukonda, in small cause suit No. 122 of 1888.

The case stated is recited sufficiently for the purpose of this report in the judgment of the High Court.

The bond executed by the defendant to the plaintiff upon which the case arose ran as follows:—

"Bond dated 15th Makasudda of the year Vikrama, executed and given to Tadimari Mallappa, guardian of Namagundha Nagappa, by Gudhudi Fakir Saheb's son, Pedda Ismail Saheb, residing in Jadala.

"The whole of the interest up to date in the matter of former account and bonds being deducted, the sum due in the matter of

* Referred Case No. 15 of 1888.

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principal is Rs. 55-14-0, in letters rupees fifty-five and annas fourteen. Particulars of instalments which were arranged:—

"Rs. 9-5-0, 15th Makasudda of Vishu.
" 9-5-0, 15th Makasudda of Chitrabhanu.
" 9-5-0, 15th Makasudda of Swabhanu.
" 9-5-0, 15th Makasudda of Tarana.
" 9-5-0, 15th Makasudda of Parthiva.
" 9-5-0, 15th Makasudda of Vyaya.

"I bind myself to pay according to these instalments. If I fail to pay in that manner, and should I fail as regards any instalment, I bind myself to pay, without having reference to subsequent instalments, with interest at Rs. 1-8-0 per cent. per month from the date of the execution of the bond. I bind myself to get the payment entered only below this bond. The payments which are not entered in this bond shall not be accepted. To this effect is the bond executed and given with my consent.

"Mark of PEDDA ISMAIL.

"Witnesses to this—
"(Signed) KARNAM CHANNAPPA, witness.
"(Signed) MOVURAPPA, witness."

The bond bore the following endorsements, each being signed for the debtor:—

"Paid towards (the amount of) this bond on the 12th Makasudda of Vishu Rs. 9-5-0.

"Paid on 10th Makasudda of Chitrabhanu Rs. 9-5-0.

"Paid on the 5th Magha Bahula of Swabhanu towards this bond Rs. 9-5-0."

Act XV of 1877, sch. II, Art. 75, to which the question referred related, enacts that for a suit "on a promissory note or bond "payable by instalments, which provides that, if default be made "in payment of one instalment, the whole shall be due," the period of limitation is three years; and, that the period begins to run "when the first default is made, unless where the payee or obligee "waives the benefit of the provision, and then when fresh default "is made, in respect of which there is no such waiver."

The parties were not represented.

The Court (Muttusami Ayyar and Wilkinson, JJ.) delivered the following

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JUDGMENT:—This is a reference made by the District Munsif of Penukonda under s. 617 of the Code of Civil Procedure. The defendant executed in plaintiff's favor a bond for Rs. 55-14-0, payable in six equal annual instalments, commencing on the 15th day of Makasudda of the year Vikrama, corresponding to the 14th February 1881. The bond stipulated that, if default was made in paying any one instalment, the whole debt was recoverable at once with interest at 18 per cent. per annum. Four instalments were paid, and the payments of the first three were endorsed on the document. The third instalment was accepted on the 16th February 1884, five days after it had fallen due. It appears that the fourth instalment was also accepted when it was overdue, but its payment is not endorsed on the bond, nor evidenced by writing. The plaintiff sued to recover the fifth and sixth instalments alleging that fresh default had been made in payment of the fifth instalment. The suit was brought within three years from the date on which the fourth instalment fell due, but it would be barred if the cause of action is taken to have arisen when default was made in payment of the third instalment. Upon these facts, the question referred to us is, whether acceptance of an instalment in arrear amounts to a waiver within the meaning of Limitation Act, sch. II, art. 75.

It is provided by art. 75 that time begins to run when the first default is made, unless where the payee or obligee waives the benefit of the provision (under which the whole debt becomes due), and then when fresh default is made, in respect of which there is no such waiver. It was held in *Papamma Row* v. *Toleti Venkaiya*(1) that if the obligee accepted one or more sums as an instalment or instalments due under the bond, such acceptance amounted to a waiver of the condition of forfeiture, and put an end to the cause of action which accrued, so that the bond was set up again as a bond payable by instalments. In *Satracherla* v *Setarama*(2) it was observed that the clause providing for forfeiture of the right to pay the debt by instalments creates a case of election for the benefit of the creditor at each default, that the creditor may waive the benefit of the provision on each occasion, and that the question whether there is a waiver on any particular occasion is one of fact. It was also pointed out there that it must be ascertained whether

(1) 5 Mad. H.C.R., 198. (2) I.L.R., 3 Mad., 65.

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the payment was accepted on account of a specific instalment, so that an intention to waive the forfeiture might be inferred, or as a mere part payment of the balance due. According to the decisions, therefore, in this Presidency the acceptance of a payment as the instalment in arrear under the bond and in its satisfaction is a waiver. It was similarly held in *Cheni Bash Shaha* v. *Kadum Mundul*(1) that a waiver consists in the receipt of an instalment after due date instead of insisting on payment in full. The decision in *Gumna Dambershet* v. *Bhiku Hariba*(2) was passed with reference to Limitation Act XIV of 1859. It was no doubt observed in *Mumford* v. *Peal*(3) that the abandonment of a right accruing on default and the revival of the right to pay the debt by instalments must be established by cogent evidence. In that case it was held that mere acceptance of a payment after a default had been made in the payment of an instalment was not sufficient proof of a waiver, because the acceptance of the payment was an act consistent, as explained in *Satracherla* v. *Setarama*(4) with an intention to treat it as a part payment on account of the balance due. The mere acceptance of a payment after default in the payment of an instalment may not be sufficient, but when the payment is accepted on account of the specific instalment in arrear as contradistinguished from a part payment on account of the whole debt, there may be sufficient evidence of a waiver. Hence it was that this Court observed in *Papamma Row* v. *Toleti Venkaiya*(5), that the payment must be accepted as a payment on account of an instalment or instalments due under the bond. It is not necessary that the creditor should say expressly that he waives the forfeiture, but it is sufficient if from the amount paid and accepted and the circumstances attending the payment, and the conduct of the parties, an intention to set up the bond notwithstanding the default as one payable by instalments is unequivocally indicated. In the case before us, the District Munsif finds that the payment made after the third instalment had fallen due was accepted as a payment made on account and in satisfaction of the third instalment, and that an intention to waive the forfeiture is sufficiently indicated.

Our answer, therefore, to the question referred to us is that the

(1) I.L.R., 5 Cal., 100. (2) I.L.R., 1 Bom., 125.
(3) I.L.R., 2 All., 863. (4) I.L.R., 3 Mad., 65.
(5) 5 M.H.C.R., 198.

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acceptance of the amount of an instalment in arrear on account or in satisfaction of such instalment and not as a mere part payment in reduction of the whole debt amounts to a waiver within the meaning of Act XV of 1877, sch. II, art. 75.

APPELLATE CRIMINAL.

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

1888. Nov. 22.

QUEEN-EMPRESS

v.

ARUMUGA AND OTHERS.*

Criminal Procedure Code, s. 297—Evidence of accomplice—Corroboration—Misdirection to Jury.

A Judge should caution a Jury not to accept the evidence of an approver unless it is corroborated: the omission to do so amounts to misdirection.

APPEAL against convictions by W. F. Grahame, Acting Sessions Judge of Tinnevelly, and a Jury, in sessions case No. 30 of 1888 on charges of dacoity, house-breaking by night, and theft in a building.

The Sessions Judge said to the Jury in the course of his charge:—

"Witnesses, 1 *Gangan Pujari*, 2 *Virasinnu*, 3 *Gurusami*, and 4 *Solai Nadan*, are the only witnesses for the prosecution whose evidence is of importance. Of those witnesses, the fourth, *Solai Nadan*, is an approver. According to the evidence of those witnesses, a band of twelve or thirteen men, among whom were the prisoners and witness 4, *Solai*, made their way into the inclosure of the temple of *Gangai Amman* near *Vepalapati*, tied the hands of witnesses 1, 2 and 3, unlocked the door of the temple with a key which first witness, *Gangan Pujari*, had, and stole from the temple cloths, money and other articles worth about Rs. 300.

"The men also took some ornaments which had been worn by *Gangan Pujari* and his mother and sister, who slept at the temple that night. They then fastened up in the temple witnesses 1, 2

Criminal Appeals Nos. 433 and 503 of 1888.

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and 3 and the mother and sister of *Gangan Pujari*, and then made their escape. The property before the Court has been identified as part of the property stolen from the temple, and the approver, *Solai*, has pointed out the two billhooks and one brass pot as having been thrown into a well because none of the robbers would take them, and the other brass pot as having been taken by first prisoner. The seventh witness, Head Constable *Subramania Pillai*, has deposed that the billhooks and brass pot were found in the well. First witness Gangan identified only prisoners 3 and 4. Witness 2, *Virasinnu*, and third witness Gurusami identified only prisoners 1 and 3, and the complicity of prisoners 2 and 5 rests on the evidence of the approver alone."

The Jury returned a verdict of guilty against all five prisoners, and the Sessions Judge sentenced them to seven years' rigorous imprisonment.

The prisoners preferred this appeal.

Mr. *Norton* and *Anandacharlu* for appellants.

The Acting Government Pleader (*Subramanya Ayyar*) for the Crown.

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

JUDGMENT:—It is admitted by the Government Pleader that the case against the second and fifth prisoners rests substantially on the evidence of the approver, as the third witness for the prosecution did not mention the name of fifth prisoner when before the Magistrate.

The Sessions Judge should have cautioned the Jury not to accept the approver's evidence unless it was corroborated, and in our opinion it is misdirection not to do so. We set aside the conviction of the second and fifth prisoners and order them to be discharged.

As regards the first, third and fourth prisoners there is other evidence corroborating the approver. We therefore confirm the conviction of the first, third and fourth prisoners, but we reduce the sentence to four years' rigorous imprisonment.

APPELLATE CIVIL—FULL BENCH.

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

1889. Feb. 5.

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

Stamp Act—Act I of 1879, s. 3 (11)—Instrument professing to effect a partition ultra vires of the executants—Instrument of partition.

Persons incorrectly purporting to be co-owners of certain property agreed to divide it in severalty by written documents:

Held, that the arrangement fell within the definition of "instrument of partition" in the Stamp Act, 1879.

CASE stated by the Board of Revenue and referred to the High Court under s. 46 of the Stamp Act, 1879.

The documents upon which the case stated arose ran as follows:—

"Deed of relinquishment of right executed by Sree Panuganti Sesharayanim Garu in favor of Sree Ravu Venkayamma Garu, wife of Sree Ravu Gopalaurayanim Garu, and inhabitant of Katrenulapalle, Padmanayakavelama (by caste) and inamdar, dated 22nd June 1887.

"Of the property which was given to your sister (my wife) Sree Panuganti Lakshmi Venkayamma Garu and to you by your mother, which was lent out to people, which was jointly held by the late Sree Panuganti Lakshmi Venkayamma Garu and you, and which consists of the valuable securities specified in the schedule, viz., documents, bonds, notes, decrees and debts, I take the documents, bonds, notes, decrees and debts from No. 94 to No. 179 (both inclusive) shown in the list, and renouncing all rights I have through her to the remaining documents, bonds, notes, decrees and debts, amounting to (valued at) Rs. 17,290-6-11, from No. 1 to No. 93 (both inclusive), I execute this deed of release in your favor. In the proceedings you may adopt

* Referred Case No. 16 of 1889.

to recover the money on the documents, &c., so relinquished, neither I nor my heirs shall raise dispute of any description at any time.

"This deed of relinquishment of right is executed with my free will and consent.

"(Signed) SREE PANUGANTI SESHARAYANIM GARU."

"Deed of relinquishment of right executed by Sree Ravu Venkayamma Garu in favor of Sree Panuganti Sesharayanim Garu, inhabitant of Katrenulapalle, Padmanayakavelama (by caste), inamdar and son of Sree Panuganti Butchiah Garu, dated 22nd June 1887.

"Of the property which was given to my sister (your wife) Sree Panuganti Lakshmi Venkayamma Garu, and to me by our mother, which was lent out to people, which was jointly held by me and the late Sree Panuganti Lakshmi Venkayamma Garu, and which consists of the valuable securities specified in the schedule, viz., documents, bonds, notes, decrees and debts, I take the documents, bonds, notes, decrees and debts from item No. 1 to item No. 93 (both inclusive) shown in the list, and renouncing all rights I have to the remaining documents, bonds, notes, decrees, debts, amounting to (valued at) Rs. 16,906-9-5, from item No. 94 to item No. 179 as per list, I execute this deed of release in your favor. In the proceedings you may adopt to recover the money on the documents, &c., so relinquished, neither I nor my heirs shall raise dispute of any description at any time.

"This deed of relinquishment of right is executed with my free will and consent.

"(Signed) SREE RAVU VENKAYAMMA GARU."

The case was stated as follows:—

"The Board are not unanimous, and the case will, therefore, be submitted, under s. 46 of the General Stamp Act, to the Honorable the Judges of the High Court for decision.

"The facts are briefly as follows: a mother died leaving property to two daughters, who enjoyed it jointly; one daughter died and her husband quarrelled with the surviving daughter about the property; to stop such quarrelling, a division of the property was made between the surviving daughter and the deceased daughter's husband, which is evidenced by the two documents, the nature and liability of which to duty are the matters now under discussion.

REFERENCE UNDER STAMP ACT, s. 46.

"The documents are counterparts of each other and run as follows:—

"Deed of relinquishment of right of { my sister and me / my wife and you } the property which was given to

by { our / your } mother, which was held { my sister and me / my wife and you } I take from { 1-93 / 94-179 } jointly by No.

on the accompanying list, and renouncing all rights I may have to the remainder, execute this deed of release in your favor."

(Signed)

"The first question is, can the two documents be read together? The Board think not.

"The second is, individually, what are they? On the face of them, they are releases, and the Board think that it is only by what they purport outwardly to be that they can be judged for purposes of stamp-duty.

"If once the question of their legal validity is entered on, the matter becomes more complicated; for the husband having no right to the property can execute no valid 'release,' and the surviving daughter's 'relinquishment of right' in his favor becomes a gift.

"At the same time each document contains an acceptance as well as release, and, *primâ facie*, this is a partition; and it is only when the legality of the matter is gone into that it is seen that the two parties are not co-owners.

"Taken together, the two documents evidence a partition; taken singly, they evidence a release; legally, only one of them is of any effect, and that is as a gift.

"The point, therefore, upon which the Board are in doubt is as to the extent to which they are justified, for purposes of assessment to stamp-duty, in going behind the outward purport of a document, and considering its actual legal validity, whether by itself, or taken in connection with others, and they accordingly refer, for the decision of the High Court, the question how the documents ought to be stamped."

The Acting Government Pleader (*Subramanya Ayyar*) for the Board of Revenue.

Subba Rau contra.

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

REFERENCE UNDER STAMP ACT, s. 46.

JUDGMENT:—Although the documents are styled releases, we are of opinion that they are really instruments of partition.

The parties purport to be co-owners of the property and in that capacity agree to divide the property in severalty.

This arrangement falls within the definition of "instrument of partition" in clause 11, s. 3 of the Stamp Act.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

SOBHANADRI.*

1889. Feb. 11.

Criminal Procedure Code, s. 195—Sanction to prosecute—Registration Act—Act III of 1877, ss. 34, 35, 41—Forged document—Registered by Sub-Registrar.

A mortgagor was charged with making a fraudulent alteration in his mortgage-deed which was then registered by a Sub-Registrar:

Held, that the sanction of the Sub-Registrar was not necessary for a prosecution on a charge of forgery.

Venkatachala in re (I.L.R., 10 Mad., 154,) *Queen-Empress* v. *Subba* (I.L.R., 11 Mad., 3) explained.

CASE reported for the orders of the High Court by W. A. Happell, District Magistrate of Godávari, under s. 438 of the Code of Criminal Procedure.

Rallabhandi Sobhanadri was charged in the Court of the Sub-Magistrate of Kothapetta with committing forgery by fraudulently altering a mortgage-deed. The mortgage-deed was subsequently registered. The question arose whether the Magistrate had jurisdiction to take cognizance of the offence for want of sanction under s. 195 of the Code of Criminal Procedure.

The case was stated as follows:—

"The complainant, Tadigadapa Gopalakrishnamma, who attested a mortgage-deed executed by the accused Rallabhandi Sobhanadri, on 30th October 1888 in favor of Vogeti Ramakrishnayya, asserts that, after the deed was executed but before it was registered, the

* Criminal Revision Case No. 34 of 1889.

QUEEN-EMPRESS v. SOBHANADRI.

accused struck out the words 'Tadigadapa Gopalakrishnamma Garu's inam,' and inserted the words 'my inam field' instead, that he did so with a dishonest intention, viz., to assert his claim to field 557 which belonged to the complainant, and that he thereby committed forgery. This mortgage-deed has been registered by the Kothapetta Sub-Registrar; and if a Sub-Registrar is a Court within the meaning of s. 195 of the Code of Criminal Procedure, then the Sub-Magistrate had no power to entertain the complaint without the Sub-Registrar's sanction.

"In 1881 Mr. Justice Innes decided that a Sub-Registrar is not a Court (see Weir's Criminal Rulings, 1882, page 400). A few years later a Divisional Bench of the High Court in *Queen-Empress* v. *Subba*(1) decided that a Sub-Registrar is not a Court. In 1886 another Divisional Bench of the High Court in *Venkatachala in re*(2) decided that a Sub-Registrar is a Court. The latest ruling, however, is that of the Bombay High Court in *Queen-Empress* v. *Tulja*(3), and they ruled that a Sub-Registrar is not a Court within the meaning of s. 195 of the Code of Criminal Procedure. My own opinion is that a Sub-Registrar is not a Court. That was the opinion I held in 1886 and which I communicated to the Mayavaram Sub-Magistrate, who, in consequence, committed a certain forgery case to the Tanjore Sessions; but that opinion was overruled by Brandt and Parker, JJ., in *in re Venkatachala*. Their ruling, though the latest passed by the Madras High Court is opposed to two previous rulings of the same Court and to a ruling of the Bombay High Court. I therefore request that the question be referred to the High Court for an authoritative ruling."

Counsel were not instructed.

The further facts appear from the judgment of the Court (Muttusami Ayyar and Parker, JJ.).

JUDGMENT.—The decision of Turner, C.J., and Hutchins, J., now reported in *Queen-Empress* v. *Subba*(3), was not overlooked in the case *in re Vencatachala*(2), but the ground on which it was distinguished was that in the earlier case, the Sub-Registrar was acting under part VI (ss. 34-35) of the Registration Act and in the latter case under part VIII (s. 41).

(1) I.L.R., 11 Mad., 3. (2) I.L.R., 10 Mad., 154. (3) I.L.R., 11 Mad., 3.

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In the former case, the Sub-Registrar could not determine whether or not the document was executed, and if execution was denied, he was obliged to refuse registration. The document could hardly therefore be said to be given in evidence before him by a party to any proceeding; whereas in the latter case (that of a will), s. 41 makes it incumbent upon the Sub-Registrar to satisfy himself that the document has been really executed by the testator, and the document has to be given in evidence before him in a proceeding in which the Sub-Registrar has to determine whether it shall or shall not be registered. A Sub-Registrar acting under s. 41 is exercising similar powers to a Registrar acting under ss. 73–75, as to which see High Court Proceedings, 12th May 1881, No. 962(1). We think, therefore, the Joint Magistrate is in error in saying that the two rulings of this Court are in conflict, though we agree with him that in the case under reference the sanction of the Sub-Registrar is not necessary. The Bombay case, *Queen-Empress* v. *Tulja*(2), is no doubt in conflict with the Madras decision in *in re Venkatachala*, it may be well if the point again arises that the question should be reconsidered.

APPELLATE CIVIL—FULL BENCH.

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

1888. Sept. 11. 1889. Feb. 15.

REFERENCE UNDER S. 39 OF ACT V OF 1882.*

Forest Act—Act V of 1882 (*Madras*), *s.* 6—*Tree patta—Occupier of land.*

The holder of a tree *patta* is a *known occupier of land* within the meaning of s. 6 of the Madras Forest Act.

CASE stated for the opinion of the High Court by G. MacWatters, Collector of Salem, under s. 39 of the Madras Forest Act.

This case depended on the construction of the last clause of s. 6 of the Madras Forest Act. The question referred was whether Madhava Rau and eleven others, who held a joint *patta* with him of certain tamarind trees, were entitled to be served with a notice

(1) Weir's Criminal Rulings, 3rd ed., p. 844. (2) I.L.R., 12 Bom., 36.
* Referred Case No. 3 of 1887.

REFERENCE UNDER S. 39 OF MADRAS FOREST ACT.

to the same effect as the proclamation made by a Forest Settlement officer on a notification of Government under s. 4.*

The *pattadars* in question, not having been served as above, did not assert their claim till after the expiry of the time fixed in the proclamation. Subsequently, however, the following application was made:—

"There is a tree patta for 11 tamarind trees in Naralapulli village. These trees were held on *patta* and enjoyed for the last 6 years by my brothers Srinivasa Row and Hanumantha Row, and, after them, by their sons Vyasamurthi Row and Vencoba Row and were leased for 5 years from 1884 to one Thammana Chetti of Chinna Mekalapully.

"Now I hear that the trees have been included in the Maharajagadai Reserve and I was also told by the lessee, when I had been

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* *Section* 4: "Whenever it is proposed to constitute any land a reserved forest, the Governor in Council shall publish a notification in the Fort St. George Gazette and in the Official Gazette of the district—

(*a*) specifying, as nearly as possible, the situation and limits of such land;

(*b*) declaring that it is proposed to constitute such land a reserved forest;

(*c*) appointing an officer (hereinafter called the Forest Settlement officer) to enquire into and determine the existence, nature, and extent of any rights claimed by, or alleged to exist in favor of, any person in or over any land comprised within such limits, or to any forest produce of such land, and to deal with the same as provided in this chapter.

The officer appointed under clause (*c*) of this section shall ordinarily be a person other than a forest officer; but a forest officer may be appointed by the Governor in Council to attend on behalf of Government at the enquiry prescribed by this chapter."

Section 6: "When a notification has been issued under section 4 the Forest Settlement officer shall publish in the Official Gazette of the district, and at the head-quarters of each taluk in which any portion of the land included in such notification is situate in every town and village in the neighbourhood of such land, a proclamation—

(*a*) specifying, as nearly as possible, the situation and limits of the land proposed to be included within the reserved forest;

(*b*) setting forth the substance of the provisions of section 7;

(*c*) explaining the consequences which, as hereinafter provided, will ensue on the reservation of such forest; and

(*d*) fixing a period of not less than three months from the date of publishing such proclamation in the Official Gazette of the district and requiring every person claiming any right referred to in section 4, either to present to such officer, within such period, a written notice specifying, or to appear before him within such period and state the nature of such right, and in either case to produce all documents in support thereof.

The Forest Settlement officer shall also serve a notice to the same effect on every known or reputed owner or occupier of any land included in or adjoining the land proposed to be constituted a reserved forest, or on his recognized agent or manager. Such notice may be sent by registered post to persons residing beyond the limits of the district in which such land is situate."

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to Maharajagadai a few days ago, that it was decided by your honor that the lessee should enjoy the trees until his lease expired, and that then the tope should be included in the Government reserve. The Government accounts and village officers will prove that my brothers and others held the patta, and we enjoyed the trees for the last 60 years. I request that an enquiry be made and the tope in question confirmed as per *patta* and excluded from the reserve. I don't know, perhaps the time for the preference of a claim expired or did not expire as I was given no notice in the matter. I only casually came to know of this affair when I had been to Maharajagadai. I therefore request that my claim may be admitted under s. 17 of the Forest Act and disposed of in the regular way."

On the 15th November 1886 the Forest Settlement officer passed the following order:—

"Claimant is not entitled to have any notice served on him under the Forest Act, as he does not own or occupy land in the reserve. It is possible that the facts stated in his petition are true, as is partly proved by the evidence on record in the claim No. 279 of 1886. As the time for preference of claims has now expired, I cannot entertain his claim; he will have to satisfy the Collector or District Forest officer hereafter that his claim is a just one, which fact no doubt the village accounts will prove, but I cannot now entertain the claim. He should also keep this endorsement."

An appeal against this order was preferred to the Collector of Salem who referred for the opinion of the High Court the question whether "a notice should have been served on Madhava Rau and his joint *pattadars* in respect of the tamarind trees for which they hold a joint *patta*."

Upon this reference the High Court (Muttusami Ayyar and Brandt, JJ.) delivered the following

JUDGMENT:—"The facts of the case are sufficiently stated in "the letter of reference. Act V of 1882 (Madras), s. 2, explains "that 'trees' include stumps, bamboos, and brushwood, and that "'timber' includes trees when they have fallen or have been "felled, whether cut up for any purpose or not; but there is no "definition of land, or of a tree which continues to derive nourish-"ments from the land. The Madras General Clauses Act contains "no definition of land, and the General Clauses Act, 1868, is, in

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"terms, applicable only to Acts of the Governor-General in "Council. One of the objects of the Madras Forest Act is to "provide a special tribunal and procedure for the adjudication "of civil rights of a particular class; and having regard to the "provisions of the General Clauses Act, we have already held that "for the purposes of the Code of Civil Procedure land includes "standing crops(1). We understand the right claimed by the "petitioner to include a right to the site on which the trees stand "as well as their produce.

"We are of opinion then that the holder of a tree *patta* is an "owner or occupier of land within a meaning of the last clause "of s. 6 of the Forest Act. We express no opinion as to the "effect of the words 'known or reputed' owner or occupier in that "section as they do not form the subject as reference."

With regard to the sentence at the end of the first paragraph of the above judgment the Collector of Salem was directed to explain the matter more particularly and to make a further reference to the High Court.

These directions were contained in an order of Government (made on certain proceedings of the Board of Revenue), dated 21st November 1887, in which it was said:—

"In Government Order No. 51, Revenue Department, dated 20th January 1887, it was held that the so-called "tree *pattadars* are mere lessees of trees and not owners or occupiers of land" and not therefore entitled to separate notices under s. 6 of the Forest Act.

"Government can give and frequently have given separate *pattas* to different persons for the cultivation of the land on which trees stand and for the enjoyment of the produce of the trees themselves. Under Board's Standing Order No. 6 (8) the tree *pattadar* has only a "preferential claim" to a *patta* for the land, if applied for by another for cultivation. The tree *patta* merely gives the *pattadar* a right to certain specific "forest produce," and this, of course, carries with it the right of access. A right to forest produce is placed on the same level in the Act (s. 11) as rights of way, water-course and pasture; but it has never been contended that persons having these latter rights are, as

(1) Madayya *v.* Venkata, I.L.R., 11 Mad., 193.

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such, entitled to separate notices. The proclamations in the villages and Gazette are intended to give them notice."

In his further letter of reference the Collector quoted Circular Orders of the Board of Revenue, dated 21st April 1858, and 28th April 1859, respectively, and the proceedings of the Board of Revenue, dated 27th March 1868, and proceeded to say:—

"In Malabar, Tanjore and Tinnevelly the tree *patta* carries with it the right to the land on which the trees stand when in these districts the tree tax is considered a substitute for the land assessment, and in all districts, whenever the tree assessment is nearly equal to or exceeds the land assessment, the holder of the tree *patta* enjoys also the land.

"It was only in 1887 that the tree tax was finally decided to be credited to the Forest Revenues at all. This is now done in all cases except where it is a substitute for the Land Assessment. Before that it was credited to Land Revenue, and in later years that on trees on waste to the Jungle Conservancy Fund. The Board of Revenue in the discussions that took place about this matter in October 1886 stated 'that a very real distinction under-'lay the question of whether trees were cut down or were allowed 'to stand; that in the latter case the trees themselves formed 'the actual crop on the land, and that the rent paid for them was 'in effect the land tax due on the land.' That claims to the rights of a tree *pattadar* were intended by the Legislature to be disposed of under the head of Forest Produce seems to me to be very inconsistent with the fact above stated, viz., that the tax on *patta* trees was only decided to be credited to Forest about a year ago. The forest produce referred to in s. 10 of the Forest Act appears to me to be the forest produce properly so called and as administered before the Forest Act came into force, *e.g.*, honey, wax, bamboos, gallnuts, &c.

"I am of opinion that the ordinary tree *patta*, that is a *patta*, without conditions as in this case, gives the tree *pattadar* an interest in the site on which the trees stand, and that he is at the very least an occupier of such site and entitled to a special notice under s. 6 of Madras Act V of 1882."

The renewed reference having come on for hearing before Kernan and Muttusami Ayyar, JJ., the matter was referred to the Full Bench by the following

ORDER OF REFERENCE TO THE FULL BENCH. We said in

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our previous order that we understood the right claimed by the petitioner to include a right to the site on which the trees stand as well as their produce. This is said to be a false or erroneous assumption both by the Government and the Board of Revenue. They do so on two grounds: the first is that the tenure evidenced by tree *pattas* does not include a right to their site, and the second is that the right to the produce does not stand on a higher footing than the forest produce referred to in s. 10 of the Forest Act. It is no doubt true that the Forest Act does not contemplate the issue of a separate notice in respect of right to mere forest produce. The questions we shall have to consider are—(1) Whether a tree *pattadar* is a mere usufructuary without an interest in the soil, regard being had to the special tenure evidenced by such *pattas*. (2) Whether the right to the produce of the trees is a right to forest produce or in the nature of such right within the meaning of the Forest Act. Of course the opinions of Government and of the Board of Revenue are not binding upon us, but the question is one of considerable general importance, and the questions were neither fully argued nor considered. It is desirable to allow them to be fully argued on both sides and given an authoritative decision once for all. In order that the decision may be authoritative, it is desirable to have the matter argued before a Full Bench, including a Judge who has had a practical knowledge of the special tenure.

The Acting Government Pleader (*Subramanya Ayyar*) for the Crown.

The tree *pattadar* is not an owner or occupier within the meaning of s. 6 of the Forest Act and is not entitled to specific notice of the proclamation or notification. Specific notice is only required for owners or occupiers, not for those who have rights to forest produce as referred to in s. 10. It is only under that section that the Collector could entertain the appeal. Section 2 includes trees under forest produce, and therefore the tree pattadar is one of those persons whose claims have to be dealt with under s. 11. He has no right to the site. Thus the Board of Revenue say in their Order, upon which the further reference has been made :—

"Collectors are authorized to grant tree *pattas* or permanent tree-rent licenses for scattered trees standing in unoccupied waste land, the *pattadar* to pay tree-tax at the revised rates, and to have the usufruct of the trees with the right of transfer or alienation,

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but to have no power to fell without permission. When an application or darkhast is made for waste land containing scattered trees which are held separately in this way, the holder of the trees is to be offered the first choice of taking the land at the *tarum* assessment. The tree tax is here credited to Land Revenue, Miscellaneous."

It also appears from the terms of the reference that the tree *pattadar* cannot fell the trees without permission, and if any one applies for the land on which the trees stand he is required either to take the land or to submit to eviction. He may have an interest in immovable property, but not necessarily an interest in land. Though the tree *pattadar* may have a right in or over land comprised within the limits of a forest still he has only a right to forest produce and cannot be regarded as the owner and occupier within s. 6.

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

JUDGMENT:—This is a case referred to the High Court under s. 39 of the Madras Forest Act by the Collector of Salem, and the question for the Full Bench is whether the holder of a tree *patta* is an owner or occupier of land within the meaning of the last clause of s. 6 of the Forest Act. The Collector states his opinion—though with some hesitation—that the holder of the tree *patta* does fall within the section, but the Acting Government Pleader has been instructed to argue against this view.

It is urged for Government that the holder of a tree *patta* has only a right to forest produce (s. 10, clause (*d*)), and that his claim can only be dealt with under ss. 11-13 of the Forest Act. On the other hand the Collector is of opinion that a tree *patta* gives the *pattadar* at any rate an interest as occupier in the site on which the trees stand.

It appears to us that the view of the Collector is correct. In *Sukry Kurdeppa* v. *Goondakull Nagi Reddi*(1) it was held that a document creating a right of use of growing trees for a term of years was an interest in immovable property within the meaning of the Registration Act. The owner of a tree *patta* has it seems to us more than a mere right of access to gather the fruits of trees

(1) 6 M.H.C.R., 71.

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found in a forest (see definition of forest produce, s. 2*); he has an interest during the continuation of his *patta* in the tree itself, and in all that is necessary for the growth of the tree including the soil in which it grows. Such interest, though far inferior to the interest of the owner or lessee of the soil, is still an interest in land.

In our view the class of rights referred to in s. 10, clauses (*a*) to (*d*), of the Forest Act are village communal rights. With regard to these it is reasonable that the Legislature should have provided that notice of the intention to acquire them should be made by public proclamation since it would be almost impossible to serve a separate notice upon every person interested; but the Legislature has been careful to provide that a separate notice shall be served upon every *known* or *reputed* owner or occupier of land, and the holder of a tree *patta* in a village is certainly, *quoad* his right to the trees in his *patta*, a *known* occupier.

This view can be tested by a precisely similar case in which there could be no doubt that a lease of what is defined as forest produce is an interest in land. If for instance there was a gravel quarry within the limits of land taken up as a reserved forest which had been leased to a contractor for a term of years, there could not be a doubt that that contractor was a known occupier of land within the meaning of s. 6 and entitled to a special notice. Yet surface soil is forest produce within the meaning of s. 2. Our answer to the reference is that the holder of a tree *patta* is a known occupier of land within the meaning of s. 6 of the Forest Act.

* "'Forest produce' includes the following things when found in or brought 'from a forest (that is to say)—minerals (including limestone and laterite), "surface-soil, trees, timber, plants, grass, peat, canes, creepers, reeds, fibres, leaves, "moss, flowers, fruits, seeds, roots, galls, spices, juice, catechu, bark, caoutchouc, "gum, wood-oil, resin, varnish, lac, charcoal, honey and wax, skins, tusks, bones "and horns."

APPELLATE CIVIL.

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

BIYYAKKA AND OTHERS (APPELLANTS),

v.

FAKIRA AND ANOTHER (RESPONDENTS.)*

1889. Feb. 14.

Civil Procedure Code, ss. 234, 332, 588—*Death of judgment-debtor between order for possession in execution of decree and delivery of possession—Appeal against appellate order reversing an order under s.* 332.

A decree-holder in a District Munsif's Court obtained an order for possession of land in execution of his decree on 20th August, on which day the judgment-debtor died. Possession was delivered on 28th August. The persons dispossessed presented a petition under s. 332 of the Code of Civil Procedure disputing his right to be put into possession, on the ground, *inter alia*, that the judgment-debtor was not represented on the record.

On appeal against the appellate order of the District Judge:

Held, assuming that the order for possession was made prior to the death of the judgment-debtor, there was no necessity for the decree-holder to bring any other person on to the record between the date of that order and the date on which the order was executed. *Ramasami* v. *Bagirathi*(1) distinguished.

APPEAL against the order of R. Sewell, Acting District Judge of Cuddapah, on civil miscellaneous appeal petition No. 206 of 1887, reversing the order of A. F. Elliot, District Munsif of Cuddapah, on civil miscellaneous petition No. 443 of 1887.

This was a petition presented under s. 332 of the Code of Civil Procedure by three persons alleging that they had been dispossessed of certain immovable property belonging to them, in execution of the decree passed in original suit No. 49 of 1887 to which they were not parties.

The plaintiff, in whose favor the decree was passed, obtained an order for possession of the immovable property in question on 20th August 1887, on which day the judgment-debtor died. Possession was given to the decree-holder in pursuance of the above order, on 28th August, no steps having been taken in the interval for the representation of the interests of the deceased

* Appeal against order No. 73 of 1888. (1) I.L.R., 6 Mad., 180.

BIYYAKKA v. FAKIRA.

judgment-debtor. On the 23rd September the present petition was filed.

The District Munsif held on the authority of *Ramasami* v. *Bagirathi*(1) that the legal representative of the deceased judgment-debtor should have been brought on to the record before the decree was executed, and accordingly directed that the petitioners should be replaced in possession.

The decree-holder filed a petition of appeal to the District Court against this order under s. 588 of the Code of Civil Procedure, and the District Judge made an order thereon reversing the order of the District Munsif, and remanded the petition for disposal on the merits observing :—

"The final order to put plaintiffs in possession was passed during the life-time of the debtor, and no further order was required. Section 234 is permissive not mandatory. The decree-holder 'may' apply, not 'shall' apply, for execution against his representatives.

"I think the observations of Oldfield, J., in *Stowell* v. *Ajudhia Nath*(2) apply. Section 234, Civil Procedure Code, enables the holder of a decree, if a judgment-debtor dies before the decree has been fully executed, to apply to the Court which passed it to execute the same against the legal representative of the deceased; but if the section is applicable to a case where the judgment-debtor dies while execution is proceeding and after sale of property has been ordered, there is nothing in it to imply that the sale is absolutely void, if no legal representative has been brought on the record, when it has been made on the authority of a Court having jurisdiction."

The petitioners preferred this appeal against the order of the District Judge.

Subramanya Ayyar for appellants.

Sivagnana Mudaliar for respondents.

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

JUDGMENT.—The question raised by the appellants' pleader for determination is whether the decree-holder was bound to bring on the record the representatives of the deceased judgment-debtor

(1) I.L.R., 6 Mad., 180. (2) I.L.R., 6 All., 255.

BIYYAKKA v. FAKIRA.

before possession was given to him. The order for possession was passed and the judgment-debtor died on the 20th August. The warrant was executed and possession given to the judgment-creditor on the 28th August. The persons in possession then came in under s. 332, Civil Procedure Code, claiming to be in possession on their own account. The District Munsif instead of following the procedure laid down by s. 332, held that the legal representative should have been brought in before application was made for execution and set aside the order for delivery, directing possession to be given to the claimants. On appeal the District Judge reversed the order of the Munsif. His order was right, but the grounds given for his order were wrong. The Munsif was bound to proceed to investigate the matter in dispute, and if he then found that the claimants were in *bonâ fide* possession of the property on their own account or on account of some person, other than the judgment-debtor, he could have made an order for restoration of the property. Section 234 had nothing to do with the case, as we must take it that the order was passed before the death of the judgment-debtor. So far as the judgment-creditor was concerned he obtained an order for possession prior to the death of the judgment-debtor, and there was no necessity for him to bring any other person on the record between the date of that order and the date on which the order was executed. He had nothing further to do unless he wished to bring in the legal representatives of the judgment-debtor. It was for the Court to execute the order passed, and s. 332 provides the remedy appropriate to the present case. Under these circumstances the rule in *Ramasami* v. *Bagirathi*(1) is not in point. The appeal fails and is dismissed with costs.

(1) I.L.R., 6 Mad. 180.

APPELLATE CIVIL.

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

1888. July 20. 1889. January 21. March 4.

MUTTUKANNU (PLAINTIFF No. 2), APPELLANT,

v.

PARAMASAMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Dancing girl caste—Adoption—Plurality of adoptions—Immoral or illegal purpose of adoption.

As a matter of private law, the class of dancing women being recognised by Hindu law as a separate class having a legal status, the usage of that class in the absence of positive legislation to the contrary regulates rights of status and of inheritance, adoption and survivorship.

A dancing woman adopted two daughters, of whom the latter was adopted in the year 1854. It was found that the custom obtaining among dancing women in Southern India permits plurality of adoptions:

Held in second appeal, that the daughter subsequently adopted succeeded to the adoptive mother in preference to the son of the daughter previously adopted.

SECOND APPEAL against the decree of C. Venkobacharyar, Subordinate Judge of Madura (West), in appeal suit No. 439 of 1886 reversing the decree of V. Kuppusami Ayyar, Additional District Munsif of Madura, in original suit No. 531 of 1885.

A dancing woman named Minal hypothecated her house to defendant No. 1, who, having sued and obtained a decree on the hypothecation deed, brought the house to sale in execution, and became the purchaser. He subsequently sold one moiety of the house under exhibit A to Minal herself and the other moiety under exhibit IV to defendant No. 2, who was the son of a deceased daughter by adoption of Minal. Exhibits A and IV were executed on the same day.

This suit was brought by Minal against the three defendants (of whom the third was asserted to have joined with the second in obstructing Minal in the exercise of her rights) to establish, *inter alia*, her right to have access to the room set apart for the worship of the family idol in the moiety of the house which was in the possession of defendant No. 2, and to obtain a decree directing defendants Nos. 2 and 3 not to interfere with such right, and to

* Second Appeal No. 838 of 1887.

remove the obstruction caused by them to its exercise. Defendant No. 1 was *ex parte*.

During the progress of the suit Minal died, and both defendant No. 2 and one Muttukannu claimed to be her legal representatives, the former by reason of the relationship referred to above, and the latter as being herself an adoptive daughter of the deceased plaintiff. Both the District Munsif and the Subordinate Judge held that Muttukannu's claim to represent Minal was superior to that of defendant No. 2, but they differed on the construction of the sale deeds exhibits A and IV. The District Munsif considered these documents reserved to Minal the right claimed by her and provided for her having access to the room set apart for worship: and he was also of opinion that on Minal's death the right devolved on her legal representative. On appeal, however, the Subordinate Judge decided that the right of worship and of access to the room in question was personal to Minal and dismissed the suit.

This second appeal was preferred by Muttukannu, for whom it was contended that the Subordinate Judge has misconstrued exhibits A and IV. On the other hand it was *inter alia* argued for defendant No. 2 that the appellant was not the legal representative of the deceased Minal.

Parthasaradhi Ayyangar and *Rama Rau* for appellant.

Subramanya Ayyar and *Bhashyam Ayyangar* for respondents.

The High Court (Muttusami Ayyar and Parker, JJ.), held that on the true construction of exhibits A and IV, the right claimed was heritable; but as to the objection to the admission of the appellant on to the record, the Court remitted the three following issues for trial:—

(1) Was it the appellant or the second defendant's mother that was first adopted by Minal?

(2) If the latter was first adopted, was the appellant adopted during the life-time of the second respondent's mother or after her death?

(3) If the former, when was the adoption made, and whether it was warranted by the custom of the caste, and whether such custom, if true, is valid?

Upon these issues the Subordinate Judge recorded findings to the effect that the mother of defendant No. 2 was first adopted, and that during her life-time the appellant was adopted in 1854;

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and that the appellant's adoption was warranted by the custom of the caste. He also recorded a finding that this custom was valid observing :—

"The word 'dasi' in its ordinary and accepted signification means a dancing girl in a pagoda. The Tamil expression means 'the slave of devas (gods).' The dancing girls are admitted as dasis after a certain ceremony in the temple called the tying of bottu or thali. This has been put a stop to since the passing of the Indian Penal Code. Defendant's vakil contends that those who are not so admitted cannot be dancing girls in the real sense of the term 'dasi.' In the circumstances of this case, I thought the question who are or who are not strictly dasis was not relevant. Plaintiff is a dasi admittedly and therefore the only point for consideration is whether the custom of plurality of adoptions is legal and valid in the class of dancing girls. Considering that the primary object of such adoptions is the gaining of wealth, naturally enough, plurality of adoptions came into vogue among the class, and indeed it seems to have found great favor and came to be recognized as a usage. This usage having been accepted by the community of dancing girls, and acted upon, and it not being repugnant to the feelings of the class, but one bringing wealth, it became a valid custom. The instances shown in the evidence and the consciousness of the class seem to prove clearly the existence of the custom and its validity. The documents D and E also support this conclusion. The custom, according to the evidence in the case seems to have been an ancient and uniform one. It has all the essentials to make it valid. I therefore find the third issue in the affirmative."

On the return of these findings the case came on for re-hearing before Muttusami Ayyar and Parker, JJ., from whose judgment the arguments adduced on either side appear sufficiently for the purpose of this report.

JUDGMENT.—This second appeal comes on for disposal upon findings on issues remitted for trial. The first plaintiff, it has been found, adopted the second defendant's mother, and during her life-time adopted again the second plaintiff. It has also been found that the custom obtaining among dancing girls in Southern India permits plurality of adoptions. The question arising for decision is whether the custom ought to be recognized as having the force of law in the class in which it obtains. We are referred

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to no decided case in which a second adoption was recognized among dancing girls, though it was made during the life-time of the first adopted daughter. There is also no foundation for it in the analogies of the ordinary Hindu law of adoption. According to it, it is only a son that can be adopted, and he can only be adopted when there is no aurasa or adopted son or such son's son or grandson alive. Though the question now raised was also raised in *Venku* v. *Mahalinga*(1), yet it was not there necessary to decide it as it was a case from South Canara where the custom was not shown to prevail. The first adoption was however considered to be valid, but the ground of decision was that the adoption was made primarily for the purpose of securing an heir competent to offer funeral oblations, and that if the adopted child after attaining her age followed the profession of her prostitute mother, the prostitution which she practised was rather an incident than the object of the adoption. The evidence in the case before us shows however that when several adoptions are made during the life-time of the first daughter, they are made presumably for the purpose of adding to the gains of the adoptive mother by employing them when they attain their age for purposes of prostitution. We see no reason to doubt that such adoptions are made for an immoral purpose and that their recognition would in one sense be contrary to good morals. It is then urged for the appellant that Hindu law recognizes dancing girls as forming a separate class, that though prostitution is their ordinary profession in life, their civil rights ought to be respected, that in adjudicating upon them, the profession which they follow must be excluded from consideration, and that questions of status and of successions to property must be determined according to the custom of the caste, even if the persons claiming such adjudication are prostitutes, and the property in regard to which rights are asserted is derived from an immoral source. It is further argued that when only one adoption is made, the adopted daughter ordinarily follows the profession of her adoptive mother, and if its immoral character is ignored in regard to the first adoption, there is no reason for insisting upon it in the case of other adoptions. It is then contended that the class being recognized by Hindu law, its usage must be upheld subject to the rule that when it is necessary to prove the immoral practice

(1) I.L.R., 11 Mad., 393.

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as part of the transaction sought to be enforced for the purpose of establishing the claim founded upon it, as in a suit for the wages of prostitution, the claim is invalid. The decisions cited in *Venku* v. *Mahalinga*(1) are relied on in support of this contention. In *Chalakonda Alasani* v. *Chalakonda Ratnachalam*(2) it was held that a dancing girl and her adopted daughter constituted together a joint Hindu family, and that the rule of Hindu law applicable to ordinary gains of science was applicable to them. The Court adjudicated upon the claim though the gains were derived from an immoral source. Again, in *Kamakshi* v. *Nagarathnam*(3) it was held that the right of survivorship among male co-parceners of an ordinary Hindu family was applicable to a dancing girl and her sister's adopted daughter. The Court observed in that case "our view of the law is that in absence of a further positive rule, daughters must be regarded as sons and take estates of inheritance from their mother similarly to sons under the general law of inheritance." Though the right of survivorship recognized in that case was one known to ordinary Hindu law, yet the usage of the caste was upheld so far as it related to the adoption of daughters and gave them the status of male co-parceners in an ordinary Hindu family though such daughters ordinarily practised prostitution, and co-parcenery among them might be regarded as an association for an immoral purpose. Further, in *Mayna Bai* v. *Uttaram*(4) the Court held that though the rival claimants were the issue of an adulterous intercourse, their rights of inheritance and their rights *inter se* must be determined with reference to some local custom or usage or the analogies of Hindu law. We consider therefore that as a matter of private law it must be taken, the class of dancing women being recognized by Hindu law as [illegible]rate class having a legal status, that the usage of that class [illegible]bsence of positive legislation to the contrary regulates [illegible] of status and of inheritance, adoption and survivorship. Although a rule of public law may supersede that of private law, yet it was pointed out in *Venku* v. *Mahalinga*(5) that the Indian Penal Code prohibited only the employment of *minors* for purposes of prostitution and any disposition which might have such employment for its object. In the case before us, the appellant

(1) I.L.R., 11 Mad., 393. (2) 2 M.H.C.R., 56. (3) 5 M.H.C.R., 161. (4) 2 M.H.C.R., 196. (5) I.L.R., 1 Mad., 396.

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was adopted in 1854 in accordance with the custom of the caste, and before the Indian Penal Code came into operation, she had acquired the status of an adopted daughter. We are therefore of opinon that the adoption is valid as being in accordance with the custom of the caste which is recognized as a section of Hindus by Hindu law, and as contravening no rule of public law in force at the time. We set aside the decree of the Subordinate Judge and restore that of the District Munsif. Under all circumstances we direct that each party do bear her or their own costs in this and in the lower appellate Court.

APPELLATE CIVIL.

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

CHAPPAN NAYAR (DEFENDANT No. 3), APPELLANT,

v.

ASSEN KUTTI (PLAINTIFF), RESPONDENT.*

1889. Jan. 11. Feb. 8.

Malabar law—Powers of karnavan—Delegation of powers of karnavan to his son, ultra vires.

The karnavan of a Malabar tarwad having been sentenced to a term of imprisonment delegated to his son all his powers as karnavan pending the expiry of his sentence:

Held, that the delegation was *ultra vires* and void.

SECOND APPEAL against the decree of A. F. Cox, Acting District Judge of North Malabar, in appeal suit No. 139 of 1887, modifying the decree of A. Annasami Ayyar, District Munsif of Pynad, in original suit No. 205 of 1886.

Suit to eject defendants Nos. 2 and 3 from certain land. Defendant No. 1, who was karnavan of the tarwad, of which defendants Nos. 2 and 3 were members, having been sentenced to three years' imprisonment, executed a document in favor of his son, defendant No. 4, delegating to him all his powers as karnavan. Defendant No. 4 purporting to act under this document (exhibit B, of which the terms are given in the judgment of the High Court) demised the land in question to the plaintiff

* Second Appeal No. 845 of 1888.

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on an improving lease. Before the expiry of the lease defendants Nos. 2 and 3 ousted the plaintiff who now brought this action for possession and to recover the value of the crop harvested by them. Defendants Nos. 1, 2 and 4 were *ex parte*.

The District Munsif held that the delegation of the karnavan's powers to his son was invalid and accordingly dismissed the plaintiff's suit. On appeal however the District Judge passed a decree for possession as prayed in the plaint, but disallowed the claim for the value of the crop.

Defendant No. 3 preferred this second appeal.

Sankara Menon for appellant.

Sankaran Nayar for respondent.

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 Muttusami Ayyar, J.).

JUDGMENT.—Defendants Nos. 2 and 3 are anandravans, and defendant No. 1 is the karnavan of a tarwad in North Malabar. In January 1883 the latter was convicted of forgery and sentenced to three years' rigorous imprisonment. On 13th March 1884 he executed exhibit B in favor of his son, defendant No. 4, authorizing him to manage the affairs of his tarwad until the expiration of the sentence. In January 1885 No. 4 defendant executed an improving lease, exhibit A, in the plaintiff's favor regarding the lands mentioned in the plaint. The plaintiff alleged that he entered into possession under exhibit A, that defendants Nos. 2 and 3 dispossessed him and carried away the crop which he had raised. He prayed that possession should be restored and Rs. 140 awarded as the value of his crop. Both the Courts below found that he had not taken possession under exhibit A, nor raised any crop and they dismissed the suit so far as it related to compensation claimed for the loss of crop.

Adverting to exhibit B, the District Munsif observed that defendant No. 1 renounced thereby all his rights and obligations as karnavan in favor of his son without the consent of the other members of his own tarwad and held that it was invalid, and that exhibit A was therefore not binding on the tarwad; but on appeal the District Judge considered that exhibits A and B were valid on four grounds, viz.: (1) that it was not alleged that the execution of exhibit B was detrimental to the tarwad; (2) that the relations between the karnavan and his anandravans were

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so strained that the selection by the karnavan of his own son for management of the tarwad during his imprisonment was not unnatural; (3) that it was likely that the son's management would proceed more closely on the lines which his father would have followed; and (4) that since his release in 1886 defendant No. 1 ratified exhibit A.

The contention in second appeal is that it was not competent to the karnavan to execute exhibit B, and that there was no valid ratification of the transaction evidenced by exhibit A. As regards ratification, respondent's pleader concedes that he can refer to no evidence in its support, nor could it have any legal effect if exhibit B were void *ab initio*.

The real point for consideration is whether effect can be given to exhibit B. There can be no doubt, and it is not denied for the respondent, that karnavanship as recognized in Malabar is a birthright inherent in one's status as the senior male member of a tarwad. It is therefore a personal right and as such it cannot be assigned to a stranger either permanently or for a time. If it can be delegated at all, it is capable of delegation only to a member of the tarwad, the principle being that the *de facto* manager thereby assists the karnavan during his pleasure, and is entitled to do so by reason of his connection with the tarwad and his interest in its property. We are referred to no decided cases in support of the proposition that karnavanship is an alienable interest or is capable of being delegated to a stranger to the tarwad. If such were the case a Mopla might become the karnavan of a Nair tarwad, and the anomaly would be apparent when it is remembered that the karnavan has to preside at the tarwad ceremonies as its representative, in addition to managing tarwad property. The decision in this case must in our judgment depend on the construction of exhibit B. If it is an assignment of the right of karnavanship, it is void, though for a term only, on the ground that the delegate is not a member of the tarwad; if on the other hand, it is a power of attorney limited to management of specific property as an agent subject to the general control of the karnavan, it may be valid on the ground that the karnavanship is *not* the interest assigned or delegated. Exhibit B is in these terms:

"Muktiarnama executed on the 1st Meenam 1059, corresponding to 13th March 1884, by Perumatathil Tattatath Ambu

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Nair of Pallikkara Amshom and Desom of Kurumbranad Taluk, now in the Cannanore Central Jail, to Puthiyadath Kunhi Kelappan of Melati Amshom and Ayanikkad Desom :—

"Though I have authorized you by the Muktiarnama last executed by me to you on the 20th Tulam 1050 to manage in my name all the affairs of my tarwad and also to have them managed, yet some obstacles having been met in the way of managing the affairs inasmuch as certain conditions were not clearly stated therein, I hereby give over and above those given by the former Muktiarnama, the following authorities :— (1) to grant to the tenants proper renewals of deeds in respect of my tarwad lands that are already in their possession and have the deeds in my name, and obtain Marupattam from them ; (2) to let, in favor of new tenants on simple lease, all the lands now recovered by suit as well as those yet to be recovered by suit, and also the lands held by the tarwad along with those that you are now holding under the first Muktiarnama executed by me ; (3) to obtain all the amounts, formerly decreed by the Court in my favor as well as the amounts due to me on account of documents, or on account of decrees that may be passed by the Court in my favor and, lastly, all the amounts due to me on any other account, and to issue receipts therefore in my name ; (4) to present, on my behalf, all the petitions in respect of all matters whether Revenue, or Magisterial or Civil, and to answer, on my behalf, all the petitions and suits presented against me. I hereby vest in you full powers to manage all the affairs relating to my tarwad. I hereby admit that your demising the property and granting receipts shall have the same force, and shall be done with the same freedom, as if I myself had done it.

"Executed in the presence of Palakkat Kelappan Nair of Pallikkara Amshom and Deshom, and (2) Ittiprath Chantu Nair, and in the handwriting of Pokkiyarath Kanna Kurup of Pallikunnam Desom, Puzhati Amshom."

Though it is styled a Muktiarnama it authorizes the stranger to manage in the karnavan's name "all the affairs of his tarwad" and also to have them managed. The karnavan declares in it "I hereby vest in you full powers to manage all the affairs

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relating to my tarwad." It does not purport to limit the agency to special matters or to the management of property only, but it purports to put the delegate in the karnavan's place in regard to all the affairs of the tarwad. The apparent intention was to impose upon the tarwad the management and the authority of the karnavan's son, and no effect can be given to it without contravening the special usage of the district. The decision of the Judge cannot be supported, and the transaction evidenced by exhibit B was in excess of the karnavan's authority as such and in violation of the right of his tarwad. We set aside the decree of the District Judge and restore that of the District Munsif. The respondent will pay the appellant's costs both in this Court and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

1889. Jan. 14, 21.

GANAPATI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

CHATHU (DEFENDANT No. 3), RESPONDENT.*

Civil Procedure Code, s. 13—Res judicata—Competent Court—Pecuniary valuation of suit—Court Fees Act (Act VII of 1870,) s. 12, sch. II, art. 17 iii—Suit for a declaratory decree.

A suit for two declarations filed in a Subordinate Court was valued by the plaintiffs at a sum in excess of the pecuniary jurisdiction of a District Munsif. It was pleaded that the matter in dispute was *res judicata* by reason of decrees passed in District Munsifs' Courts. No objection was taken in the Subordinate Court to the valuation of the suit :

Held, that the plea of *res judicata* failed.

Per Muttusami Ayyar, J.—For the purposes of jurisdiction the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one of possession of the property regarding which the plaintiff seeks to have his title declared.

SECOND APPEAL against the decrees of A. F. Cox, Acting District Judge of North Malabar, in appeal suits Nos. 260 and 285 of 1887, reversing the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in original suit No. 36 of 1886.

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* Second Appeal No. 883 of 1888.

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Suit to declare that the tarwads of the plaintiffs and defendants Nos. 1 and 2 (the karnavans of the two plaintiffs respectively) have the sole uraima right to a certain devasom and that the tarwad of the defendant No. 3 has no uraima right to it. Defendants Nos. 1 and 2 were *ex parte*.

Defendant No. 3 pleaded *inter alia* that plaintiffs' claim was *res judicata* by reason of the decree in original suit No. 361 of 1884 on the file of the District Munsif of Cannanore. That was a suit brought by the present defendants Nos. 1 and 2 to compel the present defendant No. 3 to furnish accounts of the devasom affairs. The defendant denied their claim to be uralars and the suit was dismissed. The Subordinate Judge held that the plea of *res judicata* failed, because neither the District Munsif of Cannanore nor the District Munsif of Chavascherry, in respect of whose decree in another suit a similar plea was raised, was competent to try the present suit. And he passed a decree declaring that the tarwads of the plaintiffs and defendants Nos. 1 and 2 have uraima right to the devasom in question.

Against this decree both the plaintiffs and defendant No. 3 presented appeals.

The District Judge on appeal dismissed the plaintiffs' suit, being of opinion that the above plea should prevail. With regard to the competence of the Courts which decided the previous suits to entertain the present suit, he said :—

"The plaintiffs evidently feared the plea of *res judicata*, and to escape from it if posssible, very cunningly valued their suit so as to take it out of a District Munsifs' jurisdiction. But in doing this, they have certainly overvalued it by taking five times the assessment of all the devasom lands on the value of the devasom structure as the basis of valuation. They are not personally interested in those lands or in the structure. The right they seek to have declared is either incapable of valuation or is worth only what they would receive as salary, and that is 720 seers of paddy a year. It is urged that they would receive fees, but, even estimating these in a liberal manner, the suit would certainly be one which could be decided in the Court of a District Munsif."

The plaintiffs preferred this second appeal on the following (among other) grounds :—

(1) The Lower Appellate Court is wrong in holding that the plaintiffs' claim is *res judicata* by the decision in original suit No. 361 of 1884 on the file of the District Munsif's Court at Cannanore.

(2) The District Judge is wrong in holding that the present suit is one cognizable by the Court of a District Munsif.

(3) No objection was taken either to the valuation of the suits or to the jurisdiction of the Sub-Judge.

(4) The principle on which the suit was valued for purposes of jurisdiction is the correct one.

Bhashyam Ayyangar for appellants.

Mr. Gantz for respondent.

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

WILKINSON, J.—The Lower Appellate Court was wrong in holding that the appellants' claim was *res judicata*. The former suits were tried by a District Munsif, and as laid down by the Privy Council, the words "Court of competent jurisdiction" in s. 13 of the Civil Procedure Code mean a Court which has jurisdiction over the matter in the subsequent suit, in which the decision is used as conclusive, in other words a Court of concurrent jurisdiction, *i.e.*, concurrent as regards the pecuniary limit as well as the subject-matter. No objection was taken in the Subordinate Court to the valuation of the suit, and the suit as valued was not within the jurisdiction of a District Munsif. We are not prepared to say that the principle on which the suit was valued was contrary to law. We must therefore set aside the decree of the Lower Appellate Court and remand the appeals to be heard and determined on its merits. Costs to abide and follow the result.

MUTTUSAMI AYYAR, J.—For the purposes of jurisdiction the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one for possession of the property regarding which the plaintiff seeks to have his title declared. The declaration is made in view to protect existing possession, but it is not intended that Courts with limited pecuniary jurisdiction should take cognizance of all suits for declaratory decrees irrespective of the value of the property to which the title declared by those decrees might relate. For instance, a karnavan suing to establish his right of management is not entitled to institute his suit in the Court of the District Munsif when the value of the suit

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would exceed Rs. 2,500 if it were valued as a suit for possession. On this ground also I concur in the order proposed by my learned colleague.

APPELLATE CRIMINAL.

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

1889. Feb. 13, 15.

QUEEN-EMPRESS

v.

RAMI REDDI *

Forest Act—Act V of 1882 (*Madras*), *ss.* 6, 10, 16, 21—*Tree* patta—*Trespass.*

The holder of a *patta* of certain trees on land which had been declared a reserved forest was convicted of trespass under the Madras Forest Act on proof that he had continued to gather the produce of the trees:

Held, that the conviction was bad for want of proof, that the pattadar's claim had been duly disposed of or that he had not preferred his claim within the period required by law.

PETITION under ss. 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the proceedings of the Special Deputy Magistrate of North Arcot in appeal No. 21 of 1888 confirming the conviction and sentence in case No. 106 of 1888 on the file of the Second-class Magistrate of Chittoor.

Petitioner was convicted of the offence of trespass under s. 21 of the Madras Forest Act. The land upon which the offence was alleged to have been committed had been constituted a reserved forest by a Government Notification dated 16th July 1885; this notification was cancelled by a subsequent notification published on 20th August 1885; but it was subsequently, on 8th February 1887, republished, that of 20th August 1885 being annulled.

The provisions of the Madras Forest Act as to "notifications declaring forest reserved" are as follows:—

Sec. 16. "When the following events have occurred, namely—

(*a*) the period fixed under section six for preferring claims has

* Criminal Revision Case No. 712 of 1888.

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elapsed, and all claims (if any) made within such period have been disposed of by the Forest Settlement-officer; and

(*b*) if such claims have been made, the period fixed by sections ten and fourteen for appealing from the orders passed on such claims has elapsed, and all appeals (if any) presented within such period have been disposed of by the Appellate authority; and

(*c*) all proceedings prescribed by section ten have been taken, and all lands (if any) to be included in the proposed forest, which the Forest Settlement-officer has, under section ten, elected to acquire under the Land Acquisition Act, 1870, have become vested in the Government under section sixteen of that Act;

"the Governor in Council may publish a Notification in the *Fort St. George Gazette*, specifying the limits of the forest which it is intended to reserve and declaring the same to be reserved from a date to be fixed by such Notification.

"The Forest Settlement-officer shall, before the date so fixed, publish such Notification in the manner prescribed for the Proclamation under section six. From the date so fixed, such forest shall be deemed to be a reserved forest."

Petitioner had a *patta* of certain trees on the land constituted a reserved forest; and the trespass of which he was convicted consisted in continuing to gather the produce of the trees in question, after the publication of the Government Notification constituting the reserved forest.

As a tree *pattadar* he was a 'known occupier of the land,' and as such entitled to special notice under s. 6: see *Reference under s. 39 of Madras Forest Act*(1). Sections 10 and 14 of the Forest Act relate to 'claims to rights of occupancy and ownership' and proceedings with regard thereto.

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

Mr. *Subramanyam* for petitioner.

Mr. *Wedderburn* for the Crown.

JUDGMENT.—The prosecution of the petitioner for trespass

(1) *Ante* page 203.

QUEEN-EMPRESS v. RAMI REDDI.

was under the circumstances clearly illegal. Section 16 of Act V of 1882 (Madras) lays down that the Governor in Council may publish a notification declaring a forest to be reserved when certain events have occurred, and that such forest shall become reserved from the date specified in that notification. One of the events which must have occurred before the Governor in Council can declare a forest reserved is the disposal of all claims made by owners or occupiers of land. It has not been shown in the present case that the claim of the petitioner who is an owner or occupier of land (*Reference under s. 39 of Act V of* 1882(1)) was disposed of prior to the notification of 16th July 1885; and the fact that in April 1887, subsequent to the publication of the notifications of 20th August 1886 and 8th February 1887, the Forest Officer was negotiating with the petitioner, would appear to show that his claim had never been disposed of according to law. The prosecution did not assert that the petitioner did not prefer a claim within the period required by law, and unless he had failed to do so, his right would not have been extinguished. He appears to have continued to gather the produce of the trees in his *patta* up to October 1887. We accordingly reverse the findings and sentences of the Courts below. The fine will be repaid.

APPELLATE CIVIL.

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

1887. Feb. 4, 8.

KETLILAMMA (PLAINTIFF), APPELLANT,

v.

KELAPPAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, ss. 43, 244—Separate suit on disallowance of objection to execution—Evidence Act—Act I of 1872, *s. 44—Competent Court.*

In execution of a decree the defendant, who was sued as the representative of her deceased brother, objected under s. 244 of the Code of Civil Procedure to the attachment of certain lands to which she set up independent title. The objection was disallowed and the land was sold. She then sued the execution purchaser to set aside the Court sale and obtained a decree against which no appeal was preferred. She now sued for possession:

(1) *Ante* page 203.

* Second Appeal No. 1508 of 1888.

KETLILAMMA v. KELAPPAN.

Held, that the suit lay notwithstanding the order under s. 244.

Per cur: The words "not competent" in s. 44 of the Evidence Act refer to a Court acting without jurisdiction.

SECOND appeal against the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in appeal suit No. 261 of 1887 affirming the decree of S. Ragunatha Ayyar, District Munsif of Tellicherry, in original suit No. 542 of 1886.

Suit by plaintiff No. 1 to recover possession of certain land with arrears of rent, as on the expiry of a demise to defendants Nos. 1 and 2. Plaintiff No. 2 was joined as having obtained a subsequent lease from plaintiff No. 1. Defendant No. 3 claimed to be a member of the same taveri as plaintiff No. 1 and denied her right to sue, his name however was removed from the record.

Defendant No. 4 claimed title under the following circumstances:

The land in question had been attached in execution of a decree obtained against plaintiff No. 1 and her brother as representatives of another brother, one Kunhi Raman Nambiar (deceased), in Small Cause Suit No. 360 of 1883 on the file of the Subordinate Court of North Malabar. Plaintiff No. 1 intervened in execution of the above decree under s. 244 of the Code of Civil Procedure and objected that the land was her own and was not liable to satisfy the decree. But her objections were disallowed and the land was sold and purchased by defendant No. 4, who obtained the sale certificate, and was put into possession in June 1884.

Plaintiff No. 1 then sued defendant No. 4 in original suit No. 508 of 1884 on the file of the Court of the District Munsif of Tellicherry to set aside the Court sale, and obtained a decree. No appeal having been preferred against that decree, she now sued as above for possession. Both the District Munsif and on appeal the Subordinate Judge dismissed the suit on the ground that the order under s. 244 had the force of a decree, and the proceedings in original suit No. 508 of 1884 were erroneous and therefore void. *Kuriyali* v. *Mayan*(1) was referred to.

The plaintiff preferred this second appeal on the following grounds:—

i. That the Lower Appellate Court is wrong in holding that the suit is barred by s. 244 of the Code of Civil Procedure.

(1) I.L.R., 7 Mad., 255.

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ii. The decree in original suit No. 508 of 1883 is *res judicata* in favor of the plaintiff, and the Court cannot go behind the said decree by holding that s. 244 was a bar to the maintenance of that suit, and that, therefore, the whole proceedings in that suit were void.

Govinda Menon for appellant.

Sankaran Nayar 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 Parker, J.).

JUDGMENT.—It is conceded that had it not been for the intermediate suit No. 508 of 1884 the decrees of the Courts below would be right, but it is argued by the learned Pleader for the appellant that the fourth defendant's remedy against the erroneous decree was by appeal, and that he cannot now resist a suit for possession, the sale to him having been set aside. On the other hand, s. 44 of the Evidence Act* is relied upon as showing that it is open for the fourth defendant to show that the decree in suit No. 508 of 1884 was passed by a Court not competent to pass it.

We are of opinion that the words "not competent" refer to a Court acting without jurisdiction. In this view, there is no question as to the competency of the Court, though the provisions of s. 244 of the Civil Procedure Code might have been pleaded as a bar to the suit.

There was no appeal from the decree in suit No. 508, and therefore, as far as the fourth defendant is concerned, it is a final decree, and though wrong he is not in a position to resist it. The other defendants were not parties to the suit in which the order under s. 244 of the Civil Procedure Code was passed and therefore the suit as against them is not barred by the provisions of that section.

The Subordinate Judge has disposed of the appeal upon the preliminary point.

We must, therefore, reverse the decree and remand the appeal for re-hearing. Costs will abide and follow the result.

* Section 44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections forty, forty-one or forty-two, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

VENKATRAYADU.*

1888. Jan. 18.

Stamp Act —Act 1 of 1879—s. 37 (b), ss. 40, 61, 63—Prosecution for attempt to defraud Government by understating the value of property in a partition deed.

A District Judge impounded a partition deed produced before him and forwarded it to the Collector under s. 35 of the Stamp Act, 1879, being of opinion that the executant of the deed had committed an offence under s. 63. The Collector under s. 69 sanctioned the prosecution of the executant, who was convicted by the Magistrate of an offence under s. 63 of the Act. On appeal the Sessions Court acquitted him on the ground that the Collector had not complied with s. 37 (b) or s. 40 of the Act:

Held, that the acquittal was wrong. *Empress* v. *Dwarkanath Chowdhry* (I.L.R., 2 Cal., 399), *Empress* v. *Soddanund Mahanty* (I.L.R., 8 Cal., 259), *Empress* v. *Janki* (I.L.R., 7 Bom., 82), considered.

APPEAL under s. 417 of the Criminal Procedure Code from an acquittal by W. G. Underwood, Acting Sessions Judge of Kistna, reversing the sentence of C. M. Mullaly, Joint Magistrate of Kistna, in calendar case No. 22 of 1886.

The material portion of the Sessions Court judgment was as follows:—

"The District Court in its proceedings did not allege fraud; but as it mentioned s. 63 of the Act, it must have considered that there was an intent to defraud Government. The Collector passed proceedings:— 'The parties will be prosecuted. Mr. Robinson will try the case.'

"The appellant relies on *Empress* v. *Dwarkanath Chowdhry*(1), *Empress* v. *Soddanund Mahanty*(2), *Empress* v. *Janki*(3). He also relies on the proviso of s. 61 of the Act. Subsequent to the date of the judgment, the Sub-Collector levied the deficient duty

* Criminal Appeal No. 257 of 1887.

(1) I.L.R., 2 Cal., 399. (2) I.L.R., 8 Cal., 259.

(3) I.L.R., 7 Bom., 82.

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Rs. 50 and a fine of Rs. 500. This was also the penalty he inflicted as Joint Magistrate. It is not disputed but that Rs. 50 is the deficient stamp duty.

"The document was impounded under s. 35. The Collector did not comply with s. 37 (*b*), and according to the cases quoted the conviction is illegal. There is nothing on record to show that the Collector satisfied himself under s. 40 that there was any intention to evade payment of the proper duty. It is urged that the Joint Magistrate by taking criminal measures before demanding the deficient duty has deprived the appellant of the benefit of the proviso of s. 61. Section 63, however, allows of a penalty of Rs. 5,000. It is clear that the two sections are not intended to be read together. But it does not follow that s. 27 is not governed by ss. 35 and 37. Taking the rulings quoted, the finding and sentence of the Joint Magistrate are illegal, and the fine of Rs. 500 is ordered to be returned if levied."

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 Wilkinson, J.).

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

Mahadeva Ayyar for the defendant.

JUDGMENT.—This is an appeal by Government against the decision of the Sessions Judge of Kistna reversing the finding and sentence of the Joint Magistrate in a prosecution under the Stamp Act—Act I of 1879.

In December 1884 the District Court having under s. 33 of the Stamp Act impounded a partition deed produced before it, forwarded it under s. 35 to the Collector, being of opinion that the executant of the deed had committed an offence under s. 63 of the Act. The Collector under the provisions of s. 69 sanctioned the prosecution of the offender before the Head Assistant Magistrate, from whose Court the case was transferred to the Joint Magistrate. The Joint Magistrate found that there had been "*a glaring attempt to defraud Government*," property worth about Rs. 30,000 having been set forth in the partition deed as worth only Rs. 7,975. The deficient stamp-duty leviable amounted to Rs. 50. He inflicted a fine of Rs. 500.

The accused appealed to the Court of Sessions, and the Judge reversed the finding and sentence of the Joint Magistrate. He was of opinion that the conviction was illegal, because the Collector

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had omitted to collect the deficient stamp-duty before sanctioning the prosecution. He relied on certain decisions of the Calcutta and Bombay High Courts.

We are of opinion that the decision of the Sessions Judge is not maintainable and that the finding and sentence of the Joint Magistrate were right and must be restored.

Section 37 (*b*) of the Stamp Act applies to the case of a document not duly stamped. In cases in which the omission to stamp at all or to stamp duly arises from negligence, inadvertence or ignorance of the provisions of the stamp law, it is the duty of the Collector to compel the payment of the duty. But in the present case the stamp affixed to the document was, according to the valuation of the property set forth therein, correct, and the Collector therefore had no duty to perform under s. 37. The facts affecting the amount of the duty with which the instrument was chargeable had, in the opinion of the Judge who impounded the document, not been fully and truly set forth, and the questions for determination therefore were—1st, whether the property had been properly valued, and, 2nd, if not, whether it had been undervalued with intent to defraud Government. It was not necessary, nor was it possible for the Collector, to collect any duty until it had been decided in a proper inquiry what was the real value of the property. Nor do we think that the conviction was bad, because the Collector failed to record proceedings under s. 40 to the effect that he had satisfied himself that there was an intention to evade payment of the proper duty. That section only refers to cases in which a prosecution is instituted after a penalty has been paid. It confines the power of instituting prosecutions to the Collector, and instructs him to exercise it only when it appears to him that the offence was committed with intention to evade payment of the proper duty. In the present case the Collector sanctioned the prosecution of the offender in 1884, and no penalty was levied in respect of the instrument until after the decision and sentence of the Joint Magistrate.

The cases relied on by the Sessions Judge have no application to the present case, as they were decided with reference to the offence made punishable by s. 61 of the Act, and intention to evade payment is not an essential ingredient of the offence described in s. 29, Act XVIII of 1869, see *Empress* v. *Dwarkanath*

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Chowdhry(1), or in s. 60, Act I of 1879. But the intent to defraud is the essential ingredient of the offence made punishable by s. 63.

For these reasons we set aside the finding of the Sessions Judge and restore that of the Joint Magistrate.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

1889. Feb. 4.

ABDUL AND OTHERS (DEFENDANTS), APPELLANTS,

v.

AYAGA AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code, s. 45—Suit for declaration—Multifariousness—Malabar Law—Suit by junior members of tarwad.

Suit by some of the junior members of a Malabar tarwad against the karnavan and the other members of the tarwad, and certain persons to whom some of the tarwad property had been alienated by the karnavan, for a declaration that the alienations were not binding on the tarwad:

Held, that the suit was not bad for multifariousness. *Vasudeva Shanbhaga* v. *Kuleadi Narnapai*(2) followed.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of South Canara, in original suit No. 22 of 1886.

The plaintiffs, who were some of the junior members of a Malabar tarwad, sued the karnavan, the remaining members of the tarwad, and certain persons to whom some of the tarwad property had been alienated by the karnavan for a declaration that these alienations were not binding on the tarwad.

The Subordinate Judge decreed as prayed in the plaint. The alienees preferred this appeal on the grounds (among others) that the suit was bad for multifariousness, and misjoinder of causes of action, and that the decision of the Subordinate Judge was against the weight of evidence.

Ramachandra Rau Saheb, Sankaran Nayar and *Subba Rau* for appellants.

Mr. *Subramanyam* and *Sundara Ayyar* for respondents.

(1) I.L.R., 2 Cal., 399.

(2) 7 M.H.C.R., 290.

* Appeal No. 98 of 1887.

ABDUL v. AYAGA.

The Court (Muttusami Ayyar and Wilkinson, JJ.) delivered the following

JUDGMENT:—Two questions are argued in this appeal, viz., that the suit is bad owing to multifariousness, and that the finding of the Subordinate Judge that the alienations are not binding on the tarwad is unwarranted and not borne out by the evidence. As to the first point, the plaintiffs, who are junior members of the tarwad, sue the karnavan, certain members of the tarwad who side with him, and certain alienees for a declaration that certain documents executed by the karnavan are not binding on the tarwad or its property. It is not denied that if they had prayed for the removal of the karnavan the alienees would be necessary parties. The same view was taken in the decision referred to by the Subordinate Judge (*Vasudeva Shanbhaga* v. *Kuleadi Narnapai*(1)) with reference to a Hindu family, and we see no reason why a declaratory suit should be treated differently from a suit for possession inasmuch as the title to be adjudicated upon is the same in both.

Their Lordships then proceeded to consider the evidence in the case, and agreeing with the findings of the Subordinate Judge, dismissed the appeal with costs.

APPELLATE CIVIL.

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

1889. Jan. 7. Feb. 8.

VENKAYYA (PLAINTIFF), APPELLANT,

v.

SURAMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 13—Res judicata—Decree in suit by a karnam as such binds his successor.

The karnam in a certain mitta sued to recover certain land as part of the *mirasi* property attached to his office. It appeared that the plaintiff's father and predecessor in office had sued to recover the same land by virtue of his office and that his suit had been dismissed:

Held, that the plaintiff's claim was *res judicata*.

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

* Second Appeal No. 126 of 1888.

VENKAYYA v. SURAMMA.

SECOND APPEAL against the decree of V. Strinivasacharlu, Subordinate Judge of Cocanada, in appeal suit No. 22 of 1887, affirming the decree of T. R. Malhari Rau, District Munsif of Peddapur, in original suit No. 22 of 1886.

Suit by a karnam to recover certain land on the ground that it was part of the *mirasi* property attached to his office. The plaintiff's father and predecessor in office had brought suit No. 312 of 1883 to recover the same land "by virtue of his office and by the custom" and had failed: the plaintiff met the plea of *res judicata* founded on the decree in that suit by the argument that he did not claim under his father's title but sued in his own right as holder of the office.

The District Munsif dismissed the suit and his decree was affirmed by the Subordinate Judge on appeal.

The plaintiff preferred this second appeal.

Subba Rau for appellant.

Ramachandra Rau Saheb 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 Muttusami Ayyar, J.).

JUDGMENT.—The appellant is a karnam in the mitta of Viravaram in the Godavari District, and the father of respondent No. 1 belonged to a collateral branch of the karnam's family. The land in dispute originally formed part of the emolument attaching to the office of karnam. According to the judgment in original suit No. 312 of 1883, it had been severed from the office more than 40 years ago, and passed into the possession of the respondent's branch of the family in the life-time of her paternal great-grandfather. Her father died in 1877, and during his life-time neither the appellant's father nor his grandfather sought to re-attach the land to the office. Prior to his death, the father of respondent No. 1 bequeathed his property to her, and the land in litigation passed into her possession. Thereupon, the appellant's father instituted original suit No. 312 of 1883 for its recovery, but that suit was dismissed on the ground that it was barred by limitation. Shortly after, he resigned his office, and appellant was appointed in his stead. The resignation and the appointment are found by the Courts below to have been contrived for the purpose of reviving the litigation set at rest by the final decree in original suit No. 312 of 1883. The appellant was appointed in August

1885, and he brought the present suit in 1886. The ground of claim was that the land was attached to his office, that respondent No. 1 somehow or other got into possession and leased it out to respondents Nos. 2 and 3. Respondent No. 1 contended that the appellant's appointment was illegal, that his claim was *res judicata*, and that it was barred by limitation. The Subordinate Judge held on appeal that the claim was *res judicata* and that it was barred by limitation, and dismissed the suit on both points. His decision is impugned in second appeal.

We consider the decision in original suit No. 312 of 1883 is binding on the appellant and the claim was properly held to be *res judicata*. It is conceded that such would be the case if the land in question were private property, but it is contended that the emolument attached to an office is in the nature of a salary assigned to that office, and is either no property at all or at least public property, and that each karnam acquires a fresh right to enjoy the emolument on his appointment, and is entitled to enforce it by a new suit, though his predecessor in office might have sued in respect of the same cause of action and failed. We are unable to accede to this suggestion, for, when land is held on a service tenure it does not cease either to be property or private property. If the revenue due thereon was remitted by the Crown on condition that it was to be appropriated to a specific purpose, the Crown might assess the land when the revenue ceased to be so appropriated. According to the custom of the country, the land in dispute is the hereditary property of the karnam's family, held subject to the obligation of rendering service as karnam. The incident peculiar to the tenure consists in each office-bearer having property therein while lawfully in office without power to sever it from the office and with the obligation to transmit it to his successor in office. If in breach of his duty an office-bearer alienates the land and severs it from the office, his successor has a right to avoid the alienation and to sue to re-attach it to the office within 12 years from the date of his appointment. If he fails to do so, he and his future successors are barred alike, the suit brought by him being regarded not as one brought to enforce his individual right but as one instituted by the representative for the time being of the reversion. The view suggested for the appellant, viz., that each successor may sue again on his appointment to the office, involves in it the anomaly of practically abrogating the Limitation Act.

VENKAYYA v. SURAMMA.

The suit brought by the appellant's father was brought in the interest of all future successors consequent on the jural relation between the office and the land, and the decision passed therein is, therefore, binding on the appellant.

As to the cases cited, *Papaya* v. *Ramana*(1) is only an authority for the proposition that though Regulation XXIX of 1802 does not contain a prohibitory provision, similar to that which is found in Regulation VI of 1831, yet lands attached to the office of a karnam in permanently-settled estates cannot be alienated by the holder of the office for the time being, from the very nature of the tenure on which the land is held. In that case, the alienation was made by the father of the then second and third appellants and the suit was brought within 12 years from the alienor's death and the date when the succession to the office devolved on them. The question now before us did not arise in that case. *Babaji* v. *Nana*(2) is a clear authority in support of the principle on which we think this case should be decided. Nor is the case of *Radhabai* v. *Anantarav Bhagvant Deshpande*(3) in favor of the appellant. That was a case in which the service *vatan* had been enfranchised. It was urged that, notwithstanding the enfranchisement, the *vatan* was inalienable by family custom. It was held that in the absence of fraud and collusion, judgment against one holder of such service *vatan* was *res judicata* as regards a succeeding holder, and the actual decision, therefore, is against the appellant before us. The case of *Seshaiya* v. *Gauramma*(4) decided, no doubt, that possession of a lopaikari holder or a member of the karnam's family by claim of coparcenary right was not necessarily adverse and might be taken to be permissive. But this is a matter which must have been urged in the former suit in which it was decided that the land vested in the respondent's branch in a family partition which took place more than 40 years previously. We are not now at liberty to go behind the decree passed in it and consider it on the merits. This second appeal cannot be supported, and we dismiss it with costs.

(1) I.L.R., 7 Mad., 85. (2) I.L.R., 1 Bom., 535.
(3) I.L.R., 9 Bom., 198. (4) 4 M.H.C.R., 339.

APPELLATE CIVIL.

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

1889. Jan. 21, 29.

GOVINDASAMI (DEFENDANT No. 1), APPELLANT,

v.

KUPPUSAMI (PLAINTIFF), RESPONDENT.*

Alteration in bond sued on—Materiality of alteration—Fraud—Evidence.

Suit on a bond, the date of which had been altered from 11th September to 25th September, while it was in the possession of the plaintiff. Fraud was not proved, and the period of limitation reckoned from the 11th September had not expired:

Held, that the bond was void as such, and was not receivable in evidence to prove the debt. *Christacharlu* v. *Karibasayya* (I.L.R., 9 Madras, 399) followed.

SECOND APPEAL against the decree of R. S. Benson, Acting District Judge of South Arcot, in appeal suit No. 253 of 1887, reversing the decree of V. Narayana Rau, District Munsif of Tirukovilur, in original suit No. 60 of 1887.

Suit to recover principal and interest due on a bond, dated 25th September 1882, and executed by defendant No. 1 to the plaintiff. Defendant No. 2 was joined as being an undivided member of the family of defendant No. 1, the bond having been executed by defendant No. 1 for family purposes.

The District Munsif found that the date of the bond had been altered from 11th September to 25th September and, holding that this was a material alteration which vitiated the instrument on the authority of *Gogun Chunder Ghose* v. *Dhuronidhur Mundul*(1), *Sitaram Krishna* v. *Daji Devaji*(2), *Paramma* v. *Ramachandra*(3), dismissed the suit.

On appeal the District Judge reversed the decree of the District Munsif observing "there is not a syllable of evidence to show that the alteration was fraudulent either in effect or intention. Nothing turned on the date and the cases quoted are therefore clearly irrelevant."

Defendant No. 1 preferred this second appeal.

* Second Appeal No. 1308 of 1888.
(1) I.L.R., 7 Cal., 616. (2) I.L.R., 7 Bom., 418. (3) I.L.R., 7 Mad., 302.

GOVINDASAMI v. KUPPUSAMI.

Desikacharyar for appellant.

Rama Rau for respondent.

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

JUDGMENT:—This was a suit to recover the principal and interest due on a simple bond executed by the defendant. Both the lower Courts have found that the bond was executed on the 11th September 1882 and that the date was subsequently altered, while the document was in the custody of the plaintiff, to the 25th September. The District Munsif held that the alteration was a material one and vitiated the instrument. The District Judge on appeal held that nothing turned on the date and that there was no evidence that the alteration was fraudulent. He decreed for plaintiff. The defendant appeals on the ground that the alteration of the date was an alteration of the document in a material part and that the document is therefore invalid. He relies on the Full Bench decision in *Christacharlu* v. *Karibasayya*(1). The respondent argues (1) that the alteration is not a material alteration, because it affects no one, the defendant having made a part-payment within the statutory period, and (2) that, if it be held that it is a material alteration, the document is receivable as evidence of the debt in accordance with the decision in *Ramasamy Kon* v. *Chinna Bhavani Ayyar*(2) affirmed by the Full Bench decision in *Christacharlu* v. *Karibasayya*(3).

In order to decide whether the alteration was material, it is necessary to consider whether the alteration affected the liability of either party. There can, it appears to us, be no doubt that the alteration of the date of the document from the 11th to the 25th September materially affected the liability of the defendant, for it extended the time within which the plaintiff was entitled to sue.

As to the part-payment on the 11th August 1885, which the District Judge has found to be genuine, we do not think that this part-payment is sufficient to render of no effect the alteration of the date. The contract between the parties having been reduced to writing and the only ground of action disclosed by the plaint being that which is founded upon the altered instrument, the plaintiff can only recover upon the writing. But it is undoubted

(1) I.L.R., 9 Mad., 399. (2) 3 M.H.C.R., 247.
(3) I.L.R., 9 Mad., 399.

law that the plaintiff cannot recover upon the written contract, because it has been altered in a material part.

Nor can the document be received in evidence of the debt. As remarked by Muttusami Ayyar, J., in the Full Bench case "In all the English cases in which there was judgment for the plaintiff upon the instrument in its original condition there was a separate count which did not refer to the instrument in its altered condition as the cause of the obligation which it was desired to enforce."

In the present case, the suit is not based on any antecedent transaction for which the instrument was given as security, nor did the execution of the instrument vest in the plaintiff any estate or right of the existence of which the deed would be evidence.

For these reasons, we are of opinion that the alteration of the document sued on, while it was in the custody of the plaintiff, vitiated the instrument, and we reverse the decree of the lower appellate Court and restore that of the District Munsif.

Respondent will pay appellant's costs in this and the lower appellate Court.

PRIVY COUNCIL.

SIVARAMAN CHETTI AND OTHERS (PLAINTIFFS)

and

MUTHAYA CHETTI, AND OTHERS (DEFENDANTS).

P.C.
1888.
Nov. 24.
Dec. 12.

[On appeal from the High Court at Madras.]

Village property—As to what was the common property of a village, viz., a tank—Inability of any of the co-proprietors to exclude the rest from contributing to repair it.

A village tank, on the site of an ancient one, was the common property of and used by, all the inhabitants, of whom one family on the ground of improvements and additions made by their ancestor with the general acquiescence of the village claimed, against the rest, the exclusive right of repairing the tank at their own cost. But no corresponding obligation on the plaintiffs to repair was shown; and from the evidence, including that afforded by a compromise made in 1842, it appeared that the repairs were to be effected by a common collection made through the person in management, who was to account for his receipts and expenses:

Held, that it was equally at the option of the rest of the villagers either to permit the repairs to be done by the plaintiffs, or to insist on the work being done

Present: Lord HOBHOUSE, Sir RICHARD COUCH, and Mr. STEPHEN WOULFE FLANAGAN.

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at the common cost; the tank remaining the common possession of the village, and no class of the villagers having any right to exclude the rest from contributing to the repairs.

APPEAL from a decree (4th December 1882) of the High Court(1), reversing a decree (7th April 1880) of the Subordinate Judge of Madura, East.

The parties, both described in the record as traders, Nattukottai Chetti caste, residing in the village of Karakuddi in the Shivaganga zamindari, disputed the right to repair a village tank, constructed on the site of an ancient one. The plaintiffs, four in number, were of one family, and the defendants, originally twenty-one in number, were of different families, all inhabiting the village.

In their plaint the plaintiffs stated :—

"That their common ancestor, one Meyyappa Chetti, about 70 or 80 years ago, with the consent of the Miras Ambalagars of the Karakuddi village, dug and constructed, at his own expense, the tank known as Kalkattu urani in the village, and thereupon he and his descendants became hereditary Hakdars of the urani.

"That the ancestors of the plaintiffs, and after them, plaintiffs, as hereditary Hakdars, had, up to date, been in possession of the urani, and at their own exclusive cost maintained the urani charity, by constructing stone-works round the urani, by digging supply and surplus channels, building flight of steps, building a large matam on the western bank of the urani, and by laying out a flower garden open to the public.

"That in the year 1842, on a complaint being made by Chidambaram Chetti, one of the plaintiffs' ancestors against the ancestors of the defendants 1 to 7, for wrongful interference with the urani, the then Collector of Madura, after inquiry, passed an order, dated 9th May 1842, to the effect that the urani was constructed at the exclusive cost of the ancestors of these plaintiffs, that they should therefore be allowed to make the repairs to the urani at their own cost according to mamul, and that the interference with the urani by the ancestors of the defendants Nos. 1 to 7 was wrongful.

"That subsequently, on the 2nd September 1842, Chidambaram Chetti and certain other Chettis of Karakuddi, executed a Kararnama before the Collector, to the effect that all the tanks and

(1) *Muttaya* v. *Sivaraman* (I.L.R., 6 Mad., 229).

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uranis of the Karakuddi Ilaka Nagarattars should henceforward be common to the whole community of the Nagarattars, but that the repairs, even though they should have to be made by the general contributions of the Nagarattars, should be made by the Hakdars who have right to the urani respectively by virtue of their ancestors having originally constructed the same.

"That the terms of the Kararnama were, however, never acted upon, but it was in fact virtually abandoned so far as this urani was concerned, and that since its date, plaintiffs and their ancestors, as Hakdars, had retained exclusive control of the urani and carried on repairs at their own cost."

Then followed the complaint that, in the year 1878, when they were about to repair the tank, they were stopped by the defendants, who claimed to take part in the work. They asked for a declaration of their sole right to repair, at their own cost, and for an injunction on the defendants; also claiming Rs. 350 as damages for previous interference.

The defendants, who severed in their defences, denied that the plaintiffs' ancestors had excavated the tank, which they alleged to have been made for charitable purposes by a former inhabitant, on whose death, without heirs, it had become the common property of the "Nattars" and "Nagarattars" of the village; and was appurtenant to a temple on its bank, in which temple all the inhabitants were interested, all the latter contributing to its cleaning and repairs. Some of the defendants also alleged that certain flights of steps had been built, some by the plaintiffs, but others by the defendants, at a time prior to the disputes, which arose in 1842.

The following issues were recorded: 1st, whether the plaintiffs had the exclusive right claimed by them, or the urani was the common property of the villagers; 2nd, whether the flight of steps which defendants, Nos. 1 to 4 and 6 and 7, alleged to have been constructed by their ancestors, had been so made, or by the plaintiffs' ancestors; 3rd, whether the flight of steps, which the 15th defendant claimed as having been constructed by his ancestors, had been made by the latter, or by the plaintiff's family; 4th, whether the right of maintaining and repairing the steps existed in the parties constructing them, or that right resided in the village community; 5th, whether the plaintiffs were entitled to any relief; and, if so, to what relief?

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The Subordinate Judge held that the tank was common property in the sense that the public could use the water; but that the right claimed belonged to the plaintiffs, because their family, though not the actual founders of it, had spent upon it large sums of money and improved it, "with the sanction of a few and the sufferance of many persons who could claim an interest in it." The Subordinate Judge, having referred to the Kararnama of 1842, and the other evidence, found that the plaintiffs for more than 30 years before disputes arose in 1878, had the exclusive superintendence of the tank, and cleaned it at their own expense. He held that thus "an easement" had arisen, and that the plaintiffs had thereby "acquired an exclusive right to conserve and improve the tank."

On issues 2 and 3 he held that the ancestors of defendants Nos. 1, 2, 3, 4, 6, 7 and 15 had originally constructed the steps, as alleged by these defendants.

On the fourth issue he apparently held that the defendants had lost by non-user their original right of repairing the steps constructed by their ancestors, and that the plaintiffs had acquired that right.

He refused to give the plaintiffs the damages asked for by them, but declared their sole right to repair the tank at their own cost, and enjoined the defendants from entering on the tank for the purpose of repairing it.

On appeal, the Judges of the High Court (Innes and Muttusami Aiyar, JJ.) gave the judgment, which is reported at length in *Mattaya* v. *Sivaraman*(1).

They considered that there was not any exclusive right of property in the tank itself, even alleged by either party; and it did not appear to them that there was any authority for saying that the construction of substantial adjuncts to the property of another could give the constructor a right of property therein. They held, accordingly, that the construction of certain masonry works, without opposition, did not give the plaintiffs any right to exclude others from interfering with the conservancy of the tank generally. If it did so, then some of the defendants, viz., Nos. 2 to 4 and 7, who constructed one set of steps, and the defendant No. 15, who constructed another, would equally have a right to exclude the

(1) I.L.R., 16 Mad., 229.

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plaintiffs from taking any part in the general conservancy of the tank. It was not necessary to consider whether the plaintiffs who had always repaired the steps built at their exclusive cost might not have had a right to exclude others from interfering with the repairs of that particular set of steps. The relief now sought was something far beyond this, and no ground for it had been made out. Accordingly, the High Court dismissed the suit with costs.

On this appeal,—

Mr. *J. Graham*, Q.C., and Mr. *J. D. Mayne* appeared for the appellant.

Mr. *T. H. Cowie*, Q.C., and Mr. *R. V. Doyne* for the respondent.

For the appellant it was argued that the tank was used for the benefit of the village community, being, when the improvements had been made, a charitable institution, and therefore subject to the laws regulating such establishments as temples, dharmsalas, and other things. *Primâ facie*, the management and supervision of such an institution, and the exclusive duty of providing for, and of executing, all necessary repairs, would devolve upon the founder and his heirs. The evidence established that here such was, in fact, the prevalent usage.

[Sir Richard Couch inquired if there was shown to be any legal obligation on the appellants to undertake the repairs at their sole expense]. So far only as that the appellants' family were hereditary and exclusive managers of the tank, as representing the villagers. That family were entitled to do all acts in the management, discharging the duties of managers. Thus it was that they became "Hakdars" in respect of the tank. The villagers might have sued the family, either to retire from the management, or maintain; and thus the latter had a right, corresponding to the duty to maintain, to repair exclusively. The succession to the management of a temple ordinarily depended on similar rights—See the judgment in the *Rajah Muttulinga Setupati* v. *Perianayagum Pillai*(1).

Moreover the plaintiffs relied on a uniform usage of three-fourths of a century that, in this respect, the plaintiffs' family should represent the community. The permission accorded to the

(1) L.R., 1 I.A., 209, at p. 228.

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ancestors of the defendants to construct two flights of steps into the tank would not give them a general right of interference in its management, nor any right, except, perhaps, that of keeping those particular steps in repair. Reference was made to *Churton* v. *Frewen*(1), and the *Duke of Norfolk* v. *Arbuthnot*(2) cited in the argument, and in the judgment, on the appeal to the High Court.

Counsel for the respondents were not called upon.

Their Lordships' judgment afterwards, on 12th December, was delivered by

Lord HOBHOUSE.—The plaintiffs and defendants are all inhabitants of the village of Karakuddi, and the subject of dispute is a tank belonging to that village. The plaintiffs claimed in their plaint to be hereditary Hakdars, which the High Court interpret to mean rightful owners of the tank, and they prayed for a declaration that they have the sole right to repair it at their own exclusive cost, and for other relief flowing from that right and from the defendants' interference with it. The Subordinate Judge gave the plaintiffs a decree establishing their sole right to repair the tank at their own exclusive cost. Upon appeal the High Court dismissed the suit. Their Lordships are now asked to say the High Court was wrong.

The plaintiffs do not now assert that they are owners of the tank in any full or proper sense of the word; they admit that the villagers at large have full right to the enjoyment of it; but they contend that the function of cleaning, repairing, and generally managing and protecting the tank is an hereditary possession of their family, which they have a right to retain so long as they bear the cost of it. It may be that for generosity and public spirit their attitude deserves all that has been said of it by their counsel. But the defendants object to it; and the only question for a Court of Justice is on which side the lawful right is to be found.

Though the various classes and divisions of villagers are called by local and unexplained names, this much is clear, that the tank in dispute is on the site of an old village tank; that about the beginning of the century it was improved at the cost of the plaintiffs' family upon the request of at least some leading villagers,

(1) L.R., 2 Eq., 634. (2) L.R., 4 C.P.D., 290; L.R., 5 C.P.D., 390.

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and with the general acquiescence of the village; that since the year 1842, when there was a quarrel and a settlement, the plaintiffs' family have executed the general repairs and cleansing, and have on one occasion interfered to protect the tank from encroachment; and that some of the defendants have constructed and kept in repair flights of steps leading down into it. These matters, to which the greater part of the oral evidence relates, are not conclusive either way. But the proceedings of 1842 are of great importance and repair to be carefully looked at, not because they resulted in any decree or contract binding the present parties, but because they furnish the best evidence of the true relations and legal position of the disputants.

On the 1st of April 1842 Chidambaram, who was the head of, or in some way represented, the plaintiffs' family, presented a petition to the Collector of Madura, in which he alleged that when his predecessor improved the tank, it was agreed that his family should have charge of all the affairs appertaining thereto, and maintain it for ever. Then, after stating that their opponents in the village had prevented them from cleansing the tank, he prayed, "that an order may be passed allowing us to remove the mire and maintain the said urani charity for ever as we have been usually doing, prohibiting interference on the part of the persons who are endeavouring wrongfully to trouble us, and enabling the continuance of the charity in perpetuity."

The Collector referred the matter to the local Ameen, who took evidence and made a report; and on the 9th May 1842 the Collector declared that the opponents were not justified in interfering, and gave directions to the Ameen to issue orders for the complainants to carry on the work according to custom. It is noticeable that neither in the evidence adduced to the Ameen, nor in his report, nor in the judgment of the Collector, does there appear anything to support Chidambaram's allegation of an agreement that his family should have charge of all the affairs of the tank and maintain it for ever.

The order of May 1842 was no sooner issued than the opposite party, represented by one Lakshmanan Chetty, began to petition against it. They insisted that the tank was a common charity, and denied both the right of the plaintiffs' family to maintain it solely and the fact that they had done so. And they prayed a direction "that the charity which has, according to custom, been

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maintained by our Nagarattar community in common shall continue to be maintained in common henceforth." The immediate result of this petition was that the Collector directed that action on his previous order should be suspended till he himself came to the spot. The ulterior result was a compromise of the dispute, which for the time put an end to it.

The Kararnama which embodies the compromise is the most important document in the case. It was entered into before the Collector himself very formally. It was prepared by the Head Sheristadar of the district. It was signed by Chidambaram and Lakshmanan, the principal disputants, and by two others, apparently a partisan of each side; and it was attested by the signatures of the Collector and the Assistant Collector. It runs as follows :—

"On Chidambaram Chettiar commencing repairs to the Kalkattu Amman urani, Lakshmanan Chettiar and others said that they also would give money for digging that urani. Chidambaram Chetti objected that it ought not to be so received, and both parties resorted to the authorities. Chidambaram Chettiar contended that, as (his) father originally built the Kalkattu urani, he was the owner. The authorities (said) that uranis dug for charitable purposes are common property, and Chidambaram Chettiar urged that other uranis in the village should be likewise common, which statement the authorities accepted as just, and Lakshmanan Chettiar and others also admitted it as right. Therefore, both the parties having agreed that all the tanks and uranis of the Nagarattars of Karakuddi are common property, we have, with our mutual consent, agreed in the presence of the authorities, that in future, on occasions of removing mud from the urani and doing other repairs, all the Nagarattars should collect the money in common, hand over the said money to the person who may be in management as the original proprietor of the urani, have the work done, and adjust the accounts in common, and that there shall be no dispute whatever about this in future. Therefore we have executed this to be held as a deed of Kararnama for the same. We will henceforward abide by this alone."

The inferences to be drawn from this document are clear enough. The tank is the property, not of Chidambaram, but of the villagers, and the repairs are to be effected by common collections through the person in management, who is to account for his receipts and expenses. The only obscurity is in speaking of the person in

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management as the original proprietor of "the urani." Whatever may be the meaning of that expression, it cannot detract from the clear statement that all the tanks and uranis are common property. The terms of the Kararnama are fatal to the claim of the plaintiffs that they are entitled to repair at their sole expense. Their Lordships do not find anything in the previous evidence to show that these terms are erroneous; nor anything in the subsequent evidence to show that the position of the parties has been altered. The circumstances that the plaintiffs' family have in fact executed subsequent repairs without dispute, and that they have stood forward to protect the tank when threatened with injury, are quite insufficient for that purpose.

Moreover, it is very difficult to understand how such a right as this can be claimed without a corresponding obligation, and the plaintiffs' counsel are unable to show in what way any obligation is imposed on their family. There is no endowment to support the tank, and no right of taking tolls or fees. It is confessedly at the option of the plaintiffs' family whether they will execute the repairs or not. In their Lordships' opinion, it is equally at the option of the other villagers to permit the repair to be executed by the plaintiffs, or to insist on the work being done at the common cost.

It seems a great pity that there should be litigation on such a ground. Disputes for the purpose of avoiding a charge are much more common than disputes for the purpose of bearing one. But as we have a dispute of the latter kind, it must be settled, like any other, by law. And that compels their Lordships to hold that the tank remains the common possession of the village, and that no class of the villagers has any right to exclude the rest from contributing to the repair. The appeal fails, and must be dismissed, with costs. Their Lordships will humbly advise Her Majesty to this effect.

Appeal dismissed.

Solicitors for the appellants—Messrs. *Lawford, Waterhouse and Lawford.*

Solicitors for the respondents—Messrs. *Frank Richardson and Sadler.*

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

1889. March 13.

ABDUL LATEEF

v.

DOUTRE.*

Civil Procedure Code, s. 2, 268, 272—*Official Trustees' Act (XVII of* 1864)—*Public officer—Attachment by notice.*

A decree against a married woman provided that the amount due under it should be payable out of the separate estate of the judgment-debtor. The judgment-debtor was entitled to a life-interest in certain trust funds under a settlement of which the Official Trustee was the trustee. The decree-holder proceeded to execute his decree against this life-interest by notice to the Official Trustee under s. 272 of the Code of Civil Procedure, but there were no funds in the hands of the Official Trustee which would have been attachable under s. 268. The decree-holder now applied that the life-interest might be sold:

Held, that the interest of the judgment-debtor was not validly attached.

Semble: The Official Trustee is a public officer within the meaning of s. 2 of the Civil Procedure Code.

APPLICATION for the sale, in execution of a decree for Rs. 1,170, of the life-interest of a judgment-debtor under a post-nuptial settlement, dated 19th September 1873, of which the Official Trustee of Madras was the trustee.

The decree sought to be executed as above was passed in a suit brought by Abdul Lateef upon a promissory note, dated 27th January 1879, against Mrs. Doutre, the defendant, and the decree provided that the said amount should be payable from and out of the separate estate of the judgment-debtor.

By the post-nuptial settlement, referred to above, it was provided, *inter alia*, that the income of certain trust funds should be paid to Mrs. Doutre for her sole and separate use without power of anticipation by her, and the Official Trustee of Madras was appointed trustee of the settlement. The husband died on 30th July 1886. On 26th November 1886 Mrs. Doutre borrowed from Venkatesa Chetti the sum of Rs. 3,000 and as security for the loan executed to him an instrument charging her life-interest

* Civil Suit No. 55 of 1882.

under the above settlement, and gave him a power-of-attorney to receive the income of the trust funds from the Official Trustee. The instrument of charge and the power-of-attorney were duly presented to and registered by the Official Trustee. On 15th January 1889 the decree-holder proceeded to execute his decree under s. 272 of the Civil Procedure Code by attachment of the judgment-debtor's interest in the trust funds above referred to, and served notice as provided in that section on the Official Trustee. There were no funds in the hands of the Official Trustee which would have been available for attachment under s. 268.

Mr. *W. Grant* now moved for an order to sell the interest of the judgment-debtor as above.

The Official Trustee (Mr. *Wedderburn*) contra.

The attachment by notice is bad, for the Official Trustee is not a public officer. He can only be appointed trustee with his consent (Act XVII of 1864, ss. 8, 10), and his duties are not public, but private; and he is governed by the terms of The Married Woman's Property Act—Act III of 1874—of which s. 6 only creates an exception. In the present case the Official Trustee was appointed trustee of the defendant's marriage settlement by deed. In *Shahebzadee Shahunshah Begum* v. *Fergusson*(1) the question was merely whether the Official Trustee was entitled to notice of suit and it was not necessary to decide the present question, for whether he was a public officer or not, he was not entitled to notice in that case. If the order sought is granted it must be made, subject to the powers of advancement for children, &c., contained in the deed.

The further arguments adduced in this case appear sufficiently for the purpose of this report from the judgment of Mr. Justice Shephard.

JUDGMENT.—The decree-holder, having obtained an order which purports to be made under s. 272 of the Civil Procedure Code, applies to have the defendant's interest in property in the hands of the Official Trustee sold in satisfaction of his decree. I understand that the defendant, who is a widow, is entitled under a post-nuptial settlement to which she, her late husband, and the Official Trustee were parties, to a life-interest in property consisting of immovable property and Government paper held by the Official

(1) I.L.R., 7 Cal., 499.

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Trustee; and I am also informed that on the date of the above-mentioned order there were no funds in the hands of the Official Trustee available for attachment under s. 268. The decree-holder is therefore desirous of selling the life-interest of the defendant, subject, however, to a mortgage upon it effected by her, and with that view he has obtained an order under s. 272.

The Official Trustee, who appeared in person, took exception to this proceeding, submitting in the first instance that he was not a public officer within the meaning of s. 272, or rather within the meaning of that term as defined in s. 2. The question is whether he is an officer remunerated by fees, or commission for the performance of a public duty. Having regard to the considerations mentioned by *Cunningham*, J., in a case where the right to notice of suit under s. 424 of the Code was under discussion, I am of opinion that the Official Trustee is a public officer. *Shahebzadee Shahunshah Begum* v. *Fergusson*(1), *Anantharaman* v. *Ramasami*(2). The mere fact that he is not generally bound to undertake trusts cannot in my opinion affect the nature of the duties in respect of a trust that he does undertake. The next question is whether the mode of attachment adopted by the decree-holder is applicable to a case where the whole interest of the beneficiary, and not money actually payable or likely to become payable to him, is sought to be affected. There is distinct authority on this point which I think I ought to follow. The case to which I refer arose under the provision of the Code of 1859, s. 237 of which is similar to s. 272 of the present Code. By means of a notice given under s. 237 to the Collector, a decree-holder attached the debtor's share in a sum which he and another were entitled to receive by way of malikana rights annually as compensation for certain rights in lakhiraj lands which had been extinguished; as against a subsequent mortgagee of the debtor's rights it held that the attachment could not prevail, and the reason of the decision was that an attachment under s. 237 was only good so far as it related to any specific amount which might be set forth in the request as being then payable or likely to become payable to the defendant, and that it was not applicable to a right to receive money for ever as in the case before the Court—*Nilkunto Dey* v. *Hurro Soonderee Dossee*(3) as to which see also *Salamat*

(1) I.L.R., 7 Cal., 502. (2) I.L.R., 11 Mad., 317. (3) I.L.R., 3 Cal., 414.

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Hossein v. *Luckhi Ram*(1). It was further observed in the former of these cases that though it might be doubtful whether the attachment should proceed under s. 235 or 236, in either case the defendant himself to whom the money was payable would be entitled to notice. I think that this construction of the section is the right one. In the present case there is no reason to doubt that the judgment-debtor has an interest in the property held by the Official Trustee, which may be attached and sold; but I must hold that her interest was not validly attached by the notice given to the Official Trustee under s. 272, and that therefore there can at present be no order for sale.

APPELLATE CIVIL.

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

1889. Feb. 7, 15.

MARUTHAPPA (PLAINTIFF), APPELLANT,

v.

KRISHNA (DEFENDANT), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, *ss.* 7, 9, 39—*Copy of* patta—*Tender.*

A landholder tendered to his tenant a notice stating that his *patta*, of which the particulars were given, had been prepared and calling on him to come within a month to the zemin cutcherry to fetch the *patta* and execute the *muchalka*:

Held, that there was sufficient tender of a *patta* to support a suit under s. 9 of the Madras Rent Recovery Act.

APPEAL against the decree of W. F. Grahame, Acting District Judge of Tinnevelly, in appeal suit No. 174 of 1888, affirming the decree of E. C. Ransom, Acting Head Assistant Collector of Tinnevelly, in summary suit No. 13 of 1887.

Summary suit by the Zemindar of Uttumalai under Madras Rent Recovery Act, s. 9, to enforce acceptance by his tenant of a *patta*.

The only issue in this case was "whether the *patta* on which the suit is based, or a copy of it, was tendered to the defendant in accordance with the requirements of the Rent Recovery Act."

(1) I.L.R., 10 Cal., 521. * Second Appeal No. 1152 of 1888.

MARUTHAPPA v. KRISHNA.

It was admitted that the following document had been tendered by the plaintiff to the defendant :—

"Notice given by Maruthappa Thevar, Zemindar of Uttumalai, to Krishna Nadan residing in the village of your *patta* for fasli 1296 as detailed hereunder has been prepared and is ready for distribution. You are to appear before me at the zemin cutcherry at Veerakeralampudur within one month, and receive the *pattas* and execute the *muchalka*. If you fail in so doing, steps will be taken under the Act." Then follow the particulars of the *patta*.

The Head Assistant Collector decided the above issue in the negative and dismissed the suit. The plaintiff appealed and the District Judge dismissed his appeal observing : "It is clear that "the zemindar is of opinion that it is sufficient for him to inform "his tenants that their *pattas* are ready for distribution ; and that "if he does so inform them he has fully complied with all the "requirements of the Act so as to enable him to sustain a suit to "enforce the acceptance of a *patta*. But I am of opinion that "both the language of s. 7 of the Act and that of the judg-"ment of the High Court (Morgan, C.J., and Innes, J.) in *Sayud* "*Chanda Miah Sahib* v. *Lakshmana Ayyangar*(1) show that it is "the very *patta* to be given to the tenant in exchange for his "*muchalka* which the Act requires to be tendered, and that the "tender of nothing else will enable a landholder to sustain a "suit to enforce the acceptance of a *patta*. For this reason I am "of opinion that the Head Assistant Collector rightly dismissed "the suit."

The plaintiff preferred this second appeal.

Rama Rau and *Bhashyam Ayyangar* for appellant.

Subba Rau for respondent.

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 Parker, J.).

JUDGMENT.—We are unable to concur in the view taken by the District Judge. What was really decided in *Sayud Chanda Miah Sahib* v. *Lakshmana Ayyangar*(1) was that a landholder must show that he had made a written demand upon the tenant showing definitely all the terms offered or required, and that a mere indefinite demand or notice would not suffice. In *Srinivasa*

(1) I.L.R., 1 Mad., 45.

v. *Narayanasami*(1) it was held that a tenant demanding a *patta* from a landlord was not under a corresponding obligation to make his demand in writing. In *Narayana* v. *Muni*(2) it was held that the tender of a document containing an account of rent payable in the current fasli was good as a tender.

In the case before us the document tendered contained all the details required by Act VIII of 1865, s. 4, and was in fact a duplicate of the *patta* with a notice prefixed. Had the tenant executed a *muchalka* engaging to hold in the terms thereof, the contract would have been complete. The Judge seems to have been misled by the term "copy" in s. 39, for a copy of a *patta* served upon a tenant under the provisions of s. 39 is in reality a duplicate. The question whether the tenant was bound to go to the zemin cutcherry to take some other document does not really arise. The written document tendered him fulfilled the conditions required by law and contained sufficient information for him to decide whether he would accept it or not. It is not pretended that he did accept it or that he executed a *muchalka*. The landlord has therefore a right of suit under s. 9. The decree of the Courts below must be reversed and the suit remanded to the Court of first instance. The respondent must pay appellant's costs in this and in the lower appellate Court, and the costs in the Court of first instance will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

GOPALA (DEFENDANT No. 2), APPELLANT,

v.

SAMINATHAYYAN AND OTHERS (PLAINTIFF AND DEFENDANTS, Nos. 1 AND 3), RESPONDENTS.*

1888. Nov. 28. 1889. Jan. 8.

Transfer of Property Act, s. 81—Marshalling—Creditors of coparcenary and separate creditors—Act XXVII of 1860—Adoptive son of deceased creditor—Practice—Parties to cross appeals.

Suit by the adopted son of the obligee (deceased) of a hypothecation bond to recover principal and interest due on the bond against the land comprised in the hypothecation. Defendant No. 1, the obligor of the bond, had executed it as

(1) I.L.R., 8 Mad., 1. (2) I.L.R., 10 Mad., 363.

* Second Appeal No. 382 of 1888.

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manager of a joint Hindu family, of which defendant No. 2 was a member, and for the rightful purposes of the family. The family subsequently became divided, and the hypothecated property was divided between defendants Nos. 1 and 2. Defendant No. 1 afterwards hypothecated part of his share for a private debt to defendant No. 3, who having sued on his hypothecation and brought the land to sale in execution became the purchaser.

The District Munsif passed a decree for the plaintiff, against which defendants Nos. 2 and 3 preferred separate appeals, the plaintiff being the sole respondent to each appeal. The District Judge on appeal passed a decree directing that the plaintiff should first proceed against all the property which was not subject to the hypothecation to defendant No. 3, including the share of defendant No. 2.

Defendant No. 2 preferred a second appeal joining all the other parties:

Held, (1) that the plaintiff was under no obligation to obtain a certificate under Act XXVII of 1860 for the purpose of maintaining the suit;

(2) that as the plaintiff and defendant No. 3 were not creditors of the same person having demands against the property of that person, no case for marshalling arose: and consequently that the direction of the District Judge was wrong.

Per cur.—Though both defendants Nos. 2 and 3 preferred separate appeals from the original decree, they only made the plaintiff respondent, and defendant No. 3 omitted to make the appellant before us (defendant No. 2) a party to his appeal, but the relief prayed for in each appeal was that the original decree might be set aside so far as it was in plaintiff's favor and against each appellant . . . . . Having regard to the relief claimed . . . . . we see no reason to hold that the appellant before us was a necessary party to the appeal preferred by defendant No. 3.

SECOND APPEAL against the decree of J. A. Davies, Acting District Judge of Tanjore, in appeal suits Nos. 117 and 140 of 1887, modifying the decree of C. G. Kuppusami Ayyar, District Munsif of Tanjore, in original suit No. 561 of 1885.

Suit to recover principal and interest due on a hypothecation bond, dated 25th May 1880, and executed by defendant No. 1 to the adoptive father (since deceased) of the plaintiff. Defendants Nos. 1 and 2 were members of a joint Hindu family, of which defendant No. 1 was the managing member; and the consideration for the bond sued on was a sum of Rs. 1,000 borrowed by him as such for family purposes.

In January 1881 the family property was divided between defendants Nos. 1 and 2; part of the property comprised in the hypothecation bond of 25th May 1880, viz., items Nos. 1, 3, 5 and 7 fell to the share of defendant No. 1, and part, viz., items Nos. 2, 4 and 6 to that of defendant No. 2.

On 10th March 1881 defendant No. 1 executed a hypothecation bond of part of his share, viz., items 1 and 5, for a private debt to defendant No. 3, who having obtained a decree upon the

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hypothecation bond in original suit No. 2 of 1884 in the Tanjore District Court and brought the hypothecated property to sale in execution and became the purchaser.

Upon these facts the District Munsif held that the plaintiff was entitled to proceed against all the land comprised in his hypothecation bond, viz., items Nos. 1—7, both inclusive, and decreed accordingly. Against this decree defendants Nos. 2 and 3 preferred separate appeals, the plaintiff being made the sole respondent in either.

The District Judge, on appeal, *referring to s. 82 of the Transfer of Property Act*, modified the decree of the District Munsif by adding to it a direction as follows: "That the plaintiff do first "proceed against the property, plaint items Nos. 2, 3, 4, 6 and "7 not mortgaged to the third defendant and only after those "items have proved insufficient to meet his decree-debt against "the properties Nos. 1 and 5 which are mortgaged to the third "defendant."

Defendant No. 2 preferred this second appeal joining both the plaintiff and defendants Nos. 1 and 3 as respondents.

Mr. *Subramanyam* for appellant.

Rama Rau and *Pattabhiramayyar* for respondents.

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

JUDGMENT.—It has been found by the Courts below that the defendant No. 1 executed the hypothecation bond, exhibit A, prior to the partition between him and defendant No. 2 in consideration of money borrowed by him as managing co-parcener on account of the marriages of defendant No. 2 and his sister. There is evidence in support of the finding, and we must accept it in second appeal. The plaintiff was clearly not precluded from suing, as the adopted son of the obligee, to recover the debt due under exhibit A, and he was under no obligation to obtain a certificate under Act XXVII of 1860 for the purpose of maintaining the suit, nor is it shown that the partition deed, exhibit X, has been misconstrued on any point. The material questions argued before us are that the Judge was in error in altering the original decree in an appeal preferred by defendant No. 3 against the plaintiff so as to prejudice the appellant, defendant No. 2, who was not made a party to the appeal and in applying s. 82

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of the Transfer of Property Act in favor of defendant No. 3. It is true that though both defendants Nos. 2 and 3 preferred separate appeals from the original decree, they only made the plaintiff respondent, and that defendant No. 3 omitted to make the appellant before us a party to his appeal, but the relief prayed for in each appeal was that the original decree might be set aside so far as it was in plaintiff's favor and against each appellant, and so much of the property under hypothecation as severally belonged to him. Having regard to the relief claimed by each appellant before the Judge, we see no reason to hold that the appellant before us was a necessary party to the appeal preferred by defendant No. 3. It may be that before the Judge applied the doctrine of marshalling as between defendants Nos. 2 and 3 he should have made the former a party to the appeal and should have heard him also on the point; but the omission to do so was only an error of procedure and as the facts found are the same both against defendants Nos. 2 and 3 and as both are parties to the second appeal before us, the question of marshalling may be effectually dealt with by us, and in this view the error of procedure is immaterial. We desire, however, to consider whether the direction of the Judge that the plaintiff should first proceed against property not mortgaged to defendant No. 3 can be supported, and we reserve judgment on that point.

The judgment on the point reserved was delivered on the 8th day of January 1889, as follows:—

The question which we reserved for consideration when this appeal was heard was, whether the decision of the District Judge was right so far as it directed the plaintiff to proceed first against property not mortgaged to defendant No. 3. The facts found to be established in this case are shortly these: Seven items of land originally belonged to a joint Hindu family which consisted of two co-parceners, viz., defendants Nos. 1 and 2. In May 1880 those items were hypothecated to the plaintiff's father as security for a debt contracted by defendant No. 1, as the managing member, and for the benefit of the joint family. In January 1881 the two co-parceners entered into a partition, whereby items 2, 4 and 6 fell to the share of the second, and items 1, 3, 5 and 7 to the share of the first defendant. On 10th March 1881 defendant No. 1 hypothecated items 1 and 5 to defendant No. 3 as security for a debt which he contracted for his own use. The latter

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instituted against the former original suit No. 2 of 1884, and purchased those items at a Court sale held in execution of the decree which she obtained. The plaintiff brought the present suit to recover his debt by the sale of items 1—7, and defendant No. 3 contended that she was entitled to the direction given by the Judge.

The Judge relied on s. 82 of the Transfer of Property Act, but that section has reference to a case of contribution, whilst the direction impugned in appeal could only be given, if it could be given at all, by way of marshalling securities under s. 81. We are of opinion that upon the facts found defendant No. 3 is not entitled to insist that the plaintiff shall first proceed against the items which fell to the share of defendant No. 2 so as to prejudice him. Section 81 appears to enact as a rule of law, the equity of marshalling securities as administered by the Court of Chancery in England and the principle on which it rests is that a person having two funds to satisfy his demand shall not, by his election, disappoint a party who has only one fund—*Aldrich* v. *Cooper*(1). But as pointed out by Lord Chancellor Eldon in *ex parte Kendall*(2), no marshalling ought to be enforced unless the parties between whom it is enforced are creditors of the same person and have demands against the property of the same person. In *ex parte Kendall*, the question was considered as between the creditors of a firm which originally consisted of five partners, and the creditors of four of them who carried on the partnership business as surviving partners after the death of one of the five, and the creditors of the four insisted that the creditors of the five should be ordered to proceed first against the separate estate of the deceased partner which was available to them only. After reserving judgment, the Lord Chancellor observed as follows: "That is an equity "which the creditors of the four have not. I am extremely well "satisfied that a creditor having a demand against one estate only "of his debtor, may in equity confine another creditor, having a "demand against two estates of the same debtor, to make good "his demand against that upon which he has no claim, so that he "may go against the other; but the proposition is perfectly "different, that creditors of the four partners, having no demand "against the separate estate of the deceased partner, shall compel "the joint creditors of the five, being also joint creditors of the

(1) 8 Ves., 308. (2) 17 Ves., 520.

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"four, to go against the separate estate of the deceased partner. "Whether it may be just or not, the creditors of the four have "no other right than the four themselves would have had, and the "equity of the creditors in these cases is worked out through "the equity which the debtors themselves have."

In the case before us defendant No. 3 was the creditor of the defendant No. 1 and not of the joint family, and items 2, 4 and 6, against which he insisted *inter alia* that the plaintiff should first proceed did not belong to his debtor, but belonged to defendant No. 2. Defendant No. 1 had no equity to insist that the plaintiff should first proceed against the separate property of defendant No. 2 in order to save his own separate estate. The direction given by the Judge is therefore bad in law, so far as it relates to items 2, 4 and 6, which fell to the share of defendant No. 2 and the decree appealed against is hereby modified by excluding those items from the direction embodied in the decree. The decree is confirmed in other respects, and the third respondent will pay the appellant the costs of this appeal. Respondents will bear their own costs in this Court.

APPELLATE CIVIL—FULL BENCH.

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

1888. Nov. 20.

RAMANADAN (DEFENDANT No. 1), APPELLANT,

v.

RANGAMMAL (PLAINTIFF), RESPONDENT.*

Hindu law—Right of a widow to reside in the family dwelling-house—Sale of dwelling-house in execution of a decree obtained against the managing members of family on a debt incurred for family purposes.

A house, being ancestral property of a Hindu family, was sold in execution of a decree by which the decree-amount was constituted a charge on such property. The debt sued on had been incurred for the benefit of the family by the coparceners for the time being, but since the death of such coparceners' father:

Held, the widow of the latter who resided in the said house during her husband's lifetime was not entitled as against a purchaser for value in good faith under such decree (but with notice that she resided and during her husband's life had resided

* Second Appeal No. 403 of 1886.

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in that house, and still claimed to reside there) to continue to reside for life in such portion of the house sold as she resided in subsequent to her husband's death—*Venkatammal* v. *Andyappa*(1) distinguished.

SECOND APPEAL against the decree of T. Weir, Acting District Judge of Madura, in appeal suit No. 392 of 1885, affirming the decree of V. Kuppusami Ayyar, Additional District Munsif of Madura, in original suit No. 189 of 1884.

Suit to declare the right of the plaintiff, a Hindu widow, to occupy a certain house.

The plaintiff was the widow of one Sankarappa Naick, against whose sons and grandsons defendant No. 1 obtained a decree in original suit No. 3 of 1882 on the file of the Subordinate Court of Madura (West) for the principal and interest of a sum of money borrowed of him by them. The house in question which had formed part of Sankarappa's ancestral property was attached in execution of the decree; and a claim asserted by the present plaintiff having been investigated and rejected under s. 331 of the Code of Civil Procedure, the house was sold in execution and purchased by defendant No. 1 in the name of defendant No. 2.

The plaintiff now sought to set aside the order made under s. 331 of the Code of Civil Procedure, and to obtain the above declaration on the ground that she, as the widow of Sankarappa Naick, had a right to occupy the family dwelling-house for life, and that the above proceedings in execution did not bind her interest as she was not a party to the suit.

Both the District Munsif and, on appeal, the District Judge recorded a finding to the effect that the plaintiff had occupied part of the house in question during her husband's lifetime and had continued to occupy it after his death; and though her husband and his sons had other houses at Karepetti and Madura the District Judge said:—"The plaintiff is not shown to have "ever resided in the house in the village of Karepetti, and the "other houses or shops belonging to the family in the town of "Madura have never been occupied as residences, and are not "suited for such a purpose." It was also found that defendant No. 1 had notice, at the time of his purchase, of the fact that the plaintiff was in occupation of part of the house. On these facts the District Judge upheld the decree passed by the District Munsif

(1) I.L.R., 6 Mad., 130.

declaring that plaintiff was entitled to occupy the portion of the house in question in which she had resided hitherto.

Defendant No. 1 preferred this second appeal.

Subramanya Ayyar for appellant.

Mr. *Ramasami Raju* for respondent.

The arguments adduced on the various hearings of this second appeal appear sufficiently for the purpose of this report from the order of reference and the judgments which follow.

At the first hearing the High Court directed a trial of the issue whether the debt sued on in original suit No. 3 of 1882 had been incurred for the benefit of the family. This issue was determined in the affirmative, and no objection was taken by the respondent to the finding on this question. The case having then come on for rehearing, the Court (Kernan and Brandt, JJ.) made the following

Order of Reference to the Full Bench :—

"The facts of this case, so far as it is necessary to state them for the purposes of the reference which we propose to make to the Full Bench, are that a tenement, in part of which the plaintiff continues to live, and in which she lived with her husband and sons prior to her husband's death, was sold in November 1880 by the plaintiff's son, Alagirisami, to the first defendant in discharge of a debt incurred in 1875 by Alagirisami and his three brothers, and secured by an instrument hypothecating this property; the creditor and purchaser, the first defendant in the present suit, filed a suit against the sons and grandsons of Sankarappa, the plaintiff's husband, to obtain possession of the house or for its value, and secured a decree in original suit No. 3 of 1882 for money, which was constituted by the decree a charge on the property; and in execution of that decree he purchased the tenement in suit.

"The present suit is brought by Sankarappa's widow, Rangammal, for a declaration of her right to continue to reside for her lifetime in that portion of the house in which she has lived since the death of her husband. The District Munsif held the plaintiff's right to occupy for her lifetime a portion of 'the family house' notwithstanding the purchase of the interests of the male coparceners of the family by a stranger to be established, and eviction of the widow 'without providing some other suitable

dwelling for her' to be prohibited, on the authority of *Mangala Debi* v. *Dinanath Bose*(1), *Gauri* v. *Chandramani*(2), *Talemand Singh* v. *Rukmina*(3), *Dalsukhram Mahasukhram* v. *Lallubhai Motichand*(4), and *Venkatammal* v. *Andyappa*(5). He further held it proved that the purchaser had notice at the time of his purchase of the occupation of part of the premises by the plaintiff, as the mother of his judgment-creditors, and widow of Sankarappa, their father. The District Judge upheld the decision.

"This second appeal is preferred on the ground that the house having been sold for a family debt, the plaintiff is not entitled to decree. For the purposes of this reference, the property must be held to be ancestral.

"We called for a finding on the fourth issue (which had not been tried), viz., whether the judgment-debt in original suit No. 3 of 1882 was incurred for the benefit of the family; the finding is in the affirmative, and no objection is taken to that finding.

"In *Gauri* v. *Chandramani*(2) the learned Judges cite the case of *Mangala Debi* v. *Dinanath Bose*(1) as authority for their decision that the auction-purchaser of property sold in execution of a decree against a nephew of the widow's husband could not eject the widow from the house in which she had resided with her husband. It does not appear from the report whether the fact that in Mangala Debi's case the sale was a voluntary sale was specially noticed by the learned Judges.

"*Talemand Singh* v. *Rukmina*(3) simply follows the decision in *Gauri* v. *Chandramani*(2), but reference is also made in it to 'authorities referred to by West and Bühler;' but reference to that work appears to us to show at least as much authority against the view taken by the Allahabad Court as in favor of it.

"The case of *Lakshman Ramchandra Joshi* v. *Satyabhamabai*(6) is not noticed by either the District Munsif or the District Judge, though it is referred to and distinguished in the Bombay case *Dalsukram Mahasukhram* v. *Lallubhai*(4) cited by the District Munsif. It appears to us that the last-named case itself might be distinguished from the case before us on the ground that in the former the sale was a voluntary sale; and we entertain at present

(1) 4 B.L.R., O.C., 72. (2) I.L.R., 1 All., 262. (3) I.L.R., 3 All., 353.
(4) I.L.R., 7 Bom., 282. (5) I.L.R., 6 Mad., 130. (6) I.L.R., 2 Bom., 494.

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little doubt as to the law on the subject as expounded in *Lakshman Ramchandra Joshi's case*(1) as to family property sold to pay debts (not incurred for immoral purposes) of the husband of a widow claiming maintenance or of his father or grandfather, that a sale of family property in such circumstances would be valid as against the widow, irrespective of notice of her claim on the part of the purchaser. The question for determination in the case before us is, however, somewhat different, the original debt having been incurred by the coparceners for the time being after the death of the plaintiff's husband. The view taken by West, J., in *Lakshman Ramchandra Joshi* v. *Satyabhamabai*(1) carries it however much further, and on the grounds that the debts ordinarily take precedence of claims to maintenance and that assent to the propositions of law necessary to support the decree appealed against would seem to imply that a widow has a right difficult to distinguish from a right to a charge or lien on family property, which will affect purchasers under a title such as that in the present case, although effect has not been given to such right either by agreement or by a decree of a Court such as to constitute it a charge on specific property.

"In *Venkatammal's case*(2), however, which was decided by this Court since the latest of the two Bombay cases above referred to, and in which the circumstances connected with the sale of the property at the court auction do not appear to be distinguishable in principle from those in the case before us, the learned Judges (Turner, C.J., and Muttusami Ayyar, J.), while holding that the widow, the mother of Kristnasami Chetty, by whom the original debt was incurred, could not resist the sale, decided that the widow was entitled to continue to reside in the house she had theretofore occupied, and that the house must be sold subject to that right and the decree is drawn accordingly.

"For the reasons indicated above and having regard to the apparent conflict of authority, we think it desirable that the question should be considered by a Full Bench.

"We are inclined to concur with the Bombay High Court in considering that the fact of *bonâ fide* purchasers having notice is immaterial in cases in which ancestral property is sold to defray the just debts of a widow's husband, his father's or grandfather's

(1) I.L.R., 2 Bom., 494. (2) I.L.R., 6 Mad., 130.

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debts, and if the case of a sale of such property for a debt contracted by coparceners of the widow's husband otherwise competent to deal with such property for proper purposes stands upon the same footing, notice would be immaterial in this case also.

"The question then which we would refer for the decision of a Full Bench is as follows:—

"Where ancestral property consisting of a house is sold in execution of the decree of a Court by which such property is held liable to sale in satisfaction of the sum decreed, and such decree is the result of a debt incurred not otherwise than for the benefit of the other coparceners by the coparceners for the time being, but subsequent to the death of such coparceners' father, is the widow of the latter who resided in the said house during her husband's lifetime entitled as of right, as against a purchaser for value in good faith under such decree (but with notice that she resided and during her husband's life had resided in that house and still claimed to reside there), to continue to reside for the term of her life in such portion of the house sold as she resided in subsequent to her husband's death?"

This second appeal came on for hearing before the Full Bench, and judgment was reserved. Subsequently the Court delivered the following judgments:—

KERNAN, J.—I am of opinion that, upon the facts, the widow of the father of the manager has not a right as against the purchaser to reside in the house of her late husband and family.

If the debt, in respect of which the sale took place, was a debt due by her husband, no doubt could be entertained that she had no such right. The only doubt there could be, as it appears to me, is whether her right to reside in the house had not accrued as against the manager who succeeded her husband and whether such manager could have, by any act of his, voluntarily affected her right. However, the finding is that the debt incurred by the manager was for the benefit of the family. The widow was one of the family, and, though I do not believe her right to maintenance would give her a right to increased maintenance by reason of large increase of the property of the manager, still, as the acquisition of the means of providing food and raiment for her as well as for the rest of the family was one of the objects of the manager in carrying on business, I do not see how she can resist effect being

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given to the manager's act for the family benefit. If she had got a right by contract or by decree to reside in the house before the execution of the deed by the manager, she could rely on it and resist the title of the purchaser.

I would answer the reference in the negative.

MUTTUSAMI AYYAR, J.—The house in dispute was the ancestral property of one Sankarappa, who died, prior to 1875, leaving him surviving, a widow and four sons. In 1875, the sons hypothecated the house as security for money which they borrowed from the appellant, and, in 1880, the eldest son sold the property in satisfaction of the debt. Thereupon the appellant brought original suit No. 3 of 1882 against the sons and grandsons of Sankarappa to recover either the possession of the house or its value, and obtained a decree which declared the debt to be a charge upon it. In execution of the decree, he brought the house to sale and purchased it. The widow of Sankarappa had continued to live in the house with her sons and grandsons since the death of her husband, as she had lived during her husband's lifetime. She had joined neither in the execution of the hypothecation bond of 1875, nor of the deed of sale of 1880, nor had she been made a party to original suit No. 3 of 1882. She instituted the present suit to obtain a declaration of her right to continue to reside for her lifetime in that portion of the family house, in which she had lived both prior and subsequently to her husband's death. It was found by the Courts below that the purchaser had notice, at the time of his purchase, of the occupation of that part of the house by the respondent (plaintiff) as the mother of his judgment-debtors and the widow of Sankarappa, their father. Upon these facts, the District Munsif, and, on appeal, the District Judge held that nothing more than the interests of the male coparceners passed by the court-sale, and decreed the claim in respondent's favor. On second appeal, the question, whether the debt in original suit No. 3 of 1882 was incurred for the benefit of the joint family, was ordered to be tried, and a finding was returned in the affirmative. It was contended for the appellant that the decision of a Divisional Bench of this Court in *Venkatammal* v. *Andyappa*(1) was open to doubt. The question referred to the Full Bench is :—" Where ancestral property consisting of a house is sold in execution of the

(1) I.L.R., 6 Mad., 130.

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decree of a Court, by which such property is held liable to sale in satisfaction of the sum decreed, and such decree is the result of a debt incurred, not otherwise than for the benefit of the other coparceners, by the coparceners for the time being, but subsequent to the death of such coparceners' father, is the widow of the latter who resided in the said house during her husband's lifetime entitled as of right as against a purchaser for value in good faith under such decree (but with notice that she resided there, and during her husband's life in that house and still claimed to reside there), to continue to reside for the term of her life in such portion of the house sold as she resided in, subsequent to her husband's death."

I am also of opinion that the purchase is valid against the respondent. It is found that the judgment-debt is a family debt, and I take it that the debt, though contracted only by the male coparceners, was contracted by them, not for their exclusive benefit, but for the benefit generally of the joint family consisting of themselves and their mother. A sale for the payment of her own debt would bind her interest in the house, whatever it might be, and the decree in original suit No. 3 of 1882 was one which executed the hypothecation of 1875, and which was passed against the representatives of the joint family. In these circumstances, the respondent is not entitled to set aside the sale unless she shows that the debt, which has led to it, is not binding upon her. In *Venkatammal* v. *Andyappa*(1), there was no finding as in this case that the debt in question was a family debt, that is to say, a debt contracted for the joint benefit of the mother and her sons, and that case is not therefore on all fours with the one before us. As I took part in it, and as the soundness of the decision therein is doubted in the order of reference, I desire to state the considerations upon which a distinction was made between the mother's right of maintenance generally and her right to reside in the family house in which she had lived.

For the appellant, it is urged that the claim to maintenance creates only a personal obligation against the heir in possession. I cannot accede to this contention. The son in possession of ancestral property is no doubt under a personal obligation to maintain his mother, but this is not all. The mother is entitled to insist that the maintenance should be charged on a specific

(1) I.L.R., 6 Mad., 130.

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part of ancestral property either when a partition is made by her sons or when the managing member wastes ancestral property, or when she is not duly maintained, or when for any other good and sufficient cause, the ancestral property indicated by Hindu law as the general fund from which her maintenance is to be paid is in peril. The correct view is that the obligation to maintain the mother is strengthened by giving her an interest in immovable property and thereby enabling her to constitute that interest into a specific charge, or an actual existing proprietary interest for the term of her life, and to protect her right of maintenance against improvident alienation of the fund from which it is to be satisfied. To this extent, the right of maintenance is a right *in re* or an interest in ancestral property. Neither Mr. Justice Phear nor Mr. Justice West, who held that such right was not an existing proprietary interest denied that it was a real right. Mr. Justice Phear said:—"When the property passes into the hands of a *bonâ fide* purchaser without notice, it cannot be affected by anything short of an already existing proprietary right: it cannot be subject to that which is not already a specific charge or which does not contain all the elements necessary to its ripening into a specific charge. And obviously, the consideration received by the heir for the sale of the deceased's property will, so far as the widow's right of recourse to it is concerned, take the place of the property sold." He added that the widow might also doubtless follow the property for her maintenance into the hands of any one, who takes it as a volunteer or with notice of her having set up a claim for maintenance against the heir (*Srimati Bhagabati Dasi* v. *Kanailal Mitter*(1)). Adverting to that judgment, Mr. Justice West said:—"The distinction taken between the volunteer and the alienee for value rests rather on English than on Hindu notions;" and the notice necessary to affect the purchase must be a notice of the existence of a claim likely to be unjustly impaired by the transaction. He added, if Mr. Justice Phear's observation were applied to the Bombay Presidency, the widow's claim in every case does contain all the elements necessary for its ripening into a specific charge and went on to state that it was however in his opinion not an existing proprietary right. He referred to the English law as applied to purchases made with knowledge of collateral rights and observed, "where

(1) 8 B.L.R., 228.

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the right comes into existence by covenant, the burden does not at law run with the servient tenement, whereas equity says that a person who takes it with notice that a covenant has been made shall be compelled to observe it." "In cases of maintenance," he added, "the right does not come into existence by covenant, but it is a right maintainable against the holders of the ancestral estate in virtue of their holding, no less through the operation of the law than if it had been created by agreement; and so, when the sale prevents its being otherwise satisfied, it accompanies the property, as the burden annexed to it, into the hands of a vendee with notice that it subsists. Equity, as between the vendee and vendor, will make the property retained by the latter, primarily answerable, but such property there must be to make the sale and purchase free from hazard, where the vendee has knowledge or means of knowledge of a widow's claim that cannot be satisfied without recourse to what he proposes to buy." The conclusion he came to was that the maintenance of persons entitled to no definite share was *not an indefeasible* charge, so long as it was not reduced to certainty by a legal transaction (*Lakshman Ramchandra Joshi* v. *Satyabhama Bai*(1)). The *ratio decidendi* is that the heir in possession of ancestral property is under an obligation to maintain the mother, and that she has an interest in ancestral property to ensure its due fulfilment or *jus in re* as a strengthening right, but that that right does not ripen into an indefeasible charge, until it is referred to specific property by contract or decree, that meanwhile it is only an interest analogous to a collateral right resting in covenant, that, until it is reduced to certainty, it is not an existing proprietary right, that a purchaser, however, with notice that that right cannot be satisfied without recourse to the purchase he makes, is liable for her claim, and that if the purchase is *bonâ fide* and legal at the time when it is made, a subsequent change in the circumstances of the family does not invalidate a transaction legal in its inception. I am, therefore, of opinion that the contention that the right of maintenance creates no real right, but only a personal obligation must be overruled.

Another contention is that the distinction made in *Venkatammal* v. *Andyappa*(2) between the right of residence in the family house and the right generally of maintenance is not sound

(1) I.L.R., 2 Bom., 494. (2) I.L.R., 6 Mad., 130.

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in principle. The right of residence of Hindu females is ordinarily referable to the family house and a purchaser may be presumed to have notice of that fact. It is reasonable to hold that he is not a *bonâ fide* purchaser entitled to eject her, unless it is proved that the sale is valid as against her, either because, as in this case, it is made in liquidation of a debt binding on her or an ancestral debt, or with her consent or in circumstances which would sustain a plea of equitable estoppel against her. The consideration that a real right is not a specific charge, unless that right is referable to specific property, has no application in the case of a family dwelling. Prior to the decision in *Lakshman Ramchandra Joshi* v. *Satyabhama Bai*(1), Sir Barnes Peacock, and Mr. Justice Mitter, held that an adopted son could not convey to a stranger such a right to the family dwelling as to deprive his adoptive mother of her right of residence (*Mangala Debi* v. *Dinanath Bose*(2)). The same view was taken in a Bombay case reported in *Prankoonwur* v. *Dovkoonwur*(3). There is also a smriti of Katyayana which says "except his whole estate and his dwelling-house, what remains after the food and clothing of his family, a man may give away, whatever it be whether movable or immovable; otherwise, it may not be given" (*Colebrooke's Digest, B. II, Ch. IV, Sect. II, text* 19). In *Gauri* v. *Chandramani*(4), the Allahabad High Court held that the widow had a valid right of residence against the purchaser of the family house at a Court-sale. Again, the view that the right of maintenance is not an already existing proprietary interest so as to affect a *bonâ fide* purchaser for value is in substance rather an equity founded on analogy to the English law of purchases made with knowledge of collateral rights than a strict logical deduction from texts of Hindu law or the usage of the country. According to Yajnavalkya, the mother was entitled to a share equal to that of a son when partition was made of ancestral property. This was the Smriti law on the point and the author of the Mitakshara expounded the law according to Yajnavalka's Smriti (*Mit. Chap. I, s.* 7, 1—2). But a distinction was made by the author of Smriti Chandrika between the nature of a son's interest and of a widow's interest, and the former was characterized as independent

(1) I.L.R., 2 Bom., 494. (2) 4 B.L.R., O.S., 72.
(3) 1 Borr., 2nd ed., p. 404. (4) I.L.R., 1 All., 262.

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ownership and the latter as limited to the assignment of a portion by way of maintenance. Thus, the mother's right, which originally extended to a definite share according to Yajnavalkya was limited to such a portion as would suffice for her support. According to Hindu notions, it was still a real right or a charge on ancestral property. According to the course of decisions until 1877, the mother's maintenance was considered to be a charge on ancestral property. In *Ramchandra Dikshit* v. *Savitribai*(1), it was laid down that by Hindu law the maintenance of a widow was a charge upon the whole estate and, therefore, upon every part of it. In *Heera Lall* v. *Mussumat Kousillah*(2) it was stated that the widow's right to maintenance was not merely a right of action against the heirs personally, who take the property, but a charge on the property, which formed the estate of her husband. The High Court at Allahabad observed that the charge should be enforced against the purchaser of a part of the family property with the equitable reserve that execution should, if possible, proceed in the first instance against the vendors. This is the first form of equity recognized as modifying the rule that the widow's maintenance was a charge on every part of the estate. In this Presidency, the late Sudder Court held in 1860 that a sale of property by the husband was invalid where nothing was left for the maintenance of his wife *Lachchanna* v. *Bapanamma*(3). Thus, according to judicial decisions, the mother's right of maintenance was considered to be a charge on ancestral property until 1877. But in its nature the charge was indefinite in its scope, and, as in the case of a male coparcener, a right to carve specific and individual property out of a general fund which is the common property of the joint family. In *Lakshman Ramchandra Joshi* v. *Satyabhama Bai*(4), a distinction was made between a charge on specific property and a *jus in re* in a general fund which might ripen into such charge and elucidated by Mr. Justice West in a very learned judgment by reference to several authorities. The foundation, however, for the distinction is that so long as the mother lives with her sons as a member of the joint family and continues to be supported by them, she submits

(1) 4 Bom., H.C.R., 73. (2) 2 Agra Reports, 42.
(3) Decisions of the Sudder Udalut (Madras), 1860, p. 290.
(4) I.L.R., 2 Bom., 494.

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to their dealing with the ancestral property, and that the interest she has in ancestral property under Hindu law to protect her claim to maintenance is indefinite and not referable to a specific portion of ancestral property and, until it is made certain and referred to some specific property, it does not acquire the character of a specific charge, so as to affect *bonâ fide* purchasers for value. It was the equitable protection due to *bonâ fide* purchasers for value that suggested the distinction between a specific charge, and the right over a general fund from which such charge might be carved out. It must be observed here that, though the mother living with and under the protection of her sons submits to their dealing with ancestral property, the submission is under Hindu law subject to this condition, viz., that the managing coparcener who deals with the property must act, either really or to the purchaser's knowledge, within the scope of his authority as the manager of a joint fund. As to the mother's right of residence in the family house, it is a right inherent in her and an incident of her status as mother and the son cannot arbitrarily eject her from it. There is no indefiniteness as to the specific property to which it is referable and as the residence of Hindu females in family houses is a fact well known in this country, a purchaser was held not entitled to eject her, unless he showed that the sale bound that interest. The reason for the distinction between a *jus in re* over a general fund and a charge on a specific part of that fund did not extend to the right of residence in the family house, and it was therefore held with special reference to the mode in which the theory of a charge in the nature of an existing proprietary right was developed, that the equity of a purchaser for value did not extend to the mother's right of residence in specific property, viz., the family house, unless the sale was binding on her.

In the case before us, however, the sale was made in satisfaction of a debt binding on her and in execution of a mortgage decree made against male coparceners as the representatives of the joint family.

I concur, therefore, in the opinion of Mr. Justice Kernan.

The CHIEF JUSTICE.—I concur.

PARKER, J.—I concur.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

against

RAMANNA AND OTHERS.*

1889. Feb. 15, 20.

Penal Code, ss. 372, 373—Code of Criminal Procedure, ss. 234 and 537—Obtaining a minor for prostitution—Dancing girl caste—Adoption—Misjoinder of charges—Immaterial irregularity.

A woman, being a member of the dancing girl caste, obtained possession of a minor girl and employed her for the purpose of prostitution; she subsequently obtained in adoption another minor girl from her parents, who belonged to the same caste. She and the parents of the second girl were charged together under ss. 372, 373 of the Penal Code. The charges related to both girls:

Held, (1) that the two charges should not have been tried together, but the irregularity committed in so trying them had caused no failure of justice;

(2) that ss. 372, 373 of the Penal Code may be applicable in a case where the minor concerned is a member of the dancing girl caste.

Per Muttusami Ayyar, J.—It would be no offence if the intention was that the girl should be brought up as a daughter, and that when she attains her age she should be allowed to select either to marry or follow the profession of her prostitute mother.

CASE of which the records were called for by the High Court under s. 435 of the Code of Criminal Procedure.

The first and second accused, who are members of the Bhogam or dancing girl caste, gave their daughter Ramabhai, while still a young child, in adoption to the fourth accused, who was a member of the same caste. The fourth accused had some years before obtained from a woman of another caste a girl named Dasari Narayanam, who was employed by her for the purpose of prostitution while still a minor.

The first, second, and the fourth accused were, respectively, convicted by the Additional Deputy Magistrate of Kistna in case No. 23 of 1888 of the offences of disposing of and obtaining possession of a minor with intent that such minor be employed for the purpose of prostitution, under ss. 372, 373 of the Penal Code. They appealed to the Sessions Court.

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* Criminal Revision Case No. 720 of 1888.

QUEEN-EMPRESS v. RAMANNA.

The Sessions Judge on appeal reversed the conviction of the first and second accused, holding that no offence had been proved with regard to Ramabhai; he, however, held that the fourth accused was guilty in respect of Dasari Narayanam, and confirmed her conviction. He dealt with the cases as follows:—

"The Magistrate ought not to have included in this trial the case concerning the minor Ramabhai. It has no connection whatever with the case of the first witness, and, moreover, the circumstances are different. On the merits I much doubt if a conviction can be upheld in the case of the minor Ramabhai. She is the daughter of the first and second accused, who are of the Bhogam or dancing class, and she was given in adoption to fourth accused, who is the aunt of the first accused. This may have been done in order that she might inherit the property of the fourth accused. It did not place the minor Ramabhai in a position worse than that which she occupied before this adoption. The child was of the Bhogam class both before and after the adoption. I understand that ss. 372 and 373 of the Penal Code are directed against a disposal of a minor which takes her from a position where she is not so liable to become a prostitute and places her in a position where she is more liable to become a prostitute. I do not consider that these sections can apply to adoptions among the dancing women class themselves, which do not alter for the worse the status of the child.

"Taking this view of the case, I reverse the conviction of the first and second accused, and of the fourth accused as far as the minor Ramabhai is concerned.

"It appears to me that the fourth accused is guilty under s. 372 of the Penal Code with regard to the girl Dasari Narayanam, who was obtained from a woman of another caste and was actually subjected to prostitution while still a minor, the fourth accused receiving the proceeds of this prostitution. This is altogether different from the transaction with regard to the second girl Ramabhai, who was given in adoption by one member of the dancing girl caste to another and who may be intended for marriage and not for prostitution. The question whether adoption in this class is necessarily immoral is fully discussed in the judgment of Muttusami Ayyar, J., in *Venku* v. *Mahalinga*(1). The

(1) I.L.R. 11 Mad., 393.

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sentence on fourth accused of six months' simple imprisonment and a fine of Rs. 200, in default six weeks' further imprisonment, is confirmed."

The *Acting Government Pleader* (*Subramania Ayyar*) for the Crown.

Shadagopachariyar for the accused.

The arguments adduced in this case appear sufficiently for the purpose of this report from the judgments of the Court (Muttusami Ayyar and Parker, JJ.).

PARKER, J.—The Deputy Magistrate was no doubt in error in trying the two charges together (s. 234, Criminal Procedure Code); but I do not think this irregularity has caused a failure of justice or that it has prejudiced the fourth accused.

The Sessions Judge has set aside the conviction on the ground that as the minor Ramabhai was of the dancing girl class before adoption, her adoption did not alter her status for the worse. The ground of decision does not appear to me to be sound in law.

Ramabhai was the legitimate daughter of parents who were married, though of the Bhogam caste, and the essence of the prosecution was not that she was adopted by the fourth accused, but that she was given by her parents and taken by the fourth accused with the intent that she should be employed or used for the purpose of prostitution. The child was of course too young to be immediately used for such purpose, but the allegation was that she was adopted by the fourth accused, herself a prostitute, who had quarrelled with another girl whom she had brought up to be a prostitute and whose earnings as a prostitute she had received, and that the intention of the fourth accused was to train up Ramabhai to follow the same course of life. It appears to me that if these allegations were found in the affirmative, the legal offence would be complete even though the age of the child prevented her immediate prostitution and allowed time for repentance.

In the testimony of prosecution witnesses Nos. 1, 2, 4, 5 and 7 there was legal evidence in support of the criminal intention, and the testimony of the defence witnesses that the adoption was for the purpose of the minor inheriting the fourth accused's property is not necessarily inconsistent with the allegation of the prosecution witnesses. It was for the Judge to *weigh* that evidence, but he had not done so.

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It has been held in *Venku* v. *Mahalinga*(1) that prostitution is not the essential condition or *necessary* consequence of an adoption by a dancing girl, but is an incident due to social influences. It is a question to be determined on the evidence and on the circumstances of this case whether the prosecution has made out the criminal intention or whether the Judge can come to the conclusion on the evidence that the adoption was merely made to secure to the fourth accused a person competent to perform her obsequies and to take her property.

The Judge has not recorded any finding upon the evidence. I would, therefore, set aside the acquittal and direct that the appeal be re-heard.

MUTTUSAMI AYYAR, J.—I am also of opinion that, though there was a misjoinder of charges, yet it was only an irregularity which did not result in failure of justice. I also think ss. 372 and 373 do not cease to be applicable, because the minor concerned is of the Bhogam or dancing girl caste. The act proved in the case before us is the giving and accepting of a minor, as it is said, in adoption. It is perfectly immaterial whether a second adoption during the lifetime of the first witness for the prosecution, who is said to have been first adopted, is valid, or whether it amounts to fosterage resulting in no jural relation. In order to support a conviction under s. 372 or 373, it would be sufficient to show that the girl was given and accepted with the intention mentioned therein. It is, however, necessary to bear in mind whilst coming to a finding as to the intention that, when an act is not *per se* criminal, the specific intent which renders it criminal must be established by cogent evidence. The minor Ramabhai is only a child of eight years of age, and the adoption took place three years ago. It is reasonable to infer that there was no intention at the time of adoption to employ her at once for purposes of prostitution. It would also be no offence if the intention was that the girl should be brought up as a daughter and that, when she attains her age, she should be allowed to elect either to marry or follow the profession of her prostitute mother. If, on the other hand, the intention was that the girl should be employed as a prostitute whilst she continues to be a minor, the accused might then be liable. Though the adoptive parent may be a prostitute,

(1) I.L.R., 11 Mad., 393.

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yet she may have civil rights. In criminal cases the presumption of innocence must be displaced by positive evidence. As the evidence in this case was not specific in the sense indicated above, I doubted at first if we should at all interfere in revision. After reading Mr. Justice Parker's judgment, I see no objection to directing a re-hearing of the appeal in order that the Judge may come to a distinct finding with regard to the intention, and then dispose of the case, and I concur in the order proposed by Mr. Justice Parker.

APPELLATE CIVIL.

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

SIVASANGU AND ANOTHER (DEFENDANTS Nos. 2 AND 3), APPELLANTS,

v.

MINAL (PLAINTIFF), RESPONDENT.*

1888. April 12, 13. 1889. January 29.

Hindu law—Inheritance—Rule of inheritance affected by manner of life—Maraver prostitutes—Act XXI of 1850.

A married Maraver woman deserted her husband and lived in adultery with another man, to whom she bore four children. Of these children, the two daughters associated together leading the life of prostitutes, and the two sons separated themselves from their sisters and observed caste usage. The elder daughter died leaving property in land:

Held, that the sister succeeded to the deceased in preference to the brother.

SECOND APPEAL against the decree of S. Gopalachari, Subordinate Judge of Madura (East), in appeal suit No. 539 of 1886, reversing the decree of M. A. Tirumalachari, District Munsif of Dindigul, in original suit No. 596 of 1885.

Suit to redeem certain land mortgaged by one Kuppayi, deceased, to defendant No. 1. The plaintiff was the sister of the late Kuppayi, and claimed both under a will alleged to have been executed by the latter in her favor on 8th July 1881 and also as heir by Hindu law. Defendant No. 2, who was brought on to the record by an order of the District Munsif, denied the validity of the will and claimed to be a preferential heir to the deceased, being the son of her brother.

* Second Appeal No. 75 of 1887.

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The relationship of the parties as described above was admitted, and it was also admitted that the deceased Kuppayi, who was unmarried, acquired the property in suit from a man with whom she lived as a concubine.

Kuppayi, the plaintiff, Kandasami (since deceased), who was the father of defendant No. 2 and one Karuppannan, who was brought on to the record by the order of the High Court, were the children of a woman of the Maraver caste called Karuppayi by one Shanmuga Pillai, with whom she lived as a concubine after deserting her husband. The dates when these events took place did not appear from the record of the second appeal. The plaintiff was unmarried and had lived with various paramours. The further circumstances of the family appear sufficiently below.

There was no substantial dispute as to the mortgage sought to be redeemed, and the will set up in the plaint was not established to the satisfaction of either the Court of first instance or the Court of first appeal. The sole question in this case accordingly related to the law of inheritance applicable to the case.

The District Munsif dismissed the suit and the Subordinate Judge passed a decree in favor of the plaintiff for the reasons summarized in the following order of the High Court.

Defendant No. 2 preferred this second appeal.

Bhashyam Ayyangar and *Kaliyanaramayyar* for appellants.

Subramanya Ayyar for respondent.

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

This second appeal came on for hearing on Thursday, the 12th April 1888, and on Friday, the 13th April 1888, when the Court made the following

ORDER.—The appellant is the brother's son and the respondent is the sister of one Arulayi *alias* Kuppayi. About seven or eight years before suit, Kuppayi mortgaged the land in dispute to the first defendant with possession. Kuppayi died in July 1881 leaving her surviving, besides the appellant and the respondent, a brother named Karuppannan, who is not a party to the present suit. Kuppayi and her survivors were the children and grandson of one Karuppayi, a woman of the Maraver caste. Karuppayi was originally a married woman, but she since left her husband and lived in concubinage with one Shunmuga Pillai. Kuppayi,

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the deceased, the appellant's father Kandasami, and Karuppannan, her brother, were the offspring of the illicit union between Karuppayi and Shunmuga Pillai. Kuppayi did not marry, but lived with several persons in concubinage, two of whom were the late Zamindar of Kannivadi and one Boomi Balayam Pillai. The Subordinate Judge was of opinion that she acquired the land in suit with monies which she earned by living in prostitution with the Zamindar of Kannivadi. The respondent brought the present suit against the first defendant alone to redeem the mortgage executed by her deceased sister. Though she alleged also that the property in dispute was acquired jointly by her and by her deceased sister, and that the latter left a will in her favor, she since abandoned those grounds of claim. The substantial question which was insisted on throughout was whether she was Kuppayi's heir. Like Kuppayi, she also never married, but lived in prostitution. It is alleged for her that she lived with her sister when the latter died, while her brother, Karuppannan, and nephew, the appellant, lived apart. It is admitted during the hearing of this second appeal that though the appellant's father was the son of a prostitute mother, the appellant himself was born to his father in wedlock. It does not appear from the record before us whether Karuppannan is married or not. The first defendant, the mortgagee, denied that the respondent-plaintiff was Kuppayi's legal representative, and pleaded that the appellant was the person entitled to redeem alleging that he had in his possession other properties left by Kuppayi and received the melvaram payable to Kuppayi under the instrument of mortgage. Thereupon, the District Munsif made him a party (defendant) to the suit, and as the second defendant, he contended that being the brother's son of the deceased woman, he was a preferable heir. The District Munsif held that the rule of law applicable to this case was the Hindu law applicable to the fee of an unmarried sister, and that the deceased's brother Karuppannan was the lawful heir, and on this ground he dismissed the suit. The plaintiff appealed from that decision to the Subordinate Judge and made the appellant before us one of the respondents. The Subordinate Judge considered that a prostitute was neither a maiden nor a damsel within the meaning of the rule of Hindu law which applied to the descent of sister's fee, and he was of opinion that the rule of decision was the one laid down by the

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author of the Mitakshara in regard to the peculiar property of a woman who contracted a marriage in one of the disapproved forms. He considered that the sister might be preferred to her brother, but that the brother excluded the brother's son and accordingly passed a decree in favor of the respondent. From this decree, the mortgagee, the first defendant, has preferred no second appeal, but the second defendant, the brother's son of Kuppayi, the deceased, has preferred this appeal.

As Kuppayi, to whom the property in suit belonged is dead, the case before us is clearly one of vested inheritance and not of contingent reversion, in which there might be a doubt as to whether the brother or the brother's son would be the heir in existence when the reversion should fall in or become an estate vested in possession. The appellant's pleader does not attempt to controvert the position that one of the rules applicable to collateral succession in the case of ordinary Hindu property is that the nearer in degree excludes the more remote. Nor can there be any doubt as to the soundness of the rule, for, in the compact series of heirs indicated by the text of Yagnyavalcya, the author of the Mitakshara places the brother before the brother's son. As to the rule of law applicable in the case before us, both the Lower Courts are in error. A prostitute is certainly *not* a maiden within the meaning of the rule applicable to the sister's fee. Nor can property acquired by her with funds earned by prostitution be treated as sridhanam or property given to a woman who contracts an Asura marriage or a legal marriage though in one of the inferior forms prescribed by the law. A legal marriage and the character of the property as sridhanam are the prerequisites of the rule of succession mentioned by the Subordinate Judge.

The decision of the High Court in the Sivaganga case which was confirmed by Her Majesty in Council is clearly against the view that *all* property vested in a woman, however acquired, is her sridhanam governed by the special rules of succession prescribed by the Mitakshara in regard to woman's peculiar property. We are of opinion that the property left by Kuppayi must be treated as ordinary Hindu property, if the Hindu law regulated its devolution. The rule of law applicable to the children of a prostitute mother who have elected to retain Hindu usage is that of Hindu law as laid down in the decision of the Privy Council in *Myna*

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Boyee v. *Ootaram*(1). We are, however, not inclined to apply this rule at once. Before coming to a decision it is desirable, first, to make the brother of Kuppayi a party defendant, and then to determine the question. It will also be necessary to ascertain whether, as suggested by the respondent's pleader, the respondent and Kuppayi lived together and continued to practise prostitution whilst their brother lived apart from them and resumed his *status* as a member of caste, electing to follow its approved usage and regarding his sisters as degraded, and if so, whether, according to the usage of the class to which the parties to this second appeal belong, there is any special rule of preference in favor of the sister in regard to succession to the property left by her prostitute sister.

It was held by the Sudder Dewanny Adalat in *Tara Munnee Dassea* v. *Motee Buneanee*(2) that under Hindu law prostitute daughters living with their prostitute mother succeeded to the mother's property in preference to a married daughter living with her husband. The *ratio decidendi* was that the legal relation of a married and respectable daughter to her mother ceased when the latter became an out-caste. The contention for the respondent is that directly the brothers of a prostitute marry and resume their caste usage separating from her, their legal relation to their prostitute sister ceases.

We shall, therefore, direct the Subordinate Judge to make Karuppannan a party to the present suit, and after hearing his defence, to try whether the rule of succession applicable to ordinary Hindu property is applicable to the property left by Kuppayi; whether the respondent was an associate of her deceased sister in her degraded condition as a prostitute and lived with her at the time of the latter's death, and whether, Karuppannan, their brother, and the appellant had separated from them resuming their caste usage; if so, whether, according to the usage of the class to which the parties belong or otherwise, there is a rule of preference in favor of the sister.

Another contention in this case was that the second appeal should be dismissed on the ground that the brother excluded the brother's son and that the appellant was not a necessary party to the present suit. If the Hindu law applicable to ordinary Hindu

(1) 8 M.I.A., 400. (2) VII Sudder Dewanny Adalat, 273.

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property governed this case, the suit must be dismissed on the ground that neither the appellant nor the respondent was Kuppayi's heir. The fairer course would be to make the brother a party and to adjudicate on the claim once for all after hearing his defence instead of dismissing the appeal and thereby encouraging a multiplicity of suits.

The findings on the issues mentioned above will be returned within three months from the date of the receipt of this order, when ten days will be allowed for filing objections.

In compliance with the above order, the Subordinate Judge added as a party to the suit Karuppannan, the plaintiff's brother (who in his written statement denied the title of the plaintiff and set up a superior claim in himself as a preferential heir), and subsequently returned on the above issues as follows.

As to the first issue, whether the rule of succession applicable to ordinary Hindu property is applicable to the property left by Kuppayi, he said :—

"The line of heirs to the property of female depends upon (*a*) the source of the acquisition, (*b*) the *status* of the acquirer, viz., whether she is a maiden, a female under coverture, or a widow.

"The sources of acquisition may be classified under five heads :—(1) gifts by relatives or stridhanam in the technical sense (2) presents from strangers, (3) inheritance, (4) earnings by labor, skill or mechanical arts, (5) accumulations.

"The property in dispute in this case must, upon the evidence . . . be looked upon either as a present given by the Zamindar of Kannivadi when Kuppayi was in his keeping, or as a purchase made by her with such presents. It must, therefore, be treated as falling either under division (2) or division (4) above referred to.

"But Kuppayi was neither a maiden, nor a married woman nor a widow. And though as regards presents from strangers and earnings by labor, &c., Katyayana makes this provision, viz.: 'The wealth which is earned by mechanical arts or which is 'received through affection from a stranger is subject to her 'husband's dominion,' which would seem to cover only cases where the acquisition is made by a female under coverture, there is no provision at all in the text-books, so far as I can see, in regard to the descent of property acquired by a female through prostitution, except the following which is to be found in Strange's

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Manual of Hindu Law, para. 363 :—'With prostitutes, the tie of 'kindred being broken, none of their relatives who remain 'undegraded in caste, whether offspring or other, inherit from 'them *Tara Munnee Dassea* v. *Motee Buneanee*(1). Their issue 'after their degradation succeed.'" This doctrine was accepted by the High Court in *Mayna Bai* v. *Uttaram*(2). The particulars and *ratio decidendi* of *Tara Munnee Dassea* v. *Motee Buneanee*, which was also approved of in *Mayna Bai* v. *Uttaram*, have been already given in the order of their Lordships in this suit remitting issues for trial. That decision contains the nucleus for the proposition formulated by Mr. Justice L. Strange.*

For these reasons, it seems to me that the issue under consideration must be answered in the negative, and that, at all events, the succession here would, in the first instance, devolve not on the relatives that remain undegraded in caste, but on those who are Kuppayi's heirs after the degradation or who are her associates in the degradation.

The Subordinate Judge further found with reference to the second and third issues, that (1) the plaintiff was an associate of her deceased sister in her degraded condition as a prostitute and lived with her at the time of the latter's death; and that (2) the father of the second defendant and the second and third defendants had separated from the plaintiff and her sister, resuming their caste usage. On the fourth issue it was held that on the facts recorded under the first issue the plaintiff was the preferential heir.

This second appeal having come on for re-hearing the Court delivered the following

JUDGMENT.—We see no reason to suppose that the Subordinate Judge has come to a wrong conclusion on any of the issues referred to him for trial.

But it is argued that under the ordinary Hindu law the brother excludes the sister; that no exception can be validly made (under Act XXI of 1850) on the ground that the deceased was an out-caste.

Act XXI of 1850 was intended to apply to those who by change of religion or otherwise lose their caste, and to preserve to

(1) VII Sudder Dewanny Adalat, 273. (2) 2 M.H.C.R., 202.

* The Subordinate Judge also referred to II Macnaghtens' Hindu Law, pp. 132, 133, 137.

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them any right of inheritance which they might otherwise forfeit under ancient Hindu law or the usage of the country. We are inclined to doubt whether the case before us is at all within the purview of the Act. Assuming that it is, as argued before us, the Act did not abrogate any rule of preference which might exist as between the sister of a prostitute associated with her in her degraded condition and her brother who remained in the caste, and treated her and the deceased as being out of caste.

The view taken by the Subordinate Judge that the sister is entitled to preference is supported by the principle laid down in the case mentioned,—*Tara Munnee Dassea* v. *Motee Buneanee*(1). There the competition was between a married daughter in caste and a prostitute daughter who lived with her prostitute mother when they were out of caste.

Following the opinion of the Pundit, the Sudder Dewanny Adalat held that the two prostitute daughters were alone entitled to inherit what the prostitute mother had left, and that the relation of the married and respectable daughter to the out-caste mother had been severed.

Although the case was decided prior to Act XXI of 1850, we observe that there is an analogy between the legal relation of two prostitute sisters living together in their degraded condition and that of two brothers living in coparcenary, while a third brother lives away from them without any community of interest.

We are referred to no authority in support of appellant's contention, and in principle the view taken by the Subordinate Judge appears to us to be sound. We therefore dismiss the second appeal and the second defendant will bear the plaintiff's cost therein. We make no order as to the costs of Karuppannan.

(1) VII Sudder Dewanny Adalat, 273.

APPELLATE CIVIL.

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

1889. Feb. 4, 8.

SAMINATHA (DEFENDANT No. 3), APPELLANT,

v.

RANGATHAMMAL (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 43—Hindu Law—Maintenance—Suit to declare maintenance fixed by a decree—A charge on land.

A Hindu woman having obtained a decree for maintenance against her husband, now alleged that he had alienated part of his property with a view to defeat her claim for maintenance, and sued him for a declaration that certain land which he had not alienated was liable for her maintenance:

Held, that no cause of action was shown.

SECOND APPEAL against the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in appeal suit No. 765 of 1887, affirming the decree of H. Srinivasa Rau, District Munsif of Tanjore, in original suit No. 360 of 1886.

Suit by a Hindu woman against her husband and two persons who professed to hold mortgages from him. The plaintiff had obtained a decree against her husband for maintenance at a fixed rate in original suit No. 400 of 1875 on the file of the District Munsif of Tanjore. Her plaint now alleged that defendant No. 1 (the husband) had fraudulently alienated the greater part of his property to defeat her claim to maintenance, and prayed for a declaration that certain lands which remained unalienated by him and their produce were liable for her maintenance. It was pleaded, *inter alia*, that the suit being a second suit on the same cause of action was not maintainable by reason of ss. 13 and 43 of the Code of Civil Procedure.

The District Munsif found that the professed mortgages to defendants Nos. 1 and 2 were invalid, and passed a decree as prayed for, and the Subordinate Judge affirmed his decree, observing, with reference to the plea referred to above:

"The first ground of appeal is that this second suit upon the

* Second Appeal No. 1348 of 1888.

SAMINATHA v. RANGATHAMMAL.

same cause of action is not sustainable, and s. 43 of the Civil Procedure Code is relied on. But that section in my opinion cannot apply to a case of this kind. As observed by Mr. Mayne in s. 379 of his Hindu Law, the maintenance of a 'wife by her husband is of course a matter of personal obligation arising from the very existence of the relation and independent of the possession of any property.' If the maintenance of a wife by her husband is a personal obligation, whether he possesses any property or no, such considerations as that every suit shall include the whole of the claim which a plaintiff is entitled to make in respect of the cause of action; if a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect thereof; and a person entitled to more than one remedy may sue for all or any of them but if he omits to sue, he shall not afterwards sue for the remedy so omitted—do not arise in a suit similar to this, where the plaintiff, when she sued her husband for her maintenance had no necessity to ask that her maintenance should be charged upon some portion of her husband's property. The necessity for such a prayer arose only when her husband commenced to waste his property. Therefore, it cannot be said that the claim for maintenance and a claim to have that maintenance charged upon the plaintiff's husband's property arose out of the same cause of action and that both the causes of action were so entwined as to disentitle her, under s. 43, to claim, in a separate suit, when the necessity for it arose, that a portion of her husband's property may be charged with her maintenance. When she brought her suit for her maintenance, she might have asked for such a charge, but her omission to do so cannot debar her now from asking for the relief."

Defendant No. 3 preferred this second appeal.

Pattabhiramayyar for appellant.

Subramanya Ayyar for respondent.

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

JUDGMENT.—In her plaint, the plaintiff does not in terms seek to make her maintenance a charge upon the property which has not been alienated. Such a suit would be barred under s. 43, Code of Civil Procedure, *Andi* v. *Thatha*(1). But she seeks for a

(1) I.L.R., 10 Mad., 347.

SAMINATHA v. RANGATHAMMAL.

declaration that some property not alienated is subject to her claim for maintenance, and dates her cause of action from the alienation of some other property. She does not state that her husband is about to alienate this particular property, or that she has any legal lien specially upon it, but merely that her husband has alienated other properties with a view to defraud her of her maintenance.

It is urged that the right to have maintenance made a charge upon immovable property is an equitable relief only and not a real right. This contention cannot be supported after the Full Bench decision in *Ramanadan* v. *Rangammal*(1), though in any case, s. 43, Civil Procedure Code, would operate as a bar to such a suit.

We are constrained to hold that plaintiff has alleged no cause of action which would entitle her to the declaration prayed.

The decrees of the Courts below must be reversed, and the suit dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

1889. Feb. 22.

MALLAN AND OTHERS (PLAINTIFFS), APPELLANTS IN S.A. 730 OF 1888,

v.

PURUSHOTHAMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

PURUSHOTHAMA AND ANOTHER (DEFENDANTS Nos. 1 AND 2), APPELLANTS IN S.A. 1040 OF 1888,

v.

MALLAN AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Land dedicated to family idol—Land excluded from partition of family property and declared inalienable—Subsequent purchase from Escheat Department of Government—Sale in execution.

By a partition deed by the six members of a Hindu family it was provided that part of the land of the family should be set apart for the maintenance of the family idol and should be inalienable and the rest of the land was divided equally.

Subsequently the Government claimed the dedicated land as an escheat, and sold it to the members of the family jointly, of whom one built a house on part of

(1) See ante, p. 260.

* Second Appeals Nos. 730 and 1040 of 1888.

MALLAN v. PURUSHOTHAMA.

it—less than one-sixth—with the consent of the others. The house and its site was sold in execution of a decree against the builder:

Held, that the other members of the family were not entitled to have the house removed or the sale cancelled.

SECOND APPEAL against the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in appeal suit No. 265 of 1887, modifying the decree of S. Raghunatha Ayyar, District Munsif of Tellicherry, in original suit No. 294 of 1886.

Suit to cancel the sale of certain land, described as a house-site, sold to defendants Nos. 1 and 2 in execution of a decree obtained by them against defendant No. 3 in small cause suit No. 1216 of 1884 on the file of the Subordinate Court of North Malabar, and praying that a house built by defendant No. 3 thereon be removed.

The land in question was described in the plaint as the property of a tarwad of which plaintiff and defendant No. 3 were members. The plaintiffs' case (which had also been set up in a petition (dismissed) filed by them objecting to the execution of the decree referred to above) rested on a deed of partition (exhibit A) executed in 1863 by the father (Krishna Mallan) and the five uncles of the plaintiffs including the father of defendant No. 3.

Exhibit A was as follows:—

"We six have with full will agreed to divide in the undermentioned proportion the properties consisting of those which are ancestral to us six and of those which were acquired by me Krishna Mallan by my efforts with the assistance of the ancestral money.

"The paramba called theruvath thazhe in which we raised (*sic*) and which is to the west of the road in the said vatikkakem, the upstair patinhantta house (house facing east) therein, and theruvathathaya vatteri paramba which is to the east of the road, were acquired as jenmam by me Krishna Mallan. The upstair thekkini house, padi [gate], cow-shed and vatikkini, which are in the said first paramba and the upstair kizhekkini house in the second paramba, were built by Krishna Mallan.

"It is agreed that the said two parambas which are worth Rs. 2,000 shall, without being divided, be reserved to us six with equal rights, that all incomes annually arising from the said two parambas be collected by me Krishna Mallan as long as I am alive and, after me, by my sons, and that with those incomes the worship of the family god and Easwara savas [divine worships] which are being performed from time of old for the prosperity of all the members of the tarwad, be performed for ever and ever.

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"It is agreed that Krishna Mallan, Gopala Mallan and Atchutha Mallan shall with their respective families live separately in the upstair patinhantta house in the above-mentioned first paramba, that Rama Mallan, Lekshmana Mallan and Anantha Mallan shall with their respective families live separately in the upstair kizhekkini house in theruvath thazhe vatteri paramba, the eastern and southern verandahs thereof being excluded, and that the upstair thekkini house, padi, cow-shed and vatikkini which are in the first paramba, and the eastern and southern verandahs of the upstair kizhekkini house in the second parambas shall for ever and ever remain in the exclusive possession of Krishna Mallan and his children and be enjoyed by them.

"It is agreed that neither the said six persons jointly nor each one severally can give under a document or alienate the said two parambas and the houses therein to any other person on any right, whatever, whether on kanom or on mortgage and that, if done so, it shall not be valid.

"After deducting the properties which are reserved undivided as said above, the remaining properties which are agreed upon to be divided are those which were acquired by Krishna Mallan by his efforts with the assistance of the ancestral money."

The document then proceeded to set out the separate share of the six executants.

The land in question was admittedly part of the two parambas with regard to which the provisions of the partition deed are given above: and the plaintiff claimed that by reason of those provisions it could not be sold in execution of the decree against defendant No. 3, &c. It appeared that in 1871 the Government claimed the land as an escheat, but before it was declared to be such, the surviving executants of exhibit A and the representatives of the others jointly purchased from Government the jenm right therein, the price being paid in six equal shares and the sale-deed being executed in the name of the six persons. Under these circumstances the District Munsif finding that the land in question was less than the one-sixth share of defendant No. 3 dismissed the plaintiff's suit.

On appeal the District Judge said:—

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"I accept Munsif's finding that the ground forms part of a paramba which is the undivided common property of all the six co-parceners of a family governed by Hindu Law, but I cannot understand how in this view he upheld the sale. So long as the six co-parceners continue undivided each and every one of them has a joint interest over every inch of the ground; how then this particular portion of the paramba could be sold as the debtor's sole share I cannot see. Munsif's argument is that the portion sold is less than what would fall to the debtor's share, but his share is not ascertained, and therefore any fractional part of an unascertained portion cannot be sold. The right of all the co-parceners is co-extensive over every portion of the ground and no one particular portion, therefore, could be sold as exclusively belonging to the judgment-debtor. All that could have been sold is the debtor's right, title and interest to a one-sixth share of the entire undivided property and the purchaser in auction may sue for a partition of his share. The debtor had no exclusive saleable interest in the portion sold, it being common to all the six co-parceners, of whom plaintiff is admittedly one. He has therefore a right to set aside the sale so far as the ground is concerned.

"As for the house it is the exclusive property of the debtor. He built it and it is saleable for his debt. I cannot see what right the plaintiff has to compel the purchaser to remove it.

"The result is that the sale of the ground is set aside as against plaintiff and his suit allowed so far dismissing it otherwise.

"Costs in these circumstances will be borne by each party throughout. Decree is modified accordingly."

Against this decree the plaintiffs preferred second appeal No. 730 of 1888, and defendants Nos. 1 and 2 preferred second appeal No. 1040 of 1888.

Subba Rau for plaintiffs.

Mr. *Gantz* for defendants Nos. 1 and 2.

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

JUDGMENT.—The paramba on which the house stands was no doubt set apart by the partition deed (exhibit A) for the use of the family idol, excluded from partition and declared to be inalienable. But in 1871 the Government claimed the paramba by right of escheat and the appellant's family purchased it from the Government, each of the six co-parceners paying a sixth part of the price. Since that time defendant No. 3 built the house now in dispute on a portion of the paramba with the consent of the plaintiffs and the other members of the family. The Government was entitled by right of escheat to put an end to the arrangement contained in exhibit A in favor of the family idol, and defendant No. 3 was therefore at liberty as a purchaser to elect either to conform to or to repudiate the original trust. Having regard to his conduct and that of the family in regard to the house-site in dispute subsequent to 1871, it is impossible to reconcile it with an intention to continue the original trust, at least in regard to the house and its site. We are unable to adopt the suggestion that the original trust continued to attach to the house-site in dispute after 1871.

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It is next urged that the house-site must be treated at all events as joint family property, that although defendant No. 3 might be entitled to one-sixth share in it, yet he had no specific property in the whole site on which he built the house and that on this ground the plaintiff's prayer that the respondents should be directed to remove the superstructure should be allowed. It is no doubt true that defendant No. 3 had no exclusive property in the house-site, but under the circumstances of this case it would be equitable to infer an understanding among the parties that the site was to be deducted from the one-sixth share to which defendant No. 3 might be entitled if a partition were to be effected. It was certainly not the plaintiff's intention when they granted permission to defendant No. 3 to build a house that he should be evicted from it. Although they now desire to eject the respondents Nos. 1 and 2 because they are of a different caste, we are unable to hold that the equitable consideration which would be available to defendant No. 3 would not be equally available to the purchasers.

We are therefore of opinion that the decree of the Subordinate Judge ought to be set aside and that of the District Munsif restored, but we direct each party to bear his costs both in this Court and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

1889. Feb. 7.

MUTTUSAMI AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

RAMAKRISHNA (DEFENDANT No. 1), RESPONDENT.*

Hindu law—Joint family—Purchaser from one co-parcener—Adverse possession—Limitation.

Plaintiffs being members of a joint Hindu family alleging division, and a sale to them by other members of their share in the family property more than 12 years before suit, sued to eject a more recent purchaser. The plaintiffs failed to prove division as alleged. One of the members of the family who was in possession of the property to which the sale-deed related did not join in executing it:

Held, (1) that the plaintiffs having failed to prove division as alleged were not entitled in second appeal to have their suit treated as a suit for partition;

(2) that the suit was barred by limitation, since the proposition that the possession of one co-parcener is the possession of all for purposes of limitation has no application as between a purchaser from one of the co-parceners and the other members of the family. *Ram Lakhi* v. *Durga Charan Sen* (I.L.R., 11 Cal., 683) followed.

SECOND APPEAL against the decree of E. C. Johnson, Acting District Judge of South Arcot, in appeal suit No. 132 of 1887, reversing the decree of K. Ramachandra Ayyar, District Munsif of Villapuram, in original suit No. 692 of 1886.

Suit by the plaintiffs to recover possession of certain land and to eject defendants Nos. 1 and 2 therefrom. The land in question was the ancestral property of a joint Hindu family of which the plaintiffs and defendant No. 3 and his two brothers were members. The plaintiffs alleged that in 1867 the land belonging to the family was divided into moieties; that a partition subsequently took place of the moiety which had fallen to defendant No. 3 and his brothers; and that the latter in 1873 sold their share to the plaintiffs who thus came to own five-sixths of the whole. The present suit was brought to eject defendants Nos. 1 and 2 who claimed under a recent purchase from defendant No. 3 and his son, who was joined as defendant No. 4.

* Second Appeal No. 593 of 1888.

The defendants pleaded that the land in question had become the property of defendant No. 3 by reason of the other members of the family having taken for themselves other ground elsewhere. And it appeared that the plaintiffs' sale-deed was drawn up in the name of defendant No. 3 as well as in the names of his brothers, but that he had not executed it.

The District Munsif held that the division and sale alleged by the plaintiffs were proved and accordingly passed a decree in their favor for possession. Defendant No. 1 appealed against this decree and the District Judge reversed it on appeal on the ground that the division between the plaintiffs and defendant No. 3 and his brothers was not established and that defendant No. 3 had been in possession since 1868, his possession being adverse to the plaintiffs "from the date when he refused to become a party" to the sale-deed of 1873. The plaintiffs preferred this second appeal.

Mahadeva Ayyar for appellants.

Sankaran Nayar 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 Wilkinson, JJ.).

JUDGMENT.—The finding is that no partition was ever effected between defendant No. 3 and his brothers and that the latter were not entitled to convey to the appellants the specific portion claimed by them. We do not consider that the appellants are entitled to alter the nature of their action and to ask us to treat the suit as if it were a suit brought for partition. The Judge's finding that the possession of defendant No. 3 was at all events adverse to the appellants from 1873 is correct. Co-parcenary as recognised by Hindu Law, can only subsist between the members of a joint Hindu family, and the contention that the possession of one co-parcener is the possession of all for purposes of limitation can have no application as between a purchaser from one of the co-parceners and the other members of the family. This view is also in accordance with the case of *Ram Lakhi* v. *Durga Charan Sen*(1).

The second appeal fails and is dismissed with costs.

(1) I.L.R., 11 Cal., 683.

APPELLATE CIVIL.

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

1888. Nov. 27. Dec. 6.

NARASIMMA (PLAINTIFF), APPELLANT,

and

APPALACHARLU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act VIII of 1859, *s.* 246—*Limitation Acts—Act IX of* 1871, *sch. II, art.* 15—*Act XV of* 1877, *sch. II, arts.* 11, 13—*Objection to execution.*

A petition under s. 246 of the Code of Civil Procedure of 1859, objecting to the execution of the decree by the attachment of certain land on the ground that the land was the property of the petitioner, was heard and dismissed in July 1875. In July 1877, within twelve years from the dispossession of the objector, he filed a suit against the decree-holder who had purchased at the execution sale, for the possession of the land held by him as purchaser at the execution sale:

Held, that the suit was not barred by limitation.

SECOND APPEAL against the decree of J. Kelsall, District Judge of Vizagapatam, in appeal suit No. 337 of 1887, affirming the decree of K. Murtiraju, District Munsif of Yellamanchili, in original suit No. 364 of 1887.

This was a suit filed in July 1877 to recover a certain piece of land. The plaintiff claimed to be the undivided brother of the husband (deceased) of defendant No. 2. Defendant No. 1 had obtained a decree against defendant No. 2 on a bond in original suit No. 338 of 1874, and attached and purchased at the execution sale certain land in an agraharam village, then in the possession of the plaintiff and his undivided father (since deceased), whom he ejected in November 1875. This land was subsequently exchanged for the land now sued for, on the redistribution of the agraharam lands under a partition decree passed in original suit No. 222 of 1876. The plaintiff now impugned as collusive and fraudulent the proceedings in original suit No. 338 of 1874 and the bond sued on therein and claimed to eject defendant No. 1.

Defendant No. 2 was *ex parte*.

Defendant No. 1 pleaded, *inter alia*, that the plaintiff's claim was barred by limitation by reason of his having preferred an objection to the attachment in execution of the decree in original

* Second Appeal No. 804 of 1888.

suit No. 338 of 1874, which objection was investigated and rejected on 20th July 1875.

Both the District Munsif and the District Judge found that such an objection had been made under s. 246 of the Code of Civil Procedure of 1859, and held that the suit was accordingly barred by limitation.* The District Judge discussed this question as follows:—

"If that application had been under s. 278 of the present Civil Procedure and had been disallowed under s. 281, the present suit would be clearly barred by art. 11 of Act XV of 1877.

"But the application must have been under s. 246 of Act VIII of 1859. There is nothing in the Limitation Act IX of 1871 which obliges a suit like the present to be brought within one year from the date of the order disallowing the application.

"The plaintiff says that under art. 143 of the old Act and art. 142 of Act XV of 1877, he has twelve years from date of dispossession, which was November 1875. The suit was filed 13th July 1877.

"I consider that the case comes under art. 14*a* of Act IX of 1871, 'a suit to set aside a sale in execution of the decree of a

* Act VIII of 1859, s. 246: In the event of any claim being preferred to, or objection offered against the sale of lands or any other immovable or movable property which may have been attached in execution of a decree or under any order for attachment passed before judgment, as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding section, proceed to investigate the same with the like powers as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in s. 220. And if it shall appear to the satisfaction of the Court that the land or other immovable or movable property was not in the possession of the party against whom execution is sought, or of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him at the time when the property was attached, or that, being in the possession of the party himself at such time, it was so in his possession not on his own account or as his own property, but on account of or in trust for some other person, the Court shall pass an order for releasing the said property from attachment. But if it shall appear to the satisfaction of the Court that the land or other immovable or movable property was in possession of the party against whom execution is sought, as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him at the time when the property was attached, the Court shall disallow the claim. The order which may be passed by the Court under this section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order.

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Civil Court,' and plaintiff has one year 'from the confirmation of the sale.' The suit is therefore barred."

The plaintiff preferred this second appeal.

Anandacharlu for appellant.

Mr. *Michell* for respondents.

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

JUDGMENT :—We accept the finding that the appellant preferred a claim under s. 246 of Act VIII of 1859, and that it was dismissed after investigation; but we do not consider that the suit is barred by limitation. In our opinion, it is a suit for possession by virtue of title not to set aside an order, nor merely to establish a right. The last sentence of s. 246, which directed that a suit should be brought within one year to set aside an order passed under it, was repealed in 1871(1) and it was not re-enacted in Act IX of 1871. Article 15 of that Act, like art. 13 of the present Limitation Act, refers to proceedings other than a suit, while art. 11 of the Act of 1877 is new, and applicable only to orders passed under the sections of the Code of Civil Procedure which are expressly mentioned in it. This case is governed by the principle laid down in *Ayyasami* v. *Samiya*(2). Nor can we treat the suit as one brought to set aside a sale in execution of a decree of Civil Court, for the appellant was not a party to the decree in original suit No. 338 of 1874, and he is not bound to set aside the sale held in its execution before he can recover upon his title.

We shall, therefore, reverse the decree of the Lower Appellate Court and remand the appeal to be heard on the merits. The costs will abide and follow the result.

(1) See Act IX of 1871, sched. I. (2) I.L.R., 8 Mad., 82.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

VARATHAPPA CHETTI. *

1889. March 7, 26.

Penal Code, section 174—Disobedience to lawful order of public officer—Summons by Revenue officer to give evidence in a pauperism inquiry—Act III of 1869 (Madras)—Standing Order of Board of Revenue (Madras), No. 48a.

The accused, who were parties to a petition pending in a District Court, were summoned by a tahsildar to give evidence on an inquiry by him as to whether or not the petitioner was a pauper; they omitted to attend on the summons, and were charged in respect of such non-attendance under section 174 of the Indian Penal Code and were convicted:

Held, the conviction was bad, the tahsildar not being authorised to issue the summons under Act III of 1869 (Madras).

PETITION under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of the General Deputy Magistrate of Salem in summary cases Nos. 8, 9, 10, and 11 of 1888.

The petitioners had been convicted under section 174 of the Indian Penal Code of the offence of intentional disobedience to a lawful order of a public servant. The order in question was a summons with which they had respectively been served requiring them to appear and to give evidence before the tahsildar of Namakal. The proceeding to which the summons related was an inquiry by the tahsildar into the allegation of pauperism by the petitioner in a District Court, to whose petition the accused were parties.

On its appearing that the tahsildar had been directed by the Collector of the district to hold the inquiry in question, and that the accused had for various reasons neglected to attend in accordance with the summons, the General Deputy Magistrate convicted the accused as above. The present petitions prayed for the

* Criminal Revision Case No. 19 of 1889, with which were connected Criminal Revision Cases Nos. 20 to 22 of 1889.

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revision of the proceedings of the General Deputy Magistrate on the ground, *inter alia*, that the tahsildar had no authority in law to issue the summons.

Mr. *Wedderburn* for petitioners.

The Code of Civil Procedure, section 406, authorizes the Judge to hold inquiry as to the poverty of the petitioner, and when a special procedure is provided, it must be followed. The question of liability to Court fees is not a matter of general revenue administration, but a matter peculiarly within the cognizance of the Civil Courts.

The Collector's duty was to have any witnesses he required summoned and examined by the District Court in which the petition was filed under sections 408 and 409 of the Code of Civil Procedure. In any case the wording of the summons was misleading, and there was no intentional disobedience of an order.

The *Acting Government Pleader* (*Subramania Ayyar*) for the Crown.

Pauperism inquiries are within the purview of Act III of 1869 (Madras) and so the tahsildar was lawfully competent to issue the summons. With that Act must be read the Standing Order of the Board of Revenue (Madras), No. 48*a*, which is as follows :—

"48*a*.—*Application to sue* in formâ pauperis *how to be dealt with.*

"On receiving notice under section 408 of the Code of Civil Procedure regarding an application to sue *in formâ pauperis*, Collectors should institute the necessary inquiries as to the real status of the applicant, and should they feel satisfied that he is a real pauper, they will not dispute such application.

"2. But if, on such inquiry, there appear to be circumstances in the appellant's case which *primâ facie*, disentitle him to sue as a pauper, the Collector should place himself in communication with the defendant or respondent in the case, and if such defendant or respondent is disposed to dispute the application, the Collector by co-operating with him and employing the same vakeel may effectually oppose the application.

"3. When a defendant or respondent is not inclined to oppose the application, and when the Collector is of opinion that the application should be opposed, he will employ a vakeel and cite witnesses. Such cases will naturally be rare and the regulation fee for the vakeel and other costs incurred will on application be sanctioned by Government.

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"4. When a person is permitted to sue as a pauper, it is not necessary that a vakeel should be employed to watch the further proceedings in the case ; but should circumstances subsequently come to light which show that the indulgence granted to the plaintiff or appellant was one to which he was not entitled, the Collector will act in co-operation with the defendant or respondent in the manner directed in paragraph 2, or independently as laid down in paragraph 3 of this order."

JUDGMENT :—The accused, who were defendants in a pauper petition pending in the District Court of Salem, were summoned by the tahsildar of Namakal to give evidence as to whether or not the petitioner was a pauper. They neglected to appear in obedience to the summonses which were served on them personally, and the second-class Magistrate convicted them of an offence punishable under section 174, Indian Penal Code. It is contended that the conviction is illegal on the ground that the tahsildar had no legal authority to issue the summonses. It appears that the Collector directed the tahsildar to hold an inquiry regarding the alleged pauperism of the petitioner in the District Court and to make a report. It is urged that in connection with the pauper petition a notice was served on the Government Pleader under section 408 of the Code of Civil Procedure, and that under the Standing Order of the Board of Revenue (48*a*) the Collector directed the inquiry. The point for decision is whether this class of cases is within the purview of Act III of 1869 (Madras). The contention of the Government Pleader is that the Collector was authorized by the Standing Order of the Board of Revenue (48*a*) to institute the necessary inquiry as to the petitioner's position in life and to satisfy himself that he was really a pauper, before deciding whether the Government ought to oppose his application for permission to sue as a pauper, that the purpose of the inquiry was the protection of the stamp revenue, and that the case was therefore one in which the evidence of the accused was required for the investigation of a matter in which the Collector was authorized to hold an inquiry within the meaning of section 1 of Act III of 1869.

The Act purports to empower Revenue officers to summon persons to attend at their cutcherries for the settlement of matters connected with Revenue administration. The preamble states that the Revenue administration of the country is retarded, because

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Revenue officers are not made competent by express provision of law to issue summonses for the attendance of persons in certain cases in which it is their duty to hold investigation. Then section 1 enacts: "Collectors, Sub-Collectors, Assistant Collectors, Deputy "Collectors, Tahsildars, and Deputy Tahsildars shall have power "to summon all persons resident within the district whose evidence "may appear to them to be necessary for the investigation of any "matter in which they are authorized to hold an inquiry, and also "to require the production of any document relevant to the matter "under inquiry which may be in the possession or under the "control of such person." The intention was to create a facility towards the settlement of matters connected with Revenue administration, and the facility created consisted in empowering Revenue officers to summon persons to give evidence which may appear to be necessary for the investigation of any matter in which they are authorized to hold an inquiry. Having regard to the rule of construction that when an Act gives a special power, the power must be limited to the purpose for which it is conferred, we are of opinion that the inquiry held by the tahsildar was not within the purview of the Act. The question of the petitioner being a pauper or otherwise was not one which the Revenue authorities had to decide finally in connection either with revenue or general administration. It was a question pending decision in a civil suit to which the Government was constructively a party for a limited purpose, and the Collector's power as a party was limited to obtaining information from his subordinates and from such others as were willing to supply it. It was open to him to obtain process from the Court to enforce the attendance of witnesses who might appear from the information before him to be able to prove that the petitioner was not a pauper. The tahsildar was therefore not competent to issue summonses under the Act, and we set aside the convictions of the accused and direct that the fines be refunded if collected.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Parker, and Mr. Justice Wilkinson.

AUDATHODAN MOIDIN AND OTHERS (PLAINTIFFS),

v.

PULLAMBATH MAMALLY AND ANOTHER (DEFENDANTS).*

1889. Feb. 5.

Court Fees Act—Act VII of 1870, s. 7, cl. v. (e) (e)—Paramba in Malabar, valuation of suit for.

On its appearing that a paramba in Malabar is not subject to land tax, but that a tax is levied on trees of certain kinds which may grow on it:

Held, that a paramba must be regarded for the purposes of the Court Fees Act as a garden or as land which pays no revenue, according to the circumstances of each case.

CASE referred for the decision of the High Court by A. F. Cox, Acting District Judge of North Malabar, under section 617 of the Civil Procedure Code.

The case was stated as follows:—

"One Audathodan Moidin and two others brought suit No. 754 of 1886, in the Tellicherry Munsif's Court, against their karnavan and one Pakrichi (female) for the removal of the karnavan from office, and for cancellation of a mortgage and assignment deed executed by their karnavan in favor of second defendant over three parambas, and for the recovery of the same with mesne profits.

"The District Munsif decided the suit in plaintiffs' favor and ordered the first defendant's removal from the office of karnavan and the surrender of the parambas sued for with all mesne profits.

"Against this decree the second defendant, the mortgagee, appeals.

"The amount of Court fees paid on the appeal memorandum is Rs. 12-12-0, calculated on five times the assessed revenue, viz., Rs. 25 and mesne profits from date of plaint, viz., Rs. 144-15-0. From the introduction of the Court Fees Act down to the time of Mr. Nelson's assuming charge of this Court this was the practice,

* Referred Case No. 16 of 1887.

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I understand, in calculating the stamp duty. But Mr. Nelson, in the case under reference, has ordered that Court fee should be paid on the market value of the parambas in suit, and not on five times the revenue, apparently on the authority of section 7, cl. v (*e*) of the Court Fees Act, the parambas being treated as gardens and not mere lands assessed to revenue.

"The appellant objects to this ruling and relies on the principle of the decisions *in Collector of Thana* v. *Dadabhai Bomanji*(1) *Dayachand Nemchand* v. *Hemchand Dharamchand*(2) and on section 7, cl. viii, Court Fees Act.

"I am informed that the question was not argued before Mr. Nelson in Court, and these decisions were probably not referred to by him. My own opinion is that the contention raised by the appellant is valid. In the first of the cases cited, the plaintiff sought to remove an attachment made by the Collector on a cocoanut oart or garden, and the High Court of Bombay held that the stamp duty should be calculated under section 7, cl. viii of the Court Fees Act, not on the market value, but on five times the assessed revenue. Mr. Nelson's system of valuation is, I think, inequitable when the valuation of wet lands is considered. . . . I am inclined to think that the term 'garden' in the Act was meant to include only unassessed lands, such as gardens intended for ornament and pleasure, or pepper and sugarcane gardens and the like, which are also unassessed. But Mr. Nelson's decision, together with the ruling of the High Court in their proceedings, No. 956, dated 13th May 1873, on a reference from the District Judge of South Canara, cause me to entertain doubts upon the matter which is of great importance to Government and suitors. I therefore request the favor of an authoritative ruling upon the subject."

The case having come on for disposal on 13th April 1888 before a Divisional Bench (Collins, C.J., Shephard, J.), it was directed, in view of the importance of the question involved, that it should stand over for argument before the Full Bench.

On the first hearing by the Full Bench, their Lordships directed that further information as to the circumstances under which a paramba was held should be furnished by the referring officer.

(1) I.L.R., 1 Bom., 352. (2) I.L.R., 4 Bom., 515.

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In compliance with the above direction of the High Court the Acting District Judge of North Malabar reported as follows:—

"The land used for parambas is not assessed: the assessment is levied only upon cocoanut, jack, and areca trees growing in them. Any other tree, shrub, or vine which may be grown upon the land is free from assessment. It may, and does, therefore, happen that a Malayali ryot has parambas devoted solely to pepper cultivation, for which Government charges no assessment whatever either upon the land or the crop.

"In the revenue accounts parambas are classed as *bhagayat* or garden land. There is generally a house in a paramba, but not always. There is, however, hardly a house that is not situated in a paramba. In parambas are cultivated fruit trees of all sorts, pepper vines, plantains and the like, while immediately round the house, if there is one, there may be a few flowering plants."

The case then came on for re-hearing.

The *Acting Government Pleader* (*Subramania Ayyar*) for the Crown argued that on the facts disclosed in the reference a paramba came within the ordinary acceptation of the term garden, which, however, is not defined in the Act.

The parties to the suit were not represented.

The Court delivered the following

JUDGMENT:—This is a case stated under section 617 of the Civil Procedure Code by the Acting District Judge of North Malabar.

The point on which he entertains doubt, and which he refers for our decision, is whether a paramba is, for the purpose of ascertaining the Court fee payable, to be treated as a garden or as land assessed to revenue.

By section 7, Act VII of 1870, the amount of fee payable in suits for the possession of land, houses and gardens is to be computed according to the value of the subject matter; and where the subject matter is (1) land the revenue of which is permanently settled, the value shall be deemed to be ten times the revenue payable; (2) land the revenue of which is settled but not permanently,—five times the revenue; (3) land paying no revenue,—either fifteen times the nett profits if any, or the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood; (4) and where the subject

ACUDATHODAN MOIDIN v. PULLAMBATH MAMALLY.

matter is a house or garden,—according to the market value of the house or garden.

The Acting District Judge is of opinion that a paramba should be regarded as land the revenue of which is settled but not permanently. But he himself admits that the owners of parambas pay no land revenue. In Malabar the assessment is levied upon the cocoanut, areca or jack trees which grow in the parambas. If a paramba contains no cocoanut, areca or jack trees, no assessment is charged. In fact in Malabar a tree tax is substituted for the land assessment, and whether or not a paramba is assessed depends on the nature of the trees grown therein. It is therefore evident that parambas should either be classed as land paying no revenue or as gardens. The word "garden" is nowhere defined in Act VII of 1870, but from its occurring in connection with the word houses, we are of opinion that the term refers primarily to a garden in the English sense,—ornamental or pleasure or vegetable,—and that parambas do not ordinarily come under that category. We do not, however, wish it to be understood that in no case should a paramba be treated as a garden for the purpose of the Court Fees Act. Whether or not the paramba sued for is to be regarded as a garden or as land which pays no revenue, is a question of fact which must be decided in each case. The Acting District Judge will be informed that in the case of parambas the amount of fee payable under Act VII of 1870 is to be computed either under sub-clause (c) or (e) of section 7, clause v, according to the circumstances of each case.

APPELLATE CIVIL.

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

CHEKKUTTI AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

PAKKI (DEFENDANT), RESPONDENT.*

1888. Nov. 23. 1889. Feb. 18.

Malabar law—Karnavan, insufficient maintenance of junior members by—Suit by junior members living in a tarwad house apart from the karnavan.

Suit by twelve junior members of a Malabar tarwad against the karnavan for arrears of maintenance. The plaintiffs lived in a tarwad house apart from the karnavan, who did not allege that this arrangement was contrary to his wishes, but pleaded that he provided for them adequately:

Held, that the plaintiffs were entitled to a decree for a reasonable amount by way of maintenance, in computing which allowance should be made for the income of the tarwad property in their possession. *Nallakandiyil Parvadi* v. *Chathu Nambiar* (I.L.R., 4 Mad., 169) followed.

SECOND APPEAL against the decree of A. F. Cox, Acting District Judge of North Malabar, in appeal suit No. 421 of 1885, reversing the decree of V. Gopala Menon, District Munsif of Tellicherry, in original suit No. 163 of 1885.

Suit by twelve junior members of a Malabar tarwad, of which defendant No. 1 was karnavan, to recover Rs. 165 as arrears of maintenance due to them from defendant No. 1. Defendant No. 1 pleaded that sufficient provision had been made for the maintenance of the plaintiffs.

The District Munsif found that the plaintiffs were in possession of only one tarwad paramba, and that the income of that paramba was only Rs. 15 *per annum*, and he passed a decree for Rs. 120, assessing the sum due for maintenance as Rs. 10 for each of the plaintiffs. This decree was reversed on appeal by W. Austin, the District Judge of North Malabar.

The plaintiffs preferred second appeal No. 1267 of 1886 against the decree of the District Judge. The High Court on second appeal remanded the case for a fresh decision "after finding whether

* Second Appeal No. 451 of 1888.

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the circumstances are such as to make the decision in *Kunhammatha* v. *Kunhi Kutti Ali*(1) applicable."

The then District Judge on the re-hearing of the appeal held that the decision referred to was applicable to the circumstances of the present case and passed a decree dismissing the plaintiff's suit with cost throughout.

The plaintiffs preferred this second appeal against the last-mentioned decree.

Mr. *Wedderburn* and Mr. *K. Brown* for appellants.

Sankara Menon 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 following order made by the High Court (Collins, C.J., and Muttusami Ayyar, J.) on 23rd November 1888.

ORDER:—It is not denied that the plaintiffs live in a tarwad house and apart from the karnavan, nor does he allege in his written statement that they live apart from him without his permission or contrary to his wish. On the contrary, the karnavan's defence is that he supplies them with an adequate provision: and it is not denied as found by the District Munsif that the only income they derive from the portion of the tarwad property in their possession is Rs. 15 per annum. That sum is manifestly inadequate for the support of the plaintiffs. The decision in *Kunhammatha* v. *Kunhi Kutti Ali*(1) as already remarked by this Court has no application to the present case. That was a case in which the plaintiffs lived in the tarwad house with the karnavan and the others. The case falls within the principle laid down in *Nallakandiyil Parvadi* v. *Chathu Nambiar*(2); the fact that the maintenance claimed was computed at Rs. 10 per head does not in our opinion disentitle them to a decree for such an amount of maintenance as would be reasonable in the position in which they are placed. We shall therefore ask the Judge to return a finding on the following issue:—

"What is a reasonable provision for the support of the plaintiffs, regard being had to the amount of the *total* tarwad income and to the circumstances in which the plaintiffs are placed?"

In accordance with this order the District Judge returned a finding to the effect that under "the circumstances Rs. 95 is a

(1) I.L.R., 7 Mad., 233. (2) I.L.R., 4 Mad., 169.

CHEKKUTTI v. PAKKI.

sufficient provision for the plaintiffs' maintenance in addition to the yield of the paramba." On 18th February 1889 the High Court, accepting this finding, decreed that the defendant No. 1 "as karnavan do pay to the appellants Rs. 95 with proportionate costs throughout."

APPELLATE CIVIL.

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

KANARAN (DEFENDANT), APPELLANT,

v.

KUNJAN AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1888. Nov. 27. 1889. Feb. 21.

Malabar Law—Karnavan, blindness a disqualification for the office of.

Suit to remove the defendant from the office of karnavan of a Malabar tarwad. The defendant had become blind after occupying the office of karnavan for some years:

Held, that the defendant was not a fit person to be the karnavan of a tarwad and should be removed from his office.

APPEAL against the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in appeal suit No. 604 of 1886, reversing the decree of A. Annasami Ayyar, District Munsif of Pynad, in original suit No. 471 of 1885.

Suit for the removal of the defendant from the post of karnavan of a Malabar tarwad.

The plaint set forth "that plaintiff and defendant are members of one tarwad, of which first defendant is the karnavan and first plaintiff his successor; that defendant became karnavan in 1044 after the death of Raroo Nair; that defendant became blind some twenty years ago; that first plaintiff has been managing the affairs of the tarwad since 1040;.... that defendant instituted original suits Nos. 106 and 107 of 1884 against tarwad tenants for recovery of certain properties and obtained decrees; that this act is detrimental to the interest of the tarwad; that defendant is not fit to hold the office of karnavan; that he lives in his wife's house; that he does not manage the tarwad affairs; that the said decrees were obtained to benefit his wife and children; that in the said

* Second Appeal No. 51 of 1888.

KANARAN v. KUNJAN.

suits defendant admitted that one Koonhi Kutti Kurup and one Shangaran Nambiar, who are his wife's relations, to be the members of his tarwad, and that he has done many acts injurious to the tarwad and tarwad tenants."

The District Munsif dismissed the suit, observing as to the alleged disqualifications of the defendant. "It is not contended by plaintiffs the defendant's blindness is congenital. It is also admitted by plaintiffs in the plaint the defendant became karnavan in 1044. The circumstance that the defendant became blind after he became karnavan, and also after he had spent about eight years in his karnavan stanam is not, I think, a sufficient reason to remove him from karnavan stanam. Congenital blindness, which would prevent a karnavan from attending to his duties, would possibly disqualify a member of a tarwad from succeeding to its headship. The defendant's blindness is not congenital. He became blind only after he had been karnavan for seven or eight years. From the way the defendant gave his deposition in this case it did not also appear to me that he is unfit to be the karnavan in the tarwad."

On appeal the Subordinate Judge passed a decree in favor of the plaintiff, recording findings as to the facts of the case as summarized in the following order of the High Court.

The defendant preferred this second appeal.

Sankaran Nayar for appellant.

Sankara Menon for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the order of the Court (Collins, C.J., and Wilkinson, J.).

ORDER :—The Subordinate Judge has found that until recently plaintiff No. 1 carried on the management of family affairs, the defendant, the karnavan of the tarwad, having become totally blind in 1877. The Subordinate Judge has also found that the defendant has now put himself in the hands of two pretenders who set up a claim to be members of the tarwad, which claim is disputed by the plaintiff, and that acting under their advice he has done acts detrimental to the interest of the tarwad. Under these circumstances he considered that a case had been made out for defendant's removal from the karnavan stanam. On appeal it is argued that blindness is no bar to the defendant's holding the post of karnavan, and that if it be held to be so, plaintiff

KANARAN v. KUNJAN.

No. 1 is not the senior anandravan. We are of opinion that a blind man is not a fit person to be the karnavan of a tarwad, and that to permit a blind man to continue to occupy that post under such circumstances as those disclosed in this case would inevitably tend to the ruin of the tarwad. We must therefore uphold the decree of the Subordinate Judge on this point.

Their Lordships then directed the Subordinate Judge to record a finding as to the truth of the allegation of plaintiff No. 1 that he was senior anandravan of the tarwad. But plaintiff No. 1 having died before the case came on for re-hearing, a decree was passed merely confirming the decree of the Subordinate Judge so far as it decreed the removal of the defendant from the post of karnavan.

APPELLATE CIVIL.

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

RAMANADAN (DEFENDANT), APPELLANT,

v.

RAJAGOPALA AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1889. Jan. 7, 21.

Hindu law—Money decree against father—Attachment of ancestral estate.

In execution of a money decree ancestral property of the joint family of the judgment-debtor was attached. His sons sued to release their interest from attachment, alleging that the judgment debt had been incurred for immoral purposes, which was denied by the decree-holder. It was held by the lower Courts that nothing more than the father's share was liable to be attached, as the sons were not parties to the decree:

Held, that the nature of the debt should be determined, since the creditor's power to attach and sell depends on the father's power to sell, which again depends on the nature of the debt.

Mussamut Nanomi Babuasin v. *Modun Mohun* (L.R., 13 I.A., 1; s.c. I.L.R., 13 Cal., 21) discussed and followed.

SECOND APPEAL against the decree of T. Kanagasabai Mudaliar, Subordinate Judge of Tanjore, in appeal suit No. 41 of 1886, affirming the decree of S. Subbayya, District Munsif of Negapatam, in original suit No. 267 of 1884.

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* Second Appeal No. 405 of 1887.

RAMANADAN v. RAJAGOPALA.

Suit by the members of a joint Hindu family to release the attachment of their interest in certain family property attached in execution of a money decree obtained against their father by the defendant in original suit No. 35 of 1883.

The plaintiffs, who were not parties to the suit of 1883, alleged that the decree debt had been incurred by their father "not for family purposes, but borrowed by him and his brother for immoral purposes." The defendant pleaded that the decree was binding on the plaintiffs and their share of the family property.

The District Munsif passed a decree in favor of the plaintiffs, and it was affirmed on appeal by the Subordinate Judge, who based his decision on the ground "that the decree for which the disputed property had been attached was but a simple decree against the father alone."

The defendant preferred this second appeal.

Mr. *Norton* for appellant.

Subramanya 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 Muttusami Ayyar, J.).

JUDGMENT.—The question for decision in this second appeal is whether, in the execution of a money decree against a Hindu father, ancestral property, in which he and his sons are jointly interested as co-parceners, is liable to be attached. In original suit No. 35 of 1883 the appellant obtained a decree for a sum of money against the respondents' father and his brothers, and attached their joint family property. Thereupon the respondents resisted the attachment on the ground that they were not parties to the decree, and that their interest in the family property was not liable to be proceeded against. But their claim petition was rejected without an inquiry as presented too late, and the respondents then instituted this suit to obtain a release of their three-quarters share from attachment. The appellant's case was that the decree debt was a family debt, that the bond sued upon was executed not only by the respondents' father, but also by his brothers, the adult male members of the family at the time, and that, at the date of the bond, the respondents Nos. 2 and 3 had not been born. The respondents contended that the debt was contracted by their father for immoral purposes, and the issue recorded for decision was whether the property attached was liable for

the decree debt. But both the lower Courts held that, in execution of a money decree against the father, nothing more than the father's share in ancestral property was liable to be attached if the sons were not made parties to the decree, and that it was unnecessary to enter upon an inquiry upon the nature of the debt or to consider the other questions raised by the appellant. Though the respondents' claim was rejected, the appellant's pleader admits that the execution-creditor has not yet brought the property to sale. It is argued before us that the lower Courts were in error in considering that the execution-creditor could only bring to sale the father's share in joint family property and that the fact of the sale not having yet taken place makes no difference.

We are of opinion that the decrees of the Courts below must be reversed, and that the case remanded to the Court of first instance for disposal on the merits. The decision of the Privy Council in *Mussamut Nanomi Babuasin* v. *Modun Mohun*(1), followed and explained by this Court in *Kunhali Beari* v. *Keshava Shanbaga*(2), is conclusive on the point. Those decisions show that, if the execution-creditor actually brought to sale the entire family estate and bargained and paid for it, the entire estate would pass by the Court sale, unless the son impugning it showed that the debt was immoral or vicious, and was therefore one for the payment of which the father had no power to sell it. The principle underlying the decision is that, if the entire ancestral estate was actually sold in execution of a money decree against the father to which the son was not a party, the interest that passed by the Court sale was one which the father had power to sell with reference to the nature of the decree debt, that if the son showed that it was vicious or immoral, nothing more than the father's interest passed, and that if the debt was a family debt or an antecedent personal debt of the father for the payment of which the father was entitled to sell the son's interest also, the whole estate passed by the sale. Thus the creditor's power to attach and sell depends on the father's power to sell, which again depends on the nature of the debt. If the debt was one binding on the joint family as alleged by the defendant, he would be entitled to attach and sell the whole ancestral estate, but if on the other hand the debt was vicious or immoral as alleged by the

(1) L.R., 13 I.A., 1: s.c. I.L.R., 13 Cal., 21. (2) I.L.R., 11 Mad., 75.

RAMANADAN v. RAJAGOPALA.

plaintiffs, their interest would not be liable to be attached and sold. The fact of the sale having either taken place or not taken place before the sons instituted the suit cannot affect the father's power to sell, or, therefore, the execution-creditor's power to attach in view to bring the property to sale. We set aside the decrees of the Courts below and remand the case to the Court of first instance for disposal on the merits. Costs incurred hitherto will be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

1889. March 8, 13.

RAMALINGAM (PLAINTIFF), APPELLANT,

v.

THIRUGNANA SAMMANDHA (DEFENDANT), RESPONDENT.*

Res judicata.

Certain land was attached and sold in execution of a decree against the dharmakarta of a devasthanam. One claiming to be the lawful successor in office of the judgment-debtor now sued the purchaser for a declaration that the sale was invalid:

Held, the suit should not be dismissed on proof that the plaintiff had failed to obtain a declaration of his right to the dharmakartaship against another claimant to the office, in a suit to which the present defendant was not a party.

APPEAL against the decree of S. Gopalacharyar, Subordinate Judge of Madura (East), in original suit No. 21 of 1887.

Suit (1) to declare that a sale of certain properties (consisting of a mutt in Ramnad, a mutt in Rameswaram and an adjoining tope) in execution of a decree passed in original suit No. 5 of 1882 is not binding on the interest of the plaintiff, (2) to restrain the defendant from interfering with the properties in question.

The plaint set out that the plaintiff was the duly appointed head of the Rameswaram mutt, and that the properties in question "are properties which everybody who becomes the head of the "mutt should always live upon; but they cannot be alienated. "They are not liable for the debts of any kind incurred by the "heads of the mutt." It was further alleged that in execution of the decree passed in original suit No. 5 of 1882 against one

* Appeal No. 40 of 1888.

RAMALINGAM v. THIRUGNANA SAMMANDHA.

Sethu Ramanadha Pandarasannadhi, the plaintiff's predecessor in office, on a private debt the properties in question had been attached, and that the present defendant purchased them at the execution-sale.

The defendant, who was manager of the Rameswaram Devasthanam, appointed under Act XX of 1863, denied all the above allegations, except as appears from the following paragraph of the written statement:—

"The properties in suit are the private properties of the "pandarams who have been dharmakartas of the Rameswaram "Devasthanam. They are such as can be sold or otherwise alien-"ated by them or rendered liable for their private debts. They "lastly belonged to Saminadha Pillai *alias* Sethu Ramanadha "Pandaram, who was first defendant in original suit No. 5 of "1882, and were in his possession. For the decree debt due by "him to the Rameswaram Devasthanam they were attached on "17th and 26th June 1885, and in the sale, the defendant "purchased them for the devasthanam."

The Subordinate Judge said:—

"The plaintiff practically concedes the identity of the head of "the mutt with the dharmakarta of the devasthanam. . . . . "In my opinion the plaintiff will not become the head of the "so-called mutt, unless and until he becomes, or is recognized by "competent authority as the dharmakarta of the Rameswaram "Devasthanam. From the evidence in the case I am inclined to "think that the plaintiff, if not in actual possession, has at least "some control over the properties in dispute; but I cannot say "that he is in possession as head of the mutt. It may be that "he is in possession by reason of his appointment by the late "dharmakarta under exhibit D, though, as a matter of fact, he "seems to have acquired his control only a few months after the "appointment. But he having failed as yet to establish the "validity of his appointment (it will be remembered that his suit "No. 39 of 1885 for the dharmakartaship has been dismissed by "this Court, and the matter is now before the High Court in "appeal, appeal suit No. 4 of 1887), I cannot recognize his "possession as of right."

In original suit No. 39 of 1885 the present plaintiff had sued to obtain a declaration of his right to the dharmakartaship, another claimant to that office being joined as defendant, and the present

RAMALINGAM v. THIRUGNANA SAMMANDHA.

defendant not being a party. The plaintiff's suit was dismissed in the court of first instance as appear above, and his appeal to the High Court was unsuccessful.

The Subordinate Judge passed a decree dismissing the suit against which the plaintiff preferred this appeal.

Subramanya Ayyar for appellant.

Bhashyam Ayyangar for respondent.

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

PARKER, J.—The plaintiff, alleging himself to be the duly appointed head of a mutt, sues to have it declared that the Court auction sale of certain properties in execution of a decree passed against his predecessor in the mutt is invalid against his right. He alleges that the properties belong to the head of the mutt for the time being and are inalienable. The plaintiff bases his title to the mutt upon a deed executed by his predecessor (exhibit D) on 30th January 1884. The court sale took place on 22nd March 1886, and this suit was brought on 21st March 1887. The defendant is the auction-purchaser, and is the manager of the Rameswaram Devasthanam, appointed under s. 5, Act XX of 1863.

For a long series of years the head of the mutt has been the dharmakarta of the Rameswaram Devasthanam for the time being, the only occasions on which it can be shown that any separation has occurred being when the management of the devasthanam has been committed to the charge of a special officer by the District Court. The last dharmakarta and head of the mutt was Sethu Ramanadha Pandaram, who was removed from the dharmakartaship by decree of the District Court, dated 2nd March 1883, which decree was confirmed by the High Court on appeal. On 30th January 1884 he executed the deed of appointment in plaintiff's favor, on which plaintiff's present rights are based. Plaintiff sued upon that deed in original suit No. 39 of 1885 in the Subordinate Court of Madura to establish his claim to the dharmakartaship, from which Sethu Ramanadha Pandaram had been deposed. The present defendant was not a party to that suit which was brought against another claimant to the dharmakartaship. The plaintiff's claim was dismissed on 4th September 1886, the Subordinate Judge holding the appointment invalid, and that decision has been since confirmed by the High Court.

RAMALINGAM v. THIRUGNANA SAMMANDHA.

The Subordinate Judge has not in this suit considered the validity of plaintiff's appointment by his predecessor, and the matter is not *res judicata* as between the present parties, but he has held that there is no independent institution called the Rameswaram mutt; that the mutt is in fact the residence, and the properties attached thereto are enjoyed by the dharmakarta of the Rameswaram Devasthanam for the time being. He declined to consider whether the properties were alienable or not, since he held that plaintiff having failed in original suit No. 39 of 1885 to establish his claim to the dharmakartaship could not maintain a suit to establish his rights to the properties of the mutt.

The Subordinate Judge has, therefore, decided the suit on a point not raised by the parties, since it was not part of defendant's plea that the properties were not alienable, or that the defendant acting for the devasthanam had purchased the devasthanam's own properties in satisfaction of a personal decree against the dismissed dharmakarta.

The High Court in appeal suit No. 4 of 1887 has overruled the contention that the dharmakartaship is an incident of the right of succession to the mutt. The Subordinate Judge's view is the converse of this, viz., that the right to the mutt is an incident of the right of succession to the dharmakartaship.

The plaintiff's right to sue depends upon the validity of exhibit D, upon which, between the present parties, there has been no adjudication. Should that document be held valid in plaintiff's favor, the further questions would arise whether the right to the mutt was an incident of the right to the dharmakartaship, or whether the dismissal of the late dharmakarta has effected a statutory severance of the two offices.

I would reverse the decree and remand the suit for re-hearing. Costs to follow the result.

SHEPHARD, J.—I agree in thinking that the plaintiff is entitled to have a re-trial of this case. The plaintiff sues in his character of head of the mutt in virtue of the appointment made by his predecessor on the 30th January 1884, and the main question to be considered is whether that appointment was valid in the sense that Sethu Ramanadha Pandaram, the late dharmakarta of the devasthanam, was competent to make such appointment and invest a successor with the property, which he, as head of the mutt, had previously enjoyed. That question the Subordinate Judge cannot

RAMALINGAM v. THIRUGNANA SAMMANDHA.

be said to have properly tried. Indeed, he seems to have thought that the plaintiff's failure in another suit to which the defendant was no party precluded the recognition of the right claimed by the plaintiff in the present case. In this the Subordinate Judge was clearly mistaken, as the decision in the previous suit could not make the plaintiff's present claim against another defendant *res judicata*.

I think that the plaintiff is justified in his contention that there has been no decision on the principal question raised in the suit, and that, although some of the findings recorded by the Subordinate Judge may indicate what his conclusion on that question is likely to be, the case ought to be remanded.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

1889. Feb. 8, 22.

MUTHU (PLAINTIFF), APPELLANT,

v.

KAMBALINGA AND ANOTHER (REPRESENTATIVES OF DEFENDANT No. 4), RESPONDENTS.*

Limitation Act, 1877, *sch. II, art.* 134—*Suit to redeem by assignee of equity of redemption—Title purchased at execution sale.*

Suit, in 1885, by the assignee of the equity of redemption to redeem a mortgage of 1826. The mortgagees were put into possession under the mortgage and no interest was paid. In 1855, the mortgage premises were sold at a Court sale in execution of a decree against the mortgagees as if they formed part of their family property, and the defendant derived title from the execution purchaser who had dealt with it as absolute owner:

Held, that the suit was barred under Limitation Act, 1877, sch. II, art. 134.

SECOND APPEAL against the decree of J. A. Davies, Acting District Judge of Tanjore, in appeal suit No. 115 of 1887, affirming the decree of G. Ramasami Ayyar, District Munsif of Kumbakonam, in original suit No. 245 of 1885.

Suit filed in 1885 to redeem a mortgage, dated 22nd February 1826, and executed to one Kichu Chetti, who was father of defendants Nos. 1 and 2 and grandfather of defendant No. 3. The

* Second Appeal No. 257 of 1888.

MUTHU v. KAMBALINGA.

plaintiff sued as purchaser under a registered sale deed from the mortgagor's grandson.

It was alleged that possession of the mortgaged property was delivered to the mortgagees in lieu of interest. It appeared that the property was attached as the family property of defendants Nos. 1 and 2 and sold to Ramadu Chetti in 1855 in execution of a decree obtained against them in original suit No. 327 of 1836, and that it was subsequently sold at a sale held in execution of a decree obtained in original suit No. 12 of 1881 against the widow of Ramadu Chetti and purchased by defendant No. 4.

Defendants Nos. 1, 2 and 3 did not appear.

Defendant No. 4 pleaded, *inter alia*, that the suit was barred under the Limitation Act, sch. II, art. 134, as being "a suit to "recover possession of immovable property . . . mortgaged and "afterwards purchased from the . . . mortgagee for a valuable "consideration."

The District Munsif dismissed the suit, and his decree was affirmed by the District Judge who said:—

"The property said to have been originally mortgaged in 1826 was brought in a Court sale from the mortgagee on the 20th September 1855 for valuable consideration as per exhibit X. The plaintiff had therefore only 12 years' time from that date to sue, whereas this suit was brought in 1885 or 30 years afterwards."

The plaintiff preferred this second appeal.

Rama Rau and *Bhashyam Ayyangar* for appellant.

Subramanya Ayyar for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the following judgments:—

MUTTUSAMI AYYAR, J.—This was a suit brought by the appellant to redeem a house which, he alleged, was mortgaged in February 1826, to the ancestor of respondents Nos. 1—3. The house has since been the subject of two Court sales. The first was held in 1855 in execution of the decree in original suit No. 327 of 1836 which was passed against the first and second defendants, and one Ramadu became purchaser. The second sale was held in execution of the decree in original suit No. 12 of 1881 which was instituted against Ramadu's widow, and respondent No. 4 was the purchaser at that sale. Respondent No. 4 pleaded, *inter alia*, limitation in bar of the claim and relied on Act XV of 1877,

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sch. II, art. 134. The Judge upheld the contention on appeal, and it is urged in second appeal that the suit is governed by the sixty years' rule. It is urged (i) that art. 134 does not apply to Court sales and (ii) that respondent No. 4 ought to show that what he actually purchased was the absolute title to the house and that he instituted due inquiry as to the title of the judgment-debtors which was put up to sale. Art. 134 describes the suit to which it is to apply as a suit to recover possession of immovable property conveyed or bequeathed in trust or *mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration* and it then prescribes 12 years from the date of the purchase as the period of limitation. This ought to be read together with art. 148 which prescribes 60 years for a suit against a mortgagee to redeem or recover possession of immovable property mortgaged, and, when so read, it is clear that the purchase contemplated in art. 134 is that of the absolute title to or property in the subject of the mortgage. A mere assignment of the mortgage is not within the purview of the article, for the assignee will only stand then in the shoes of the mortgagee and cannot be regarded as purchaser of the property under mortgage. This view is in accordance with the decision of the Privy Council with reference to Act XIV of 1859, section 5, in *Juggernath Sahoo* v. *Syud Shah Mahomed Hossein*(1). There is also no doubt that the party relying on art. 134 which cuts down the mortgagor's right to sue from 60 years to 12 years is bound to show that he purchased the absolute title and that he paid value for it. As to the contention that the article does not apply to Court sales, we do not think that it can be supported. Though, in a Court sale, the sale is not the act of the mortgagee, but the act of the Court executing the decree, yet the purchase is of the property under mortgage by reason of the exercise by the Court of the power of sale vested in the mortgagee. We can see no distinction between it and a voluntary sale, when the purchaser bargained for and bought the absolute title and when he had no means of information showing that the position of the judgment-debtors was really that of mortgagees in regard to the property purchased. If an honest mistake made in connection with a purchase for value at a voluntary sale is protected after 12 years' adverse possession, we do not see why

(1) L.R., 2 I.A., 48.

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a similar mistake made in connection with a Court sale should not be likewise protected. The same view was taken by the High Court at Allahabad in *Bhagwan Sahai* v. *Bhagwan Din*(1). In the case before us, the sale certificate issued to Ramadu described the house as the property of defendants Nos. 1 and 2. Several documents show that Ramadu dealt with it as absolute owner ever since 1855. I am of opinion that the decision of the Judge that the suit is barred by art. 134 is right, and I would dismiss this second appeal with costs.

WILKINSON, J.—The plaintiff as the purchaser in January 1885 of the equity of redemption sues to redeem a mortgage alleged to have been granted in 1826 by Peddu Chetty Viranna Chetty, the ancestor of plaintiff's vendor to Kichu, the ancestor of defendants Nos. 1—3. Defendant No. 4 purchased a portion of the property in Court sale in execution of the decree obtained in original suit No. 12 of 1881 against the heirs and representatives of one Ramudu Chetty who had himself purchased the property in execution of a portion of a decree in original suit No. 327 of 1836 obtained against defendants Nos. 1 and 2. The Lower Appellate Court held that the suit was barred by art. 134, sch. II of the Limitation Act, and dismissed the plaintiff's suit without going into the merits. On appeal, it is argued that what defendant No. 4 purchased was not an absolute title, but a mortgage. By art. 134 the right of a mortgagor to recover possession of immovable property mortgaged and afterwards purchased from the mortgagee for valuable consideration is limited to 12 years from the date of purchase. In the case of *Radanath Doss* v. *Gisborne*(2) the Privy Council laid down what in their view was the meaning of the word purchaser in section 5, Act XIV of 1859, which corresponded to art. 134. They held that the word must mean some person who purchases that which in fact is a mortgage upon a representation made to him and in the full belief that it is not a mortgage, but an absolute title. And reading together arts. 134 and 148, it is evident that the purchase referred to in art. 134 must be a purchase of the absolute title. It is therefore incumbent upon the purchaser whether in a Court sale or in a private sale, for I see no reason why any distinction should be drawn between them, to show that he purchased the absolute title in the full belief

(1) I.L.R., 9 All., 97. (2) 14 M.I.A., 1.

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that it was the absolute title he was purchasing. No reason can be assigned why the same protection which is afforded to a purchaser for valuable consideration at a private sale should not be extended to a purchaser at Court auction. It is a question of fact in each case what passed by the sale, an absolute title, or only the right of the mortgagees. There is evidence in this case to show that Ramadu purchased in the full belief that he was purchasing an absolute title, and that he always dealt with the property as if he had acquired an absolute estate. The decree of the Lower Court is therefore right, and this second appeal must be dismissed with costs.

APPELLATE CIVIL.

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

KUNHAMMED (DEFENDANT No. 2), APPELLANT,

v.

NARAYANAN MUSSAD (PLAINTIFF), RESPONDENT.*

1888. Sept. 6. 1889. Feb. 11.

Landlord and tenant—Malabar kanam—Change in character of land—Passive acquiescence of landlord—Estoppel—Compensation for improvements by tenant.

Land was demised on kanam for wet cultivation. The demisee changed the character of the holding, by making various improvements which were held to be inconsistent with the purpose for which the land was demised. On a finding that the landlord had stood by while the character of the holding was being changed and had thereby caused a belief that the change had his approval:

Held, on second appeal, that the demisee was entitled to compensation for his improvements on redemption of the kanam. *Ramsden* v. *Dyson* (L.R., 1 H.L., 129) followed.

SECOND APPEAL against the decree of F. H. Wilkinson, District Judge of South Malabar, in appeal suit No. 496 of 1887, modifying the decree of O. Chandu Menon, Acting District Munsif of Shernad, in original suit No. 457 of 1886.

This was a suit by the plaintiff to evict the defendant from certain land demised by him on kanam to the defendant's father on 17th November 1888.

The plaint stated that the land demised was a "palliyal or two-crop paddy land," and the kanam deed provided for the use by

* Second Appeal No. 1151 of 1888.

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the demisee of "water from a *chola* for 11 Indian hours daily." It was alleged that the defendant had converted a portion of this land into paramba or garden land, planting cocoanut and areca nut trees thereon, and that this alteration in the character of the land was calculated to injure the plaintiff. The prayers of the plaint were that the plaintiff be put into possession, and that the defendant pay to him Rs. 50, being the cost of restoring the land to its former condition, and arrears of rent, on payment of the kanam amount.

The defendant admitted the tenancy and the arrears of rent and the change in the character of the holding but claimed compensation for improvements.

The District Munsif held that the plaintiff had acquiesced in the change effected in the character of the holding, and passed a decree to the effect that the plaintiff should pay to the defendant the value of the improvements as valued by a Commissioner before recovering possession of the land demised.

On appeal, the District Judge without recording any finding on the question of acquiescence by the landlord reversed that part of the District Munsif's decree which related to compensation to the tenant, and decreed that the tenant should pay the cost of restoring the land to its former condition on the ground that the improvements in question were "unsuitable to the holding and inconsistent with the purpose for which it was let."

The defendant preferred this second appeal.

Narayana Rau for appellant.

Sankaran Nayar 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.—In 1868 the respondent demised a palliyal to the appellant on kanam for wet cultivation. Exhibit A which evidences the demise provided for its being irrigated from a *chola* for 11 Indian hours a day and for payment of rent in paddy. It provided also for the surrender of the land within 12 years if the rent should be in arrear. There is nothing in the document to show that any improvement unsuited to the holding and inconsistent with the purpose for which the land was demised was in the contemplation of the parties. It is found by the Judge that the appellant converted a large portion of the wet land into paramba, planting jack, cocoanut and areca nut trees. There was, however,

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evidence to show that the respondent lived within three miles, that he had means of obtaining knowledge of the conversion of the land into a paramba, and that he raised no objection. There is no doubt upon the facts found that the appellant's claim to compensation is not referable either to the kanam document or to any subsequent express arrangement made with the respondent or to any overt act on his part which is inconsistent with his present contention. Nor is there any ground for doubting the correctness of the finding that the so-called improvement is unsuited to the nature of the holding and inconsistent with the purpose for which the land was demised. In this state of facts, the Judge held that the appellant was entitled to no compensation; but that, on the other hand, he was liable to pay the respondent the cost of restoring the land to its former condition. It is urged that the passive acquiescence of the landlord was sufficient to sustain the appellant's claim to compensation and reliance is placed on the authority of *Shibdas Bandapadhya* v. *Bamandas Mukhapadhya*(1). On the other hand, the respondent's pleader draws our attention to the decision of this Court in *Ravi Varmah* v. *Mathissen*(2) and to the cases cited therein, *Pilling* v. *Armitage*(3) and *Ramsden* v. *Dyson*(4). There is really no conflict in the principle on which the cases cited were decided. The general rule was laid down in *Ramsden* v. *Dyson* in these terms. "When money is laid out by a tenant in the hope or expectation of "an extended term or an allowance for expenditure, the tenant has "no claim which a Court of law or equity can enforce if such hope "or expectation has not been created or encouraged by the land-"lord." Our decision must then depend not so much on the suitability of the improvements to the nature of the holding as on the fact of the landlord having by conduct or otherwise raised an expectation that the outlay had his approval, and that the tenant would be reimbursed when he was called on to vacate possession, and the special équity raised by such conduct. Again, in *De Bussche* v. *Alt*(5) "it was observed that if bare acquiescence is a "valid defence, it must be an acquiescence while the act acquiesced "in is in progress and not after it has been completed." The Lord Justices said "If a person having a right and seeing another "person about to commit, or in the course of committing an act "infringing upon that right, stands by in such a manner as really

(1) 8 B.L.R., 237.
(2) Second Appeal No. 296 of 1884 *unreported*; see Note at end of this report.
(3) 12 Ves. Jun., 78. (4) L.R., 1 H.L., 129. (5) L.R., 8 Ch. D., 286.

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"to induce the person committing the act, and who might have "otherwise obtained from it, to believe that he assents to its being "committed he cannot afterwards be heard to complain of the act. "Mere submission to an act when it is once completed without any "knowledge or assent upon the part of the person whose right is "infringed upon is only a submission to an injury, and it cannot "take away the right infringed upon when such submission is for "any time short of the period of limitation." In the case before us the Judge appears to have decided against the tenant mainly on the ground that the improvements made were unsuited to the holding. But it is also necessary to ascertain before we dispose of this appeal whether the landlord did not stand by when the land was being converted into a garden and thereby cause a belief that such conversion had his approval. We shall ask the present District Judge to return a finding upon the record and upon any further evidence on the question mentioned above within six weeks from the date of the receipt of this order, when ten days will be allowed for filing objections.

In compliance with the above order the District Judge returned a finding to the effect that the landlord stood by when the lands in question were being converted into a garden, and thereby caused a belief that such conversion had his approval.

This second appeal having come on for re-hearing, the Court delivered judgment, modifying the decree of the District Judge and restoring that of the District Munsif.

NOTE.

RAVI VARMAH *v.* MATHISSEN.—This case came before the High Court on appeal from the District Court of North Malabar. The appellant, who was the Raja of Cherakkal, had sued to eject the respondents from certain items of property. It appeared that the respondents were in possession of that portion of the property which is in question in the following extract from the judgment, as assignees of one Bappen Chinnan under a document described as a "deed of surrender," dated 10th March 1855. Bappen Chinnan's title rested on exhibit E—a lease, dated 20th July 1849, granted to him by the appellant's kovilagam—in which it was provided "that Bappen "Chinnan should plant the paramba with four kinds of trees, and that "as soon as they come into bearing he should receive the value of

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"the improvements and surrender the land." The respondents, who were members of a German mission, had erected certain buildings and made various improvements on the land, and pleaded that the plaintiff was not entitled to eject them without paying full compensation for their expenditure.

On the question of compensation the High Court (Muttusami Ayyar and Brandt, JJ.) said:—

"As to the valuation of improvements, the appellant complains that it is excessive. But we consider that it is reasonable and in accordance with the principles laid down in second appeal No. 762 of 1884. It is no doubt true, as contended for the respondents, that several of the improvements made by them are excluded from those for which compensation is considered to be due. But we cannot say that those improvements are suitable to the purpose for which the paramba was originally let to Bappen Chinnan, or within the terms of exhibit E. We do not consider that it is competent to us to enhance the compensation either on the ground that subsequently to 1855 there was a doubt about the appellant's jemn title, or that the appellant stood by when the buildings were raised. According to the finding, the respondents got into possession as assignees of Bappen Chinnan, who was the appellant's tenant, and it was not open to him or to them to question the landlord's title. Moreover there was an express contract E as to the nature of the improvements to be made, and there is no evidence to show that the appellant since did anything which could have reasonably led the respondents to believe that he would go beyond his agreement and compensate them for other improvements. We are aware of no authority for holding that upon principles of general equity a enant or his assignee is entitled to compensation or relief for expenditure incurred by him under the observation of the landlord, unless he can show that it was incurred with reference to some agreement. On the other hand *Pilling* v. *Armitage*(1) is an authority to the contrary. And the learned Judges, who, in *Ramsden* v. *Dyson*(2), were not unanimous in respect of the findings of the facts, were agreed as to the general rule that when money is laid out by a tenant 'in the hope or expectation of an ex-'tended term or an allowance for expenditure, the tenant has no 'claim which a Court of law or equity can enforce, if such hope or 'expectation has not been created or encouraged by the landlord.' But the present case does not fall either within that proposition or within the proposition in respect of an omission, whereby one person has intentionally caused or permitted another to believe a thing not

(1) 12 Ves. Jun., 78. (2) L.R., 1 H.L., 129.

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true and to act upon such belief. It was not indeed contended in express terms that the appellant is estopped by reason of his conduct, and we cannot hold that by reason of the improvements in this case having been made within a short distance of the residence of the landlord, and on land belonging to him which he must have frequently passed, any other or further relief can be afforded to the respondents than they are entitled to under the terms of the agreement under which they held the land and by the custom of the country.

"At the same time, we cannot refrain from saying that this appears to be a very hard case, and we consider ourselves justified in the peculiar circumstances in directing that the decree do provide that the respondents be at liberty to remove within six months all the improvements made by them, for which no compensation has been allowed."

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

SATHUVAYYAN (DEFENDANT No. 7), APPELLANT,

v.

MUTHUSAMI (PLAINTIFF), RESPONDENT.*

1888. August 9. Sept. 27.

Hindu law—Personal decree against managing member of joint family not impleaded as such—Effect of sale in execution of such decree—Transfer of Property Act—Act IV of 1882, *s.* 99—*Sale of mortgage property in execution of decree on a money bond for interest due on the mortgage.*

The managing member of a joint Hindu family executed in 1878 a mortgage on certain lands, the property of the family, to secure a debt incurred by him for family purposes, and in 1881 he together with his brother executed to the mortgagee a money bond for the interest then due on the mortgage. In 1882 the mortgagee brought a suit on the money bond and having obtained a personal decree against the two brothers merely, brought to sale in execution part of the mortgaged property which was purchased by a third person:

Held, that the sale did not convey the interest of another undivided brother who was not a party to the decree:

Held, further per *Kernan, J.*, that the sale in execution was invalid under Transfer of Property Act, s. 99.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 814 of 1886, modifying the decree of T. Audinarayana Chetti, District Munsif of Shiyali, in original suit No. 22 of 1885.

* Second Appeal No. 1284 of 1887.

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This was a suit for the division and separate possession of a one-third share of certain land which was alleged to be the property of an undivided Hindu family of which the plaintiff and defendants Nos. 1 to 5 were members; defendant No. 6 represented the interest of the mortgagee of part of the land in question under a mortgage, dated 10th August 1878, and executed by the defendant No. 1, the plaintiff's brother, as manager of his family for family purposes. Defendant No. 7 had purchased the land in question at a sale held on 28th January 1885 in execution of a decree obtained by the mortgagee upon a money bond executed on 24th August 1881 by both of the plaintiff's brothers, viz., defendants Nos. 1 and 2, for a sum of money then due as interest on the above mortgage. The suit on the bond was original suit No. 130 of 1882, to which the plaintiff was not a party, and in which the defendants were (as was admitted in the present case) "not impleaded either as the managing members or as representatives of the family."

The District Munsif decided that the plaintiff was not entitled to any relief against defendant No. 7, but on appeal the Subordinate Judge held the sale in execution of the decree in original suit No. 130 of 1832 invalid as against plaintiff.

Defendant No. 7 preferred this second appeal.

Desikacharyar for appellant.

Ramachandra Ayyar 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 following judgments:—

KERNAN, J.—The plaintiff claims, in this suit, to be entitled to a one-third share in all the items of property Nos. 1 to 61 mentioned in the plaint, which property, he states, is the undivided family property of himself and his brothers, defendants Nos. 1 and 2, and the defendants Nos. 3 to 5.

The following facts have been found by both the Courts, viz., first, that defendant No. 1 was manager of the undivided family, and that he, on the 10th of August 1878, executed a mortgage to Palaniappa Chetty, agent of Arunachellum, the father of defendant No. 6, for Rs. 2,500, borrowed for the payment of debts and other necessities of the family including the purchase of the plaint lands items 50 to 61; second, that interest being due on that mortgage, defendants Nos. 1 and 2 on the 24th of August

1881 executed a mere money bond to Palaniappa Chetty for Rs. 700, and third, that the amount of that bond was given on account of the said interest.

Original suit No. 130 of 1882 was filed by Arunachellum Chetty, father of defendant No. 6, against the defendants Nos. 1 and 2 and Palaniappa Chetty on that bond, and a decree was obtained against defendants Nos. 1 and 2 on the 21st of September 1882. Under that decree, the plaint items Nos. 1 to 31 and 34 to 48 were attached and were, on the 28th day of January 1885, sold by auction and defendant No. 7 bought them for Rs. 135, and obtained a certificate on the 17th of June 1885, which certifies that defendant No. 7 bought the lands set up for sale and not merely the shares of the defendants in execution.

In the plaint in this suit it is stated, and the fact is, as appears on the record that the plaintiff was not made party to the suit No. 130 of 1882. Therefore, he contends, he is not bound thereby or by the sale. He alleges that there was collusion between defendant No. 6 and defendants Nos. 1 and 2, but he states that he was absent from the village when the suit was filed. The collusion has been negatived by both Courts. The District Munsif decided that the plaintiff is bound by the decree and the sale, although he was not party thereto, inasmuch as the debt, for which the decree was obtained, was incurred for family necessity and contracted by the manager of the undivided family and inasmuch as the plaintiff, who lives with defendants Nos. 1 and 2 was, as the Munsif believed, set up in this action to defraud defendant No. 6 of his interest in a portion of the lands mortgaged. The Munsif disallowed the plaintiff's claim to share in the lands purchased by defendant No. 7 and allowed plaintiff a one-fourth share in the plaint items, viz., 32, 33, 49 to 61.

On appeal the Subordinate Judge, by a decree, dated 12th August 1887, allowed the plaintiff's claim to a one-fourth share in all the plaint items, on the grounds that the plaintiff was not a party to the suit No. 130 of 1882 and is not bound thereby or by the sale, and that the decree was personal against defendants Nos. 1 and 2, the plaintiff's brothers, and all that passed under the sale was the estate and interest of defendants Nos. 1 and 2.

The plaintiff, by permission of the Subordinate Judge, argued, as a ground of appeal, not put forward in the first instance, that as the decree in suit No. 130 of 1882 was obtained by the mort-

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gagee after the coming into force of the Transfer of Property Act, 1882, the sale was contrary to section 99 of that Act. The Subordinate Judge overruled that contention, holding that only the parties to the suit could raise it.

This last mentioned ruling was erroneous. There is no limitation contained in section 99 or elsewhere confining the application of that section to the parties to the suit. This suit is an instance where the provisions of section 99 might properly be applied as the plaintiff has an interest in the property. The plaintiff no doubt did not admit his liability as a member of the family to the payment of the mortgage of 10th August 1878, but when the Courts decided that the mortgage bound him, he was entitled to take the objection under section 99 that the sale in suit No. 130 of 1882 was invalid. The fact that the sale took place before this suit was filed cannot give validity to the sale, if it was contrary to the provisions of section 99. The plaintiff in suit No. 130 of 1882 was a mortgagee within the meaning of section 99, although the mortgage was in the name of his agent, the third defendant in that suit, who admitted the right of his principal. To treat the plaintiff in suit No. 130 of 1882 as not being the mortgagee, he being the principal, and to treat the agent, the third defendant as the mortgagee, because the mortgage was in his name, would be to evade the provisions of section 99. For then the person beneficially entitled to the amount of the mortgage and interest should be held not to be the mortgagee, but that his agent who held the mortgage only as agent was the mortgagee. The plaintiff in that suit No. 130 of 1882 was entitled to file a suit to foreclose the mortgage or sell the property, making his agent a party.

We do not agree with the judgment of the Lower Appellate Court on this point and are of opinion that the sale was invalid under the Transfer of Property Act.

The next question is whether the decree in suit No. 130 of 1882 obtained against the defendants Nos. 1 and 2 binds the plaintiff, their brother, on the ground that he was liable with them to the debt for which the suit was brought, although he was not party-defendant in that suit. That suit was on a money bond by the defendants Nos. 1 and 2; the bond did not refer to either of them as manager of the family or to the mortgage in any way. The decree was a mere money decree against the defendants. Though the plaintiff may be bound by the debt for which the

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bond was given, he was not party to, or represented by either of, the defendants Nos. 1 and 2 in suit No. 130 of 1882. A sale in execution of that decree could be legally made of the shares of defendants Nos. 1 and 2, but not of the plaintiff's share. That share was not the property of the defendants Nos. 1 and 2 or either of them. No doubt, under a money decree against a father on foot of a debt which bound the sons, the whole interest and all the shares of the sons could be legally sold and conveyed, although the sons were not parties to the suit. The principle of such decision is that the father is entitled by his own act, without the assent of his sons, to sell the whole estate for payment of such debts as bind the sons. But that principle has not been extended, so far as I know, to the case of any manager of a family except a father. The course of decisions in this Presidency is that, in the case of adult coparcener, a brother, who is manager, but is not sued as such, does not represent in a suit or proceedings affecting the family estate the coparcener who is not made party to the suit, and that a decree in such suit and execution thereon would not bind him—*Viraragavamma* v. *Samudrala*(1). That was the case of a debt binding on both brothers, and for which a money decree only was had; but the manager was not sued in his character as manager—*Guruvappa* v. *Thimma*(2).

The case of *Daulat Ram* v. *Mehr Chand*(3) in the Privy Council was a case, where a managing member granted a mortgage of the family property, and was sued on it and there was a sale. Other brothers of the joint family filed a suit to set aside the sale on the ground that they were not parties to the suit and they declined to go into evidence as to the nature of the debt, or whether it was of a nature to bind them and it appeared that they got part of the produce of the purchase money of the sale. The Court held they were bound. But that was the case of a decree in a suit on foot of a mortgage, and the decree was for sale of the property mortgaged and the defendants refused to meet the case, on the ground that they had received a portion of the purchase money. Although the plaintiff in this case and his interest in the property may be bound by the mortgage created by his brothers and for the debt on the bond, that does not interfere with his right to have the sale made in suit No. 130 of 1882 set aside.

(1) I.L.R., 8 Mad., 208. (2) I.L.R., 10 Mad., 316. (3) I.L.R., 15 Cal., 70.

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WILKINSON, J.—I am of the same opinion. The only question for determination in this appeal is whether the plaintiff's share in the joint family property passed to appellant, the auction purchaser. The plaintiff's brothers, defendants Nos. 1 and 2, executed a bond to defendant No. 6 for Rs. 600. Upon that bond, defendant No. 6 brought a suit, obtained a decree, and, in execution, brought the joint family property to sale; defendant No. 7, appellant, purchased it. It has been held that a money decree against one brother, who was not impleaded as the managing coparcener or representative of the family, does not bind the other brothers and that no more than the judgment-debtor's share is liable to be attached and sold in execution—*Viraragavamma* v. *Samudrala*(1). This was followed in *Guruvappa* v. *Thimma*(2).

The case relied on by appellant's pleader—*Daulat Ram* v. *Mehr Chand*(3) is not applicable, as that was a case of a mortgage effected by the managing members. It is admitted that, in original suit No. 130 of 1882, defendants Nos. 1 and 2 were not impleaded either as the managing members or as representatives of the family, and the decree obtained was, therefore, a personal decree and one by which the present plaintiff was in no way concluded.

The decree of the Subordinate Judge, therefore, so far as it held that the plaintiff's rights did not pass by the sale in execution, is right.

The decree of the Lower Appellate Court is confirmed and this appeal dismissed with costs.

(1) I.L.R., 8 Mad., 208. (2) I.L.R., 10 Mad., 316. (3) I.L.R., 15 Cal., 70.

APPELLATE CIVIL.

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

1889. April 1.

GOPI REDDI AND ANOTHER (PLAINTIFFS),

v.

MAHANANDI REDDI AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, s. 525—Loss of award, procedure on.

When an award has been lost, a Court acting under s. 525 of the Code of Civil Procedure, cannot take secondary evidence of its provisions and pass a decree accordingly.

CASE referred for the opinion of the High Court by H. H. O'Farrell, Acting District Judge of Kurnool, under s. 617 of the Code of Civil Procedure.

The case was stated as follows:—

"In this suit the plaintiffs originally prayed that an award may be filed under section 525 of the Code of Civil Procedure. The award produced by the plaintiffs is a copy of the original award which was given to them by the arbitrators, and signed only by four out of five arbitrators, the fifth admittedly refusing to sign.

"The defendants on the other hand deny that they ever submitted to the arbitration and that the so-called arbitrators passed an award.

"It is found that the original award and all the papers relating to the arbitration are not forthcoming owing to the dishonest conduct of Nagamuthu Mudelliar, one of the arbitrators. On my suggestion the plaint was amended by inserting the words 'copy of the award' for the word 'award.'

"On the merits of the case I have found that as a matter of fact the defendants did submit to arbitration and an award was passed by the arbitrators. But I entertain great doubts as to whether in the absence of the original award the suit is maintainable.

"As the matter is of considerable importance and no appeal lies against my decision I resolve to refer this point of law to the

* Referred Case No. 2 of 1889.

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High Court under section 617, Civil Procedure Code, on the following grounds:—

"(i). Under section 525, Code of Civil Procedure, a Court is required to file the award and found a decree thereon. In the absence of the original award, is a Court acting under this section at liberty to take secondary evidence of the award and decree accordingly? I think not. The whole procedure in section 525 is an extraordinary procedure, whereby a private document is made to have the force of a decision of a judicial tribunal. It may have been, and in my judgment was, the intention of the Legislature that such jurisdiction should not be exercised except under certain safeguards against its abuse, one of these being that the document itself should be filed in Court. I am strengthened in this conclusion by the fact that there is no appeal. If a Court is at liberty to go into the question of what the award was and take secondary evidence of its disputed contents, why should the Legislature have precluded the decision of the Court from being appealed against? Such a course would be a premium on the manufacture by plaintiffs who had no case whatever of bogus awards. If the only matters contemplated by the Legislature as under dispute under the provisions of section 525 are such matters as are referred to in section 521, there is an intelligible ground for refusing an appeal. The parties having selected their own arbitrators it is not deemed advisable to give them increased facilities for disputing their decision. Where the whole matter of the arbitration is in dispute this reason does not prevail.

"(ii). It may be said that it has been laid down in *Micharaya Guruvu* v. *Sadasiva Parama Guruvu*(1) that the power to file an award includes the power to determine whether there has been a submission to arbitration, and that the reasoning above given would be equally applicable as against that decision. No doubt that would seem to be so, and on the precise point laid down by that decision I am of course bound, but with the utmost respect I would say that I do not understand the principle of that decision. Their Lordships merely affirmed the proposition without assigning any grounds for it. The proposition of law has been dissented from in later cases, which have not come under their Lordships' notice as yet, in the Bombay and the Calcutta

(1) I.L.R., 4 Mad., 319.

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High Courts—*Samal Nathu* v. *Jaishankar Dalsukram*(1), *Bijadhur Bhugut* v. *Monohur Bhugut*(2), *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhri*(3), *Hurronath Chowdhry* v. *Nistarini Chowdrani*(4). I am, of course, bound by the Madras decision on the particular point, but I think I should not be justified, especially seeing that the grounds on which it apparently rests have been denied by other High Courts in going beyond that judgment and extending its supposed principle to matters that are merely analogous.

"(iii). I would also draw a distinction between the filing of documents which are merely evidence of a fact, and the filing of documents which are not merely evidence but part of the procedure laid down by the law as necessary for obtaining a decree. In the former case secondary evidence can of course be taken under the ordinary provisions of the law of evidence. In the latter case this can only be done by express enactment. As an example of the latter case I would take the instance of a will. Under section 244, Act X of 1865, probate of a will is to be sought for by petition with the will annexed. If the will is lost then probate may be granted of a copy or on proof of the contents by oral evidence under the provisions of sections 208 and 209. If secondary evidence could be given of the will under the ordinary rules relating to documents why was it necessary for the Legislature to enact these special sections permitting this to be done? This seems to me to show that where the filing of a document is in itself, a matter of procedure, and not merely of evidence, secondary evidence cannot be admitted without express enactment. This is precisely the case here. Section 525 says the award shall be filed. There is no provision enabling the Court to file a copy of the award, or to take secondary evidence of the contents of the award.

"The question is whether in the absence of the original award is a Court, acting under section 525, Code of Civil Procedure, at liberty to take secondary evidence of the award and decree accordingly?"

Ramachandra Rau Saheb for plaintiffs.

Visvanadha Ayyar for defendants.

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

(1) I.L.R., 9 Bom., 254. (2) I.L.R., 10 Cal., 11.
(3) I.L.R., 9 Cal., 557. (4) I.L.R., 10 Cal., 74.

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JUDGMENT :—We are of opinion that where the award cannot be produced and therefore cannot be filed, the special procedure, by which a decree can issue upon the award filed in Court becomes impossible, and the plaintiffs must, therefore, be referred to a regular suit to enforce the terms of the award.

We make no order as to the costs of this reference.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

1889. Feb. 22, 27.

IMAM (PLAINTIFF), APPELLANT,

v.

BALAMMA (DEFENDANT No. 3), RESPONDENT.*

Hindu law—Notice by possession of widow of her rights to maintenance—Sale of family property to discharge previous mortgage.

Immovable property of a joint Hindu family was sold by a member of the family and his two sons to the plaintiff, and the purchase money was expended in redeeming a mortgage. The character of the mortgage debt was not shown.

In a suit by the plaintiff for possession it appeared that the property in question had been in the exclusive possession of another member of the family, and after his death in that of his widow, for more than 26 years; and that neither of them had concurred in the sale to the plaintiff; it was also found that the widow was entitled to possession on account of maintenance:

Held, that the separate possession of the widow was notice to the plaintiff of her interest in the land, and that he was not entitled to defeat it.

SECOND APPEAL against the decree of J. W. Best, District Judge of South Canara, in appeal suit No. 378 of 1887, reversing the decree of K. Krishna Rau, District Munsif of Udipi, in original suit No. 67 of 1887.

This was a suit instituted in 1887 for possession of certain land. The land was the property of a joint Hindu family to which the defendant belonged. Defendants Nos. 1 and 2 were the sons of one Ramappa (deceased), and defendant No. 3 was the widow of Ramappa's brother Bhadru. The dates when Ramappa and Bhadru died did not appear from the record of the second appeal.

* Second Appeal No. 1369 of 1888.

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The plaintiff claimed the land under exhibit A—a sale-deed, dated 1879, which reserved a right of re-purchase by the vendors till 29th October 1882—executed to him by defendants Nos. 1 and 2 and their late father. He also alleged a oral demise by him to defendants Nos. 1 and 2, which, however, he failed to establish.

Defendants Nos. 1 and 2 were *ex parte*.

Defendant No. 3 denied all knowledge of the sale and the oral lease set up. She contended that the northern moiety of the property was her husband's self-acquisition, and that the southern moiety was given to her for defraying the expenses of family ceremonies. She also pleaded that the suit was barred by the law of limitation; and further claimed to be entitled to retain possession on account of her maintenance.

The Munsif found that the plea of self-acquisition and reservation for family ceremonies was not made out, and held that there was no limitation bar inasmuch as the possession was never adverse. As to the sale he said that it had taken place without the co-operation of either Bhadru or his widow, and that "though "the plaintiff showed that the purchase money was paid in dis-"charge of a mortgage of 1873—exhibit B—there was nothing to "show that the debt received by the mortgagee was of such a "nature as to be binding on defendant No. 3." Moreover, no issue was framed as to the nature of the debt. On the above findings, and on the authority of *Venkatammal* v. *Andyappa*(1) the Munsif decreed that, subject to the third defendant's right to the possession during her life, of the plaint house and other buildings, the plaintiff do recover possession of the immovable property and that upon the death of defendant No. 3 the plaintiff shall be entitled to take possession of the buildings.

On appeal by the defendant No. 3 the District Judge expressed his concurrence in the findings of the Munsif on the questions of the letting and self-acquisition; but being of opinion on a consideration of the whole evidence that the plaint property had been in the exclusive possession of Bhadru after his death and defendant No. 3 for 26 years, and finding that there was no evidence on the record which showed that the husband of defendant No. 3 had left any property sufficient for the maintenance of defendant No. 3, he reversed the Munsif's decision and dismissed the plaintiff's suit.

(1) I.L.R., 6 Mad., 130. As to this case see *Ramanadan* v. *Rangammal*, *ante* p. 260 (Reporter's Note).

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The plaintiff preferred this second appeal.

K. Narayana Rau for appellant.

Neither the possession of Bhadru nor of defendant No. 3 was adverse to the plaintiff. So long as no partition is come to, the possession of one member is permissive as far as all the other members of the joint family are concerned. In the case of exclusive possession the continuing consent of the other co-sharers is implied. Exclusive possession is one thing and adverse possession another. *Sheo Pershad Sing* v. *Leelah Singh*(1), *Shurfunnissa Bibee Chowdhrain* v. *Kylash Chunder Gungopadhya*(2).

The District Judge ought to have recorded a finding as to whether the debt discharged by the sale in plaintiff's favor was binding on defendant No. 3; and should also have ascertained whether the plaintiff had notice of her charge for maintenance at the time of sale.

Subba Rau for respondent.

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

JUDGMENT.—The first and second defendants are brothers, and the third defendant is the widow of their father's brother Bhadru. The property in dispute consists of a garden and a house and a well, and it is found by the Judge to have been in the exclusive possession of Bhadru and after his death of the third defendant for upwards of 26 years. The three defendants constituted together a joint Hindu family governed by the Mitakshara law. On 29th October 1879 the first and second defendants and their father sold the property in dispute to the plaintiff, reserving, however, a right of re-purchase till 29th October 1882, but as they failed to re-purchase the garden within the stipulated time, the sale in favor of the plaintiff became absolute. He brought the present suit to recover possession of the garden and the house, alleging his purchase and also an oral letting to the first and second defendants. Both the Courts below have found that the oral letting has not been proved and we dismiss it, therefore, from our consideration. The third defendant, who alone resisted the claim, contended that the northern moiety of the garden was self-acquisition and that

(1) 20 W.R., 160. (2) 25 W.R., 53.

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the southern moiety, though joint family property, was allotted to her husband for defraying the expenses of certain family ceremonies. Both Courts found that these allegations were not proved. The third defendant claimed to be entitled to retain possession of the property on account of her maintenance as the widow of Bhadru, and the Judge upheld the contention, observing that there was no evidence on the part of the plaintiff that there was any other property of the third defendant's husband sufficient for her maintenance. On this ground and on the ground that the third defendant and her late husband had had exclusive possession for nearly 30 years, the District Judge dismissed the suit with costs. It is contended that the Judge has recorded no finding as to whether the debt discharged by the sale in plaintiff's favor was binding on the third defendant, that neither the possession of Bhadru nor that of the third defendant was adverse to the plaintiff and that the Judge has not ascertained if the plaintiff had notice of the third defendant's charge for maintenance at the time of the sale.

It is true that the Judge does not state explicitly that the debt evidenced by exhibit B is not binding on the third defendant, but we have no doubt that he intended to adopt the Munsif's finding. He observes that the Munsif is doubtless correct in his finding that the first defendant is in collusion with the plaintiff with a view to dispossessing the third defendant and that the alleged oral lease, even if proved, must be taken to be a sham. He has also found that the first and second defendants have not lived in commensality with the third defendant or her husband for nearly 30 years. Though the possession of the third defendant or of her husband is not necessarily adverse to the plaintiff's vendors, yet the separate possession of family property by a widow of a joint Hindu family is notice that she has some interest therein and if the plaintiff had enquired he would have acquired a knowledge of her possession in her right of maintenance. The finding that there was collusion negatives the contention that the purchase was *bonâ fide* and without notice. As the suit is in ejectment and the title to present possession is not made out, the decision of the District Judge is right, but this of course will not preclude the plaintiff from suing to recover possession on determination of the life estate.

We dismiss this second appeal with costs.

APPELLATE CRIMINAL.

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

1889. April 10.

QUEEN-EMPRESS

v.

NARASIMMAYYA.*

Forest Act (Madras)—Act V of 1882, *ss.* 4, 7, 16 *and* 21.

A claim put forward to part of certain land notified for reservation under the Madras Forest Act originally rejected, was held to be valid by the District Court on appeal. The High Court set aside the decision of the District Court and directed that the appeal be reheard. Pending the rehearing, a lessee of the claimant felled trees on the land and was charged under s. 21 (*a*) with the offence of making a fresh clearing prohibited by s. 7 of the Act. The Magistrate acquitted him on the ground that there was no order in writing served on him by the Forest Department prohibiting him from felling trees pending the rehearing:

Held, that the acquittal was wrong.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by H. M. Winterbotham, District Magistrate of North Malabar.

The case was stated as follows:—

"The accused was charged, with having some time in April and May 1888, committed an offence under section 21 (*a*) of the Madras Forest Act by making a fresh clearing in the Pambara Forest which had been notified, under section 7 of the Act, for reservation. The forest was notified for reservation in October 1884. One Pudhadi Kettilamma put forward a claim to a portion of it. The Forest Settlement officer rejected the claim on 30th September 1886. Appeal was made by the claimant to the District Court of South Malabar. The District Judge heard the appeal *ex parte* and reversed the Forest Settlement officer's decision on 6th October 1887. Government applied to the High Court to have the *ex parte* order set aside. The High Court set aside the order and directed a rehearing of the appeal on 9th March 1888.

"The effect of the High Court's order of 9th March directing a rehearing of the appeal is to leave the Forest Settlement officer's

* Criminal Revision Case No. 76 of 1889.

judgment temporarily in full force and effect. The felling complained of admittedly took place in April and May 1888. The appeal was not reheard and determined till 24th August 1888. It appears perfectly clear that between the months of March and August 1888 the accused, as lessee of the claimant Pudhadi Kettilamma, had not the least excuse for trespassing upon the forest, and the Sub-Magistrate's remark that he ought to have been prohibited by an order in writing is utterly unsound.

"During the said period it cannot even be pleaded that any decision of a Court existed in Pudhadi Kettilamma's favor. The Forest Settlement officer found that the Government were in possession and that the claimant had no title to the property, and it was this finding that was in force at the time that the felling complained of took place.

"I learn that the lessee, encouraged by the Sub-Magistrate's judgment, has recommenced felling and I therefore think it proper to bring the illegal acquittal of the accused to the High Court's notice for such action as may be deemed proper. I think a re-trial should be ordered.

"Although the Government are undisputedly in present possession of the forest and have a large stock of timber lying in it, no steps have been taken to work the forest, and it seems only fair that Government should be accorded such protection as the law warrants against the illegal felling of the opposite party pending the final disposal of the dispute."

Section 21 of the Madras Forest Act (Act V of 1882) renders it penal for any person "to make a fresh clearing prohibited by section 7" *; it provides, however, as follows:—

"Nothing in this section shall be deemed to prohibit . . . (*inter alia*) . . . the exercise of any right continued under section 12 or

* Section 7. During the interval between the publication of such proclamation and the date fixed by the notification under section 16 no right shall be acquired in or over the land included in such proclamation, except under a grant or contract in writing made, or entered into by, or on behalf of, the Government, or by, or on behalf of, some person in whom such right, or power to create the same, was vested when the proclamation was published, or by succession from such person, and no fresh clearings for cultivation or for any other purpose shall be made on such land. No patta shall, without the previous sanction of the Governor in Council, be granted on behalf of Government in such land, and every patta granted without such sanction shall be null and void.

Nothing in this section shall be deemed to prohibit any act done with the permission in writing of the Forest Settlement officer.

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created by grant or contract in the manner described in section 18." Section 12 relates to the case where a right to forest produce is admitted by the Forest Settlement Officer. The terms of section 18 are given in the foot-note*: those of sections 4 and 6 which provide for notice to occupiers, &c., of an intended reservation of forest appear *ante* p. 204; those of section 16 as to "notifications declaring forest reserved" appear *ante* p. 226.

The *Acting Government Pleader* (*Subramanya Ayyar*) for the Crown.

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

JUDGMENT:—The ground on which the Sub-Magistrate acquitted the accused, viz., that there was no order in writing served on the defendant by the Forest Department prohibiting him from felling trees during the pendency of the second hearing of the appeal before the District Court is clearly erroneous. Between the date of the notification under section 4 and the date of the notification under section 16 any fresh clearing is clearly rendered illegal by section 7, and the only question therefore was whether the accused had effected a clearing between those dates. We set aside the acquittal and direct the case to be reheard.

* Section 18. No right of any description shall be acquired in or over a reserved forest, except under a grant or contract in writing made by, or on behalf of, the Government, or by, or on behalf of, some person in whom such right, or the power to create such right, was vested, when the notification under section 16 was published, or by succession from such person:

Provided that no patta shall, without the previous sanction of the Governor in Council, be granted on behalf of Government for any land included within a reserved forest, and every patta granted without such sanction shall be null and void.

APPELLATE CIVIL.

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

PAPAMMA (DEFENDANT), PETITIONER,

v.

THE COLLECTOR OF GODÁVARI (PETITIONER), RESPONDENT.*

1889. Feb. 20. March 21.

Civil Procedure Code, s. 622—*Act XIX of* 1841, *ss.* 2, 3, 5, 15—*Regulation V of* 1804 (Madras).

On a petition presented by the Agent of the Court of Wards a District Court made an order which purported to have been made under Act XIX of 1841, s. 5. The conditions prescribed by ss. 3 and 4 were not shown to exist:

Held, the order of the District Court was illegal, and was subject to revision under s. 622 of the Code of Civil Procedure.

PETITION under s. 622 of the Code of Civil Procedure praying ma High Court to revise the order of A. L. Lister, District Judge was odávari, made on civil miscellaneous petition No. 106 of 1888, life; 17th March 1888.

adoptie above petition was presented by the Collector of Godávari appointent to the Court of Wards, and prayed that the Head the affat Collector should be appointed Curator under Act XIX minor s s. 5, in respect of the property of a deceased zamindar, the Ate order of the District Judge granted the prayer of the 1841 on.

Ba The present petitioner was the adoptive mother of the late d indar, and claimed to be rightfully in possession of the property concerned. This petition, which was preferred under s. 622 of the Code of Civil Procedure, proceeded on the grounds that the District Judge had no authority to pass the above order under the Act referred to; that he had acted illegally and with material irregularity in appointing a Curator without proper inquiry and without issuing notice to him, and on other grounds.

The *Acting Advocate-General* (Hon. Mr. *Spring Branson*), *Bhashyam Ayyangar* and *Subba Rau* for petitioner, relied on the provisions of Act XIX of 1841, ss. 1, 2, 3, 5 and 15. The provisions of ss. 5 and 15 are given in the judgment of the Court. Those of ss. 1, 2 and 3 are as follows:—

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1. It is hereby enacted that whenever a person dies leaving property, movable or immovable, it shall be lawful for any person claiming a right by succession thereto, or to any portion thereof, to make application to the Judge of the Court of the district where any part of the property is found or situate for relief, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended.

2. It shall be lawful for any agent, relative, or near friend, or for the Court of Wards, in cases within their cognizance, in the event of any minor disqualified or absent person being entitled by succession to such property as aforesaid, to make the like application for relief.

3. The Judge, to whom such application shall be made, shall, in the first place, inquire, by the solemn declaration of the complainant, and by witnesses and documents at his discretion, whether there be strong reasons for believing that the party in possession or taking forcible means for seizing possession has lawful title, and that the applicant, or the person on whose be he applies, is really entitled and is likely to be materially judiced if left to the ordinary remedy of a regular suit, an the application is made *boná fide*.

Mr. *Michell* and *Subramanya Ayyar* for respondent.

The arguments adduced on this petition appear suffi for the purpose of this report from the judgment of the (Muttusami Ayyar and Parker, JJ.).

JUDGMENT.—This is an application for the revision of an made by the District Court of Godávari. The order in ques was passed under Act XIX of 1841, s. 5, and it purports appoint the Head Assistant Collector of the Godávari District as Curator to take possession of the property belonging to the Nidadavole, Baharzalli, and Ambarupeta Estates, the records, personal property, accounts, and other documents appertaining thereto and of all the other personal property belonging to the deceased proprietor Venkata Ramaya Appa Rao Bahadur.

The question for decision is whether, in the circumstances under which the order was made, it is bad for want of jurisdiction.

The facts of the case are shortly these. From 1827 to 1864 Narayya Appa Rao had been the proprietor of the estates mentioned above, and upon his death in 1864, they devolved on his

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two widows, Sri Raja Papamma Rao the petitioner before us, and Sri Raja Chinnama Rao. The junior widow died since and the petitioner was left in sole possession. On 19th June 1885, Papamma Rao, in the exercise of authority conferred upon her by her husband, adopted Raja Venkata Ramanuja Appa Rao Bahadur, Zamindar of Medur Perganna, and had the estates registered in his name, alleging that the ownership therein vested in him by virtue of the adoption. The adopted son died on 1st January 1888 leaving him surviving an only son named Narayya Appa Rao, an infant aged 10 months, a widow named Sri Raja Venkata Raja Gopala Venkayamma Rao, and his adoptive mother, the petitioner in this Court. On the 1st March 1888 the Government authorized the Court of Wards to assume management of the estates on behalf of the minor under Regulation V of 1804, and when the Collector of the district, as Agent of the Court, proceeded to take possession, the petitioner refused to allow him to do so or to have access to estate records. She contended that she had managed the estates subsequently to the adoption and that she was entitled to be left in possession and management during her life; firstly, because it was subject to that condition she made the adoption in 1885; and secondly, because the deceased proprietor appointed her by his will, dated 1st January 1888, to manage all the affairs, and to keep all the property in her possession until his minor son attained his age. On 17th March 1888, the Collector, as the Agent of the Court of Wards, applied, under Act XIX of 1841, s. 2, to be put in possession of the estates of Nidadavole, Baharzalli, and Ambarupeta, and all the personal property of the deceased proprietor, Venkata Ramaya Appa Rao. The petition prayed also that pending the decision of the summary suit, the Head Assistant Collector of the Godávari District might be appointed Curator under Act XIX of 1841, s. 5. On the same day the District Judge made the order which the petitioner now impeaches for want of jurisdiction. It does not appear that beyond the statements contained in the Collector's petition, there was any other evidence before the District Judge when he made the order. The petition first set forth the adoption of the deceased proprietor, the registry of the estates in his name at the request of Papamma Rao, the subsequent collection of all Government dues from him, and stated that the property therein was vested in him. It next referred to his death, to the minority of

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the son left by him and the decision of the Government that the Court of Wards should assume management under Regulation V of 1804. It went on to state that the petitioner refused to allow the Collector to take possession or to have access to the estate records, and then to ask to be put in possession and for the appointment of the Head Assistant Collector as Curator pending decision of the summary suit. Three objections are in the main taken to this order, viz., (1) that the Act was put into force against the petitioner contrary to the provisions of section 3 and section 5; (2) that the order was made without ascertaining first whether the conditions under which alone it could lawfully be made under section 5 really existed, and (3) that the order could not be extended to the accumulations of income derived whilst petitioner was in possession in her own right prior to the adoption in 1885.

The order of the 17th March only authorizes the Curator to take possession of the property of the deceased proprietor, and it does not relate to any property which may belong to the petitioner in her own right. If any property in her possession is really a saving out of the income derived in her own right, it is a matter which she is at liberty to urge and prove before the Judge, and, until she does so, and the Judge makes an order in regard to it, there is no ground for our interference.

As regards the omission to comply with the procedure prescribed by section 3, it is certainly a material error of procedure having a bearing on the *interim* order which we are asked to revise. It is not denied that the Judge has under the Act general jurisdiction over the property of the deceased proprietor. Nor is there any doubt that sections 3 and 4 impose an obligation on the Judge to satisfy himself by some inquiry, before citing the party complained against, that there are strong reasons for believing that the party in possession has no lawful title and that the party suing is likely to be materially prejudiced if left to a regular suit. The scheme of the Act is that the finding of the Judge on the two points mentioned in section 3 is a condition precedent to the Act being put in force; for, section 4 enacts that in case the Judge is satisfied of the existence of such strong ground of belief, but not otherwise, he shall cite the party complained of. No witnesses were apparently examined nor documents produced in this case before the Judge made his order. Though the application is verified, neither the Collector nor any one acquainted

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with material facts was examined. Nor does the application embody any information in regard to the claim set up by the petitioner when she refused to allow the Collector to take possession or in regard to the grounds on which that claim was considered untenable. As the inquiry directed by section 3 ought to be held prior to the citation of the petitioner, the party applying under the Act was bound to show, and, if he did not, it was incumbent on the Judge to call upon him to show, in the language of section 3, strong reasons for the belief that the party in possession had no lawful title and that the minor was likely to be materially prejudiced if the Court of Wards was left to the ordinary remedy of a regular suit. It is no doubt in the Judge's discretion to call for witnesses or documents if the solemn declaration of the complainant affords sufficient information and enables him to form an opinion as directed by section 3. The omission to follow the procedure has in this case deprived the petitioner of the protection to which she was entitled under the Act before she could be cited. In this sense the irregularity was material.

Again section 5 under which the order now before us was made runs as follows:—

"In case it shall further appear upon such application and examination as foresaid that danger is to be apprehended of the misappropriation or waste of the property before the summary suit can be determined and that the delay in obtaining security from the party in possession or the insufficiency thereof is likely to expose the party out of possession to considerable risk, provided that he be the lawful owner, it shall be lawful for the Judge to appoint one or more Curators with the powers hereinafter next mentioned whose authority shall continue according to the terms of his or their respective appointments and in no case beyond the determination of the summary suit and the confirmation or delivery of possession in consequence thereof: provided always that in the case of land the Judge may delegate to the Collector or to his officer the powers of a Curator, and also that every appointment of a Curator in respect of any property be duly published."

It will thus be observed that the conditions subject to which a Curator is to be appointed are (1) that there must be an application and an examination as aforesaid (that is to say as directed in section 3), (2) that the Judge must be in a position to say upon such application and examination that danger is to be apprehended of

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misappropriation or waste of the property before the summary suit can be determined, and (3) that the delay in obtaining security from the party in possession or its insufficiency is likely to expose the party out of possession to considerable risk. On referring to the Collector's application of 17th March 1888 we find no averment showing that any of these conditions existed and when the Judge made his order he had no other evidence before him. We must come to the conclusion that, at the time the order before us was made, the Judge overlooked the conditions subject to which alone he was authorized to appoint a Curator.

As regards the statement that the deceased had given directions by his will for the possession of the estate during the minority of his son and that the Judge had no power to put the Act into force in opposition to such directions, section 15 shows that it is a matter to be established by the petitioner during the trial. Section 15 is in these terms—" And it is hereby enacted that the Act shall not be put in force to contravene any public Act of settlement. Neither in cases in which the deceased proprietor shall have given legal directions for the possession of his property after his decease in the event of minority or otherwise, in opposition to such directions, but in every such case so soon as the Judge having jurisdiction over the property of a deceased person shall be satisfied *of the existence of such directions*, he shall give effect thereto." The proper construction is that, if it is shown that the deceased proprietor had given lawful directions as to the possession of his property after his decease and during the minority of his son, the Judge having jurisdiction is bound to give effect to them and not to put the Act into force so as to contravene them. The section appears to us rather to provide a rule of decision for the guidance of the Judge in dealing with the summary suit on the merits than to interdict the exercise of jurisdiction under the Act.

The order of the 17th March 1888 is therefore open to objection in that the Judge failed to satisfy himself that the special condition prescribed by sections 3 and 4 as necessary to his exercising jurisdiction existed in the case, and he also failed to see that the conditions prescribed by section 5 as necessary to interfering with the party claiming to be in possession by the appointment of a Curator existed. The Judge appears to have considered that an application from the Collector on behalf of the Court of

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Wards was all that was needed and overlooked the provisions of the Act, first in regard to the special limitation subject to which the jurisdiction vesting in him under the Act ought to be exercised, and next in regard to the conditions which limit his power to appoint a Curator. These omissions or errors of procedure clearly amount to material irregularity in the investigation of a matter on which his jurisdiction depended within the meaning of s. 622 of the Code of Civil Procedure.

We therefore set aside the order appointing the Head Assistant Collector a Curator under section 5.

The summary suit which has been fixed must be heard and disposed of by the Judge in accordance with the provisions of the Act regard being had to the very special circumstances to which the Act was designed to apply and subject to the limitations to which we have referred above.

We do not think it necessary in this order to refer to the affidavit and other documents which have been filed in this Court as they were not before the Judge at the time of making the order we are asked to revise.

The counter-petitioner (the Collector) must pay the costs in this Court, and the costs in the Court below will abide and follow the result of the summary suit.

Provincial

Lands of v. comprise

APPELLATE CIVIL.

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

1889. March 12.

RAMANAMMA (PLAINTIFF), APPELLANT,

v.

SAMBAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Maintenance—Limitation—Limitation Act XIV of 1859, *s.* 1, *cl.* 13—*Refusal of persons liable to maintain—Cause of action.*

In a suit for maintenance brought in 1887 by a Hindu widow against the undivided family of her deceased husband who had died about 24 years before suit, it appeared that her maintenance had not been made a charge on specific property:

Held, that time began to run against the plaintiff's claim under the Limitation Act of 1859, only from the date of refusal on the defendants' part to maintain her. *Narayan Rao Ramchandra Pant* v. *Ramabai* (I.L R., 3 Bom., 415) followed.

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* Second Appeal No. 1170 of 1888.

RAMANAMMA v. SAMBAYYA.

SECOND APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Cocanada, in appeal suit No. 124 of 1887, confirming the decree of Y. Janakiramayya, District Munsif of Cocanada, in original suit No. 236 of 1887.

Suit by a Hindu widow against the undivided brother and nephews of her late husband, to establish her right to maintenance, to constitute it a charge on the family lands and to recover a certain sum by way of arrears of maintenance.

Her husband died in or about 1853. In 1863 she executed a kararnama which was relied on by the defendants as amounting to a release of her claim to maintenance.

The District Munsif dismissed the suit. He adopted the defendants' construction of the kararnama; and also, finding the plaintiff's allegation that she had been maintained by the defendants until 1885 to be false, he held that her suit would in any case have been barred under the Limitation Act. Upon the latter point he said:—

"It is evident that the plaintiff's claim for maintenance was "governed by the Limitation Act XIV of 1859, as her husband "died in 1853; and as she never received any maintenance from "the defendants, her claim for the same was barred, under Act "XIV of 1859, s. 1, cl. 13, before the year 1866, *Abbakku* v. "*Ammu Shettati*(1); as the remedy was extinguished long before "the Limitation Act of 1871 came into force, the more i[illegible] Judge "provisions in the later enactments cannot help the pl[illegible]son shall "revive a claim once barred, I find this issue in defer[illegible] give effect "and against the plaintiff." [illegible]vn that the

On appeal the Subordinate Judge affirmed the decree of the District Munsif.

The plaintiff preferred this second appeal.

Subba Rau for appellant.

Desikacharyar 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 Shephard, J.).

JUDGMENT.—Two points arise in the case. In holding that the suit is barred by limitation, the Courts below have followed the decision in *Abbakku* v. *Ammu Shettati*(1) and held that section 1,

(1) 4 M.H.C.R., 137.

clause 13 of the Act of 1859 is applicable to the case. But the judgment of the Privy Council in *Narayana Rao Ramchandra Pant* v. *Ramabai*(1) makes it clear that that sub-section does not apply unless the maintenance has been made a charge on specific property. That is not the case here, and, therefore, time began to run against the plaintiff only from the date of refusal on the defendants' part to maintain her, when the cause of action arose. With regard to the release, we are also of opinion that it has been misconstrued. The release was given at a time when no claim for maintenance was under discussion, and there is nothing to show that it related to maintenance. We must reverse the decree of the Lower Appellate Court and remand the appeal for disposal on the merits. Costs to be provided for in the revised decree.

APPELLATE CIVIL.

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

1889. March 25.

SRINIVASA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

SIVAKOLUNDU (DEFENDANT), RESPONDENT.*

Provincial Small Cause Court Act (Act IX of 1887), sched. II, art. 41—Civil Procedure Code, s. 586—Suit for contribution—Joint property.

Lands of which part belonged to the plaintiffs and part to the defendant were comprised in a patta which ran in the names of the plaintiffs and another. The defendant's share of the assessment fell into arrear and was collected from the plaintiffs who now sued to recover Rs. 200 being the amount so paid together with interest:

Held, the suit was of a nature cognizable by a Court of Small Causes, and so no second appeal lay. *Krishno Kamini Chowdhrani* v. *Gopi Mohun Ghose Hazra* (I.L.R., 15 Cal., 652) followed.

SECOND APPEAL against the decree of G. D. Irvine, District Judge of Coimbatore, in appeal suit No. 19 of 1888, reversing the decree of T. Dorasami Pillai, District Munsif of Erode, in original suit No. 739 of 1885.

Suit for Rs. 200. The plaint was summarized by the District Munsif as follows:—

(1) I.L.R., 3 Bom., 415.

* Second Appeal No. 1646 of 1888.

SRINIVASA v. SIVAKOLUNDU.

"Plaint states that patta No. 1 comprising 60 fields in Pudu-"pariyur Karai, Satyamangalam taluk, runs in the names of "plaintiffs and Pattabiramien (deceased) the half-brother of second "and third plaintiffs; that of those 60 fields, three, viz., 354, 355A "and 356, appertain to defendant's enjoyment, and the others to "plaintiffs and the said Pattabiramien's enjoyment; that assess-"ment, road-cess, &c., due under the patta No. 1 for Fusli 1292 "amounted to Rs. 1,998-12-10, of which plaintiffs' share was "Rs. 1,323-8-11. Pattabiramien's share was Rs. 468-10-5, and "defendant's share for the said three fields was Rs. 206-9-6; that "Pattabiramien paid his, that defendant having left Rs. 155-9-4 in "arrears, it was collected from plaintiffs, together with their own "share from 13th November 1882 to 16th April 1883, on the ground "that plaintiffs were pattadars. Hence the claim as under:—

	RS.	A.	P.
Amount paid for defendant	155	9	4
Compensation thereon at 1 per cent. per mensem from 17th April to 11th November 1885	48	12	0
Total ..	204	5	4
Amount relinquished	4	5	4
Balance ..	200	0	0"

The District Munsif passed a decree in favor of plaintiffs for Rs. 155, but this decree was reversed on appeal by the District Judge who dismissed the suit.

The plaintiffs preferred this second appeal.

Pattabhiramayyar for respondent objected under s. 586 of the Code of Civil Procedure that no second appeal lay. A suit for contribution is cognizable in a Small Cause Court—*Krishno Kamini Chowdhrani* v. *Gopi Mohun Ghose Hazra*(1), *Nath Prasad* v. *Baij Nath*(2).

Bhashyam Ayyangar for appellants.

The case is governed by the Provincial Small Cause Court Act, Act IX of 1887, which was in force when the second appeal was filed. Sched. II, art. 41 of that Act exempts from the cognizance of a Court of Small Causes:—"a suit for contribution

(1) I.L.R., 15 Cal., 652. (2) I.L.R., 3 All., 66.

"by a sharer in joint property in respect of a payment made by "him of money due from a co-sharer or by a manager of joint "property, or a member of an undivided family, in respect of a "payment made by him on account of the property or family."

The question is in what sense is the term "joint property" used: in the present case the assessment is joint.

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

JUDGMENT:—The pleader for the defendant (respondent) raises the preliminary objection that the suit being one of a Small Cause nature, and the value being only Rs. 200, no second appeal lies. It was held by a Full Bench of the Calcutta High Court in *Krishno Kamini Chowdhrani* v. *Gopi Mohun Ghose Hazra*(1) that cases falling within the provisions of section 69 of the Contract Act are cognizable by a Court of Small Causes under s. 6, Act XI of 1865. It is argued, on the other side, that the present suit, which is one for contribution, is expressly excluded by the present Small Cause Court Act IX of 1887, sched. II, art. 41. But we are unable to accede to this contention. That article refers to a suit for contribution by a sharer in joint property. We cannot hold that because the patta for the lands held by the appellants stands in the name of the plaintiffs and another, the property is joint property. The lands, the assessment of which has been paid by plaintiffs, are in the exclusive enjoyment of the defendant, and the plaintiffs have no right to them. This second appeal, therefore fails, and is dismissed with costs.

(1) I.L.R., 15 Cal., 652.

APPELLATE CRIMINAL.

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

1889. March 29.

LUTCHMAKA

*in re.**

Criminal Procedure Code, s. 545—Death caused by rash and negligent act—Compensation to widow of deceased.

An order that the amount of a fine imposed on one convicted of causing death by a rash and negligent act be paid as compensation to the widow of the deceased is illegal.

CASE of which the records were called for by the High Court under section 435 of the Code of Criminal Procedure in exercise of its powers of revision.

In criminal case No. 1 of 1889 in the Court of the District Magistrate and Justice of the Peace, Bangalore, entitled the *Government* v. *Maller*, the accused described as a British born subject, was convicted under section 304A of the Penal Code of the offence of causing the death of one Munusami by a rash and negligent act, and was sentenced to pay a fine of Rs. 50, and it was ordered that "the whole amount of fine, if recovered, be paid to Lutchmaka, the widow of the deceased as compensation."

The records of the case having been sent for by the High Court as above the Court (Muttusami Ayyar and Parker, JJ.) delivered the following

JUDGMENT:—The award of compensation to the widow was not legal under section 545, Criminal Procedure Code, and must be set aside.

* Criminal Revision Case No. 68 of 1889.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

1888. Nov. 13. 1889. March 4.

SUBBA AND ANOTHER (DEFENDANTS NOS. 1 AND 5), APPELLANTS,

v.

NAGAPPA (PLAINTIFF), RESPONDENT.*

Landlord and tenant—Ejectment—Permanent tenancy pleaded—Notice to quit.

Suit to eject defendants from certain land held by them from the plaintiff under a *chalgeni* (yearly) demise of 1869. The defendants pleaded that they were *kattugudi* (permanent) tenants of the land in question; they had set up their title as *kattugudi* tenants previous to the *chalgeni* demise, but it did not appear that they had re-asserted it up to date of suit:

Held, that the issue whether the plaintiff had given a notice to quit, reasonable and in accordance with local usage, should be tried.

Baba v. *Vishvanath Joshi* (I.L.R., 8 Bom., 228) considered.

SECOND APPEAL against the decree of J. W. Best, District Judge of South Canara, in appeal suit No. 312 of 1885, modifying the decree of J. Lobo, District Munsif of Puttur, in original suit No. 211 of 1884.

Suit for the recovery of 24 kulies of land, of which 17 were alleged to be held by the defendants Nos. 1, 2 and 3, on *chalgeni* or yearly tenure from the plaintiff, and the remaining 7 to have been in the wrongful possession of the defendants and their father since 1873. The defendants admitted the plaintiff's title to the land but claimed to be *kattugudi* or permanent tenants of the land.

Both the Lower Courts found that the *chalgeni* tenure set up was true, and the wrongful possession proved, and passed a decree as sued for with costs.

This second appeal was preferred to the High Court by the defendants principally on the grounds that as the defendants had been in possession of the lands for a long time the Lower Courts ought to have held that they were not liable to ejectment at will; and that as no notice to quit had been given by the plaintiff, the suit ought to be dismissed.

K. Narayana Rau for the appellants relied on *Abdulla Rawutan* v. *Subbarayyar*(1), where the objection as to want of notice to quit was allowed to be taken for the first time in second appeal.

* Second Appeal No. 942 of 1887. (1) I.L.R., 2 Mad., 346.

SUBBA v. NAGAPPA.

Ramachandra Rau Saheb for respondent contended that the defendants had forfeited their right to notice by their denial of plaintiff's title. *Baba* v. *Vishvanath Joshi*(1).

K. Narayana Rau in reply quoted *Paidal Kidavu* v. *Parakal Imbichuni Kidavu*(2), *Prannath Shaha* v. *Madhu Khulu*(3), which are in conflict with *Baba* v. *Vishvanath Joshi*(1).

On the first hearing of this second appeal the Court (Parker and Shephard, JJ.) made the following

ORDER :—The suit is brought to recover lands, parts of which are alleged in the plaint to have been held by the defendants on chalgeni tenure and other parts to have been wrongfully occupied by them since 1873. The defendants pleaded limitation as an answer to the whole suit and denying the alleged chalgeni lease averred that they held the land comprised in it on permanent tenure. The facts were found by the District Court in the plaintiff's favor, and the only point seriously urged in appeal, relating to the land included in the chalgeni lease, was that the defendants as tenants were entitled to reasonable notice, and reference was made to the case of *Abdulla Rawutan* v. *Subbarayyar*(4), where it was held that giving of notice being a necessary part of landlord's title to eject a tenant from year to year, objection on the score of want of notice might be taken even in second appeal. To the contention founded on this authority, it was answered that the defendants had forfeited their right to notice by their denial of the plaintiff's title, and the plaintiff's vakil relied on a Bombay case *Baba* v. *Vishvanath Joshi*(1), in which it was held that the tenant's right to notice was so forfeited by reason of his pleading in the suit a perpetual tenancy.

In so far as this case decides that a disclaimer of the landlord's title made in the suit only suffices to disentitle the tenant to notice, the case is not supported by the English authority on which it professes to be based—see *Vivian* v. *Moat*(5), and is in conflict with decisions of this Court and of the High Court of Bengal (*Paidal Kidavu* v. *Parakal Imbichuni Kidavu*(2), *Prannath Shaha* v. *Madhu Khulu* (3)). In the present case, there is evidence to show that the defendants' father asserted a kattugudi tenure in 1852 and again in 1867. But in 1869 they accepted the

(1) I.L.R., 8 Bom., 228. (2) 1 M.H.C.R., 13.
(3) I.L.R., 13 Cal., 96. (4) I.L.R., 2 Mad., 346.
(5) 16 Ch. D., 730.

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chalgeni lease exhibit A from the plaintiff, and it does not appear that after that date and before the institution of the suit, the defendants repeated their assertion of the kattugudi tenure. It is therefore unnecessary to consider the question raised by the conflicting cases decided in Bombay and Calcutta (*Baba* v. *Vishvanath Joshi*(1) and *Kali Krishna Tagore* v. *Golam Ally*(2). The present case is similar to that of *Abdulla Rawutan* v. *Subbarayyar*(3), where also it would appear that the permanent tenure was set up by the tenant only in the course of the suit. We therefore remit the case for finding on the two following issues:—

(1) Whether before the institution of this suit the plaintiff gave any, and what notice, to the defendant to quit the premises comprised in the chalgeni lease.

(2) Whether such notice, if given, was a reasonable notice and in accordance with local usage.

The finding is to be on the evidence already on record and on any fresh evidence to be taken.

The provisions of the Transfer of Property Act with regard to notice are not applicable, because it is not shown that any notification making the provisions of chap. V applicable to agriculture leases has been issued—See section 117.

In compliance with the above order, the District Judge submitted his findings to the effect that notice was given in accordance with the custom of the country, and that it was in the circumstances of this case reasonable and sufficient.

On receipt of the above findings, this second appeal came on for final hearing, and the Court delivered the following

JUDGMENT :—The objections to the finding cannot be maintained.

We accept the findings upon the two issues which are in favor of the plaintiff. The result is that the appeal must be dismissed with costs. The plaintiff is entitled to his costs throughout.

(1) I.L.R., 8 Bom., 228. (2) I.L.R., 13 Cal., 248.
(3) I.L.R., 2 Mad., 346.

APPELLATE CIVIL.

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

1889. March 25. April 26.

SADAGOPACHARI AND OTHERS (PETITIONERS), APPELLANTS,

v.

KRISHNAMACHARI AND OTHERS (COUNTER-PETITIONERS), RESPONDENTS.*

Execution of decree determining rights of rival religious sects—Decree, whether executory or declaratory—Limitation—How far a sect bound by decree against some of its members.

In a suit determined in 1840, in which various members of the Vadagalai sect residing in a certain village were plaintiffs and various members of the Tengalai sect residing in the same village were defendants, it was held that an image of a priest revered by the latter sect was not entitled to a place in a certain temple of the village, or to public worship in a certain street, or to procession in the streets of the village; and it was directed that, if the defendants continued to make the image an object of public worship, it should be removed. In 1888 various members of the Vadagalai sect, asserting that the members of the Tengalai sect had acted in contravention of the decree in the above suit, filed an execution-petition therein, praying that various members of the Tengalai sect be arrested, and "that the image of their priest, which they attempt to worship publicly, be removed until they obey the terms of the decree." It appeared that, in 1868, the District Magistrate had granted an application to restrain the Tengalais from acting contrary to the above decree. The execution-petition was dismissed by the District Court:

Held, the petition was rightly dismissed, since the execution of the decree was barred by limitation, and the decree, if it was capable of execution at all, could not be executed against the parties to the present petition.

APPEAL against the order of R. S. Benson, Acting District Judge of South Arcot, dated 10th December 1888.

The order appealed against was made on a petition entitled execution-petition No. 43 of 1888 in civil suit No. 30 of 1828 in the late Court of Adalat in the Chingleput zilla. The prayer of the petition was "that counter-petitioners, Tengalai Brahmans of "the Tiruvendipuram village, may be arrested and imprisoned "in execution of the decree in the above suit, and that the image "of their priest, Manavala Mahamuni, which they attempt to "worship publicly, may be removed until they obey the terms "of the decree."

* Appeal against Order No. 160 of 1888.

The District Judge dismissed the petition, and the petitioners, who are Brahmans of the Vadagalai sect, preferred this appeal against his order.

The terms of the decree to which the petition related are set out in the following judgment of the High Court, from which the circumstances giving rise to the present case appear sufficiently for the purpose of this report. Exhibit D, which is referred to in the judgment, is an order, dated 5th September 1868, made by the District Magistrate of South Arcot under section 62 of the Code of Criminal Procedure, granting an application made by some of the Vadagalai sect that the members of the Tengalai sect be restrained from proceeding with the construction of a temple, &c., on the ground that its construction, &c., was "contrary to both the letter and spirit" of the decree referred to above.

Subramanya Ayyar, *Bhashyam Ayyangar*, *Sundara Ayyar*, and *Desikacharyar* for appellants. The decree now sought to be executed was, in fact, an injunction. The suit in which it was passed was a suit between the sects, and the decree is capable of execution against the present defendants, whose interests were represented by the defendants joined in that suit. *Srikhanti Narayanappa* v. *Indupuram Ramalingam*(1). The whole body of the community to which the defendants belonged was bound, as where in England a few parishioners appear on an indictment against all the inhabitants of a parish for non-repair of a highway. It was so held in *Regina* v. *The Inhabitants of Haughton*(2); compare also *Jenkins* v. *Robertson*(3); *Commissioners of Sewers of the City of London* v. *Gellatly*(4) a suit for an injunction in which rights of common were in question was decided on the same view of the law; *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya*(5) is also an authority in favor of the appellants; and see *Parthasaradi* v. *Chinnakrishna*(6).

As to the question of limitation, the application for execution is not barred because the case would be governed by article 178 of the Limitation Act. *Raghubans Gir* v. *Sheosaran Gir*(7), *Basant Lal* v. *Batul Bibi*(8), *Thakur Das* v. *Shadi Lal*(9).

Mr. *Johnstone* and *Mahadeva Ayyar* for respondents. The counter-petitioners were not represented in the suit, only some of

(1) 3 M.H.C.R., 226. (2) 1 E. & B., 501. (3) L.R., 1 App. Ca., 117.
(4) L.R., 3 Ch. D., 610. (5) I.L.R., 7 Bom., 323. (6) I.L.R., 5 Mad., 304.
(7) I.L.R., 5 All., 243. (8) I.L.R., 6 All., 23. (9) I.L.R., 8 All., 56.

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them are the descendants of the parties to it; in any view they have not been made representatives to the persons then on the record under sections 234 and 235 of the Code of Civil Procedure. If they are representatives, obligations can only be enforced against them as such with regard to property. But here they are sought to be made liable to the decree for themselves and not as representatives. In *Parthasaradi* v. *Chinnakrishna*(1) it was a question of a real and not, as here, of a personal right. Moreover the application is barred under the Limitation Act.

Bhashyam Ayyangar in reply. Certain properties are not to be used for certain purposes, that is the decision.

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

JUDGMENT:—The parties to this appeal are Vaishnava Brahmans of the Vadagalai and Tengalai sects residing in the village of Tiruvendipuram in the district of South Arcot. There is a temple in that village dedicated to the deity called Daivanayakaswami, and the image of Vedanta Desikar, the saint or religious preceptor of the Vadagalai sect, is consecrated therein and affiliated to it. The Vadagalai ritual and creed in connection with questions of sectarian interest dominated in the institution from time immemorial, and the Tengalais endeavoured so early as 1807 to change that state of things, but failed. The latter then instituted original suit No. 190 of 1807 in the late Zilla Court of Vriddháchalam to recover from certain Vadagalai Brahmans 500 pagodas or Rs. 1,750 as damages for having prevented them from placing in the temple the image of their religious teacher and saint called Manavala Mahamuni and singing their hymn in his honor known by its initial words *Sri Saila Dayapatram*, and from celebrating monthly the annual feasts on his account as part of their worship. The suit was dismissed by the Zilla Judge in April 1810, and the Provincial Court confirmed his decision in April 1815, the *ratio decidendi* being that the claim advanced by the Tengalais was contrary to custom or the usage of the institution. The second attempt made against the Vadagalai influence in the temple consisted in the Tengalais setting up in it the idol of their priest and worshipping it in accordance with their ritual in 1808.

(1) I.L.R., 5 Mad., 304.

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This led to a counter-move on the part of Vadagalai Brahmans after the disposal of the suit of 1807, and in April 1816 they moved the Zilla Court for the removal of the image of Manavala Mahamuni from the temple. The idol was accordingly removed from the temple and secured in the Tahsildar's office under process of Court. The third attempt made by the Tengalai Brahmans was in 1828, and it consisted in making a new image of their priest in substitution for the one secured in the Tahsildar's office, in setting it up in the house of a Tengalai Brahman in the village, in celebrating a festival as a form of worship for ten days in the same way in which similar festivals are performed by Vadagalais in honor of their saints and religious teachers, and in carrying the idol in procession on the night of the tenth or last day of the festival through the "Dikhandana streets included in the Navasandi," which were said by Vadagalai Vaishnavas to be attached to the temple of Daivanayakaswami in the village. This attempt differed from the attempt of 1808 in that the house of a Tengalai Brahman was selected as a place of worship, but resembled it in the worship being public. A ten days' festival, in which every Tengalai Brahman might take part, was adopted as the form of worship, and it closed with a street procession accompanied with recitation of hymns in accordance with Tengalai ritual, and the assertion of the rival sect that all the streets in which the idol of Daivanayakaswami was carried in procession were attached to the said temple was disregarded. The Vadagalai Vaishnavas of the village resented this step, and after the usual preliminary controversy before the magisterial authorities of the district, instituted original suit 30 of 1828. The relief prayed for in that suit consisted of the recovery as damages of Rs. 1,050, which they alleged to have spent in connection with their applications to magistrates for interference, of a direction that the worship and the ceremonies performed to the idol of Manavala Mahamuni newly made and set up in the house of the then first defendant situated in the Dekhandana Navasandi streets of Daivanayakaswami temple and the performance of ten days' festival on its account be discontinued, and of an order for the removal of the newly set up idol. The ground of claim was that the worship of Manavala Mahamuni, either in a house in the Dekhandana street attached to Daivanayakaswami temple, or in the streets known as

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Navasandi, was contrary to usage, and that those streets were attached to that temple. In that suit 10 Vadagalai Brahmans of the village appeared as plaintiffs and included 13 Tengalai Brahmans residing in the village as defendants. The Tengalais denied that the streets were attached to the pagoda and that the usage was against them. In December 1829 the Court of First Instance, the then Zilla Court of Chingleput, decreed "that "the practice of the defendants assembling in a private house "and there performing ceremonies to an idol of their priest and "public worship and carrying it in procession through the streets "of the village be discontinued, and that should they continue to "make the idol the subject of the cause" an object of worship, the same be removed and that the damages sued for be paid. On appeal the Provincial Court confirmed the decree in June 1837, and in second appeal the late Court of Sadr Adalat, in October 1840, modified the decision in the following terms:—

"The Sadr Adalat consider the Tengalais to have entirely "failed in proving that their public worship or their publicly "carrying in procession through the streets of the said village of "any image of the said saint is established by immemorial custom. "On the contrary, they deem both unauthorized innovations. But "there is nothing to prevent the inmates alone of any Tengalai "family resident therein from worshipping within their own "respective dwellings in a private manner the household image "of their said saint set up for family worship which in size is "invariably different from what is fixed in pagodas or carried "in procession, provided all but the inmates of such house are "excluded from such worship so as to distinguish such family "from public worship."

Thus the result of the sectarian litigation which extended from 1807 to 1840 was a judicial determination, that the image of Manavala Mahamuni was not entitled to a place in the Daivanayakaswami temple, or to public worship as contradistinguished from family worship in any private house in the Dikhandana street, or to procession in the streets of the village. It is noteworthy in connection with the suit of 1828 that the plaintiffs and defendants were not formally described as representatives of the rival sects, but that the matter litigated and determined was professedly what concerned those sects, and that no decretal order

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was drawn up formally and separately as is the practice at present, but a direction was embodied in the judgment of the Zilla Court as modified by that of the Court of Sadr Adalat.

It appears from exhibit D that between 1840 and 1868, the Tengalai Brahmans attempted from time to time on different occasions to evade the decree, but that such attempts were suppressed by the magistracy. In 1868 they endeavoured to build a new temple within the limits of Tiruvendipuram agraharam and to set up in it the image of Pillalokachary, the priest of their saint Manavala Mahamuni, and thereby to evade the decree passed in the suit of 1828 and revive the public worship of the image of their priest by giving it the name of Pillalokachary instead of Manavala Mahamuni. The Vadagalai Brahmans asked the then District Magistrate to restrain their rivals from proceeding with the construction of the new temple and to prohibit them from assembling for public worship within such temple contrary to the spirit of the decree of the Sadr Court, as such proceedings on the part of Tengalai Brahmans were calculated to lead to a breach of the peace. These admitted that the building then under construction was intended for public worship, but contended that the decree of a Civil Court could only be enforced by a Civil Court, that the interference of the magistrate was illegal, that the idol set up in the building under construction was not that of their saint, and that the principle of religious freedom which obtained in 1868 was not understood in 1828, and that there was no likelihood of any breach of the peace by allowing them the freedom of worship which they desired to secure. By consent the then Collector's Sheristadar was deputed as commissioner to compare the original idol taken from the Tengalais in 1839 in consequence of the decree of the Civil Court and deposited in the taluk cutcherry with the idol set up in the new building then being erected and to report whether the object of worship was substantially the same though different in name. On the commissioner's evidence that it was substantially the same, the District Magistrate granted the injunction applied for under section 62 of the Code of Criminal Procedure then in force, observing that "the erection of the new building and the setting up of the idol of "Manavala Mahamuni within that building as an object of public "worship were acts opposed to the decree of the highest judicial "tribunal and calculated to lead to serious disturbances and a

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"breach of the peace." As far as we can gather from the papers to which our attention is drawn nothing more transpired up to 1887. In 1888 the counter-petitioners, who are Tengalai Brahmans at Tiruvendipuram, jointly purchased a house in one of the car streets near the temple, set up the idol of Manavala Mahamuni, and began to revive the public worship of their priest, alleging that they were not bound by the decree of 1840, that that decree was illegal and barred by limitation, that it was further incapable of execution, and that at the best it could only form a ground for Vadagalai Brahmans to claim damages. Thereupon the Vadagalai Brahmans applied to the District Court of South Arcot for execution of the decree in original suit No. 30 of 1828 by the arrest and imprisonment of the counter-petitioners until they obeyed the terms of that decree and by the removal of the image of their priest Manavala Mahamuni newly set up in the fourth counter-petitioner's house. The Judge dismissed the petition with costs on the ground that the counter-petitioners could not be regarded as parties to the suit of 1828 by reason merely of their being descendants of defendants in that suit, and that section 234, which provides for the execution of a decree against the legal representative of a deceased judgment-debtor, relates only to the execution of decrees for property. The Judge also observed that the decision in *Srikhanti Narayanappa* v. *Indupuram Ramalingam*(1) had no application in this case and referred to *Parthasaradi* v. *Chinnakrishna*(2) as showing that the opinion of Hindu pandits on which the decree in the suit of 1828 was based was opposed to the law of India under the British administration. From this order petitioners have preferred this appeal. The questions which we have to decide in this appeal are whether the decree in original suit No. 30 of 1828 is capable of execution, if so, whether it may be executed against counter-petitioners and whether its execution is barred by limitation. The Tengalai Brahmans are apparently endeavouring to revive a sectarian quarrel which was after protracted litigation set at rest by the late Sadr Court in 1840 and which the magistrates since prevented from reviving by interfering to preserve the public peace. This view of the facts might be material for the purpose of dealing with an application, whereby a magistrate is asked to maintain the existing state of things against

(1) 3 M.H.C.R., 226. (2) I.L.R., 5 Mad., 304.

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those who seek to change it so as to risk a disturbance of the peace and otherwise than under the sanction of a fresh decree, whether the existing decree which recognized it would or would not be upheld if the sectarian question were again litigated. As to the decision in *Parthasaradi* v. *Chinnakrishna*(1), to which the Judge refers, it must be remembered that it expressly recognizes the competency of the magistrate to give such directions as he may consider necessary to prevent a breach of the peace, and that it also points out that a special right having a legal origin may at times co-exist with the right of the general public to use particular streets as thoroughfares and detract from it. During the progress of original suit No. 30 of 1828, it was asserted by the Vadagalai Brahmans, though it was denied by the Tengalai Vaishnavas, that the streets included in what is called the Navasandi of Daivanayakaswami's temple in the village were attached to that temple. Although the decree in that suit proceeded on the ground that what the Tengalais attempted to do was an innovation, and that it was not authorized by Hindu law as explained by the pandits, and although the law applicable to the use of thoroughfares under the British administration as expounded by later decisions might be different, yet it is necessary to note that a plea might possibly be set up, if any future litigation were to arise, that a special right derogating from the public right existed in this case. With these observations, which we make in view to prevent any misapprehension as to the effect of our order, we proceed to deal with the specific questions, upon the decision of which the appeal before us must stand or fall, viz., (i) whether the decree in the suit of 1828 is capable of being executed, (ii) whether its execution is barred by limitation, and (iii) whether it can be executed as against the counter-petitioners if it can be executed at all. On each of those questions we consider that this appeal cannot be supported. As to the first question, the judgment in the suit of 1828 contains no doubt the observation that the then defendants should discontinue public worship of the image of their priest Manavala Mahamuni as contradistinguished from family worship in which the inmates of a particular family alone take part and from which the general public are excluded, and that they should not take the idol in procession through the streets of the village. But the observation

(1) I.L.R., 5 Mad., 304.

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is followed by the direction that should they continue to make the idol an object of public worship, the idol be removed. This direction had reference to the particular idol set up in the then first defendant's house, and so far as that idol is concerned, it appears that the direction has either been carried out or complied with. This being so, the further question arises whether the observation might be taken to have done more than declare the obligation of the Tengalai Brahmans as to what they ought not to do in relation to their personal worship of their saint as introductory to the direction in the nature of consequential relief, that if they continued to persist in what they were bound not to do, the idol they set up be removed. We are now pressed with the contention that the observation has the force of a perpetual injunction and that it has reference not only to the idol then set up by the then defendants, but also to any similar idol which may be set up for a similar purpose at any future time by the descendants of those defendants and other residents in the village of the Tengalai sect. Judging from the conduct of the Vadagalai Brahmans since 1840, they have themselves treated this part of the decree as merely declaratory of their right. It is then urged that no occasion arose since for its execution; but this statement is clearly inconsistent with exhibit D, which shows that the Tengalais set up a new idol in 1868 under a different name, and that they from time to time attempted to act in breach of their obligation subsequent to 1840. The Vadagalais never applied to the District Court for executing the portion of the decree now under consideration, but asked for magisterial interference in the interests of public peace. This appears to indicate that the observation in the decree was regarded by them not as a perpetual injunction, but as a declaration of right ancillary to the specific relief then decreed, viz., the removal of the obnoxious idol and the award of damages. Even assuming that the observation was equivalent to a perpetual injunction, the execution of the decree is clearly barred by limitation. The right to apply for such execution arose not only more than three but also more than twelve years prior to this application, at all events in September 1868, when the Vadagalai Brahmans applied to the District Magistrate for the issue of an injunction under the Code of Criminal Procedure. We cannot regard applications made to magistrates for interference in order to maintain the public peace as steps taken in aid of execution in view to save limitation.

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Again, none of the counter-petitioners were parties to the suit of 1828, and it is alleged on their behalf that some of them were strangers to that suit. The contention that a few may represent many in a suit when the matter litigated is of common interest might support a fresh suit instituted to bring those not named in a writ of injunction within its scope, but cannot in our judgment be extended to commitment for contempt consequent on the breach of the injunction in the case of those who are not named in the writ and who were not then in existence, unless and until the injunction is revived against them. Nor are we prepared to adopt the suggestion of the appellants' pleader as to the constructive extension of parties to a decree for purposes of execution so as to bring under its operation every member of a sect, not only as the sect existed when the decree was made, but also as it might exist at any time thereafter and for all time to come inclusive of persons since born and since settled in the village.

We do not think that such a theory has the sanction either of general principles or of the Code of Civil Procedure when the subject matter of the decree is neither the incident of a legal relation arising from contract nor that of a declaration of title to specific property, but is the incident of personal worship in a particular village where two rival sects live together. The general rule is that no one who is not expressly named in the writ of injunction is liable to be committed for its breach, and section 234 has, as pointed out by the Judge, no application to this case. The proper remedy consists in the revival of the injunction by suit against those not named on the record, before an application can be made for their commitment by way of execution.

For these reasons, we are of opinion that this appeal must fail and we dismiss it with costs.

APPELLATE CIVIL.

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

1889. Jan. 23, 24. Feb. 4.

PONDURANGA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

NAGAPPA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Religious Endowments Act—Act XX of 1863, *ss.* 3, 4, 11, 12—*Suit by members of a temple committee, burden of proof—Form of decree.*

Suit by the members of a temple committee appointed under Act XX of 1863 against one claiming to be the hereditary trustee of a Hindu temple for possession of certain temple property, for a declaration of their right to receive certain annual dues and for a perpetual injunction restraining defendant from interfering with those dues:

Held, the burden of proving that the temple was of the class mentioned in s. 3 of Act XX of 1863 lay on the plaintiffs.

On its appearing that the defendants' ancestor was not the founder of the temple but was appointed trustee by the Government, as also were his successors in the office of trustee, of whom all were not members of his family:

Held, (1) the plaintiffs were entitled to a decree declaring the temple in dispute to be of the class mentioned in Act XX of 1863, s. 3, and as such, subject to their jurisdiction;

(2) the plaintiffs were not entitled under Act XX of 1863, ss. 4, 11 and 12, to be put in possession of the property of the temple or in receipt of its income.

APPEAL against the decree of K. R. Krishna Menon, Subordinate Judge of Tinnevelly, in original suit No. 59 of 1884.

The plaintiffs represented the Vishnu Temple Committee appointed in 1864 under the Religious Endowments Act—Act XX of 1863, and claimed the management and control of the Ramasami temple at Palamcottah under section 3 of that Act: the plaint prayed (1) for possession of the temple properties; (2) that the Court should establish the plaintiffs' right to receive certain annual dues; (3) for an injunction restraining the defendants from interfering with these dues; (4) for further relief.

The defendants' case was that the temple in question was not of the class referred to in section 3 of the Religious Endowments Act, but was governed by section 4, and that the trusteeship of the temple was hereditary in his family.

* Appeal No. 99 of 1887.

The Subordinate Judge dismissed the suit. The plaintiffs preferred this appeal.

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 (Muttusami Ayyar and Parker, JJ.)

Mr. *Subramanyam* and *Kalianaramayyar* for appellants.

Rama Rau and *Sankaran Nayar* for respondents.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Tinnevelly who dismissed the appellants' suit with costs. The appellants are members of a Devastanam Committee appointed under Act XX of 1863, and the minor respondent is the son of one Vengu Mudali, the late trustee of Kodanda Ramasami temple at Palamcottah, in the district of Tinnevelly. On Vengu's death in 1882, a dispute arose between the parties to this appeal as to whether the *tasdik* allowance payable to the temple ought to be paid to the trustee whom the Committee might appoint, or to the respondent as hereditary trustee. In January 1883 the Collector of Tinnevelly ordered that the payment be postponed for six months, that the appellants might meanwhile sue to establish their right to the temple; hence this litigation.

The contest in the suit was whether the temple was of the class mentioned in section 3 or 4 of Act XX of 1863, and whether the suit was barred by limitation as alleged by the respondent. Further, the plaint prayed for a decree (1) for possession of the temple and its properties, (2) for a declaration of the appellants' right to receive the *tasdik* payable to the temple, (3) for a perpetual injunction restraining the respondent from interfering with the collection of the *tasdik* and other allowances due to the institution, and (4) for such other relief as might seem proper to the Court in the circumstances of the case. The Subordinate Judge was of opinion that the temple in question was not of the class mentioned in section 3 of Act XX of 1863, that it was not necessary to decide the second question, and that, even if the institution came under section 3, the appellants were not entitled to recover possession either of the temple or its properties. There can be no doubt, nor is it denied, that the *onus* of proof is on the appellants. We agree with the Subordinate Judge that the appellants would not be entitled to possession of the temple and its properties even if it were found to be subject to their juris-

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diction. It is provided by section 11 of Act XX of 1863 that no member of a Committee shall be capable of being or shall act as the trustee of a temple for the management of which such Committee shall have been appointed, and as it is the lawful trustee or manager of the temple for the time being that is entitled to possession of its properties and to the receipt of its income, the appellants are not at liberty to claim to be put in his place. As regards the injunction prayed for in the plaint, we do not consider that this is a proper case for a perpetual injunction under section 54 of Act I of 1877. The appellants' counsel draws our attention in this connection to section 12 of Act XX of 1863, but it appears to us to be limited to such property as was actually in the possession of the Board of Revenue when the Act was passed. Under that enactment the Committee has, subject to the restrictions imposed by section 4, the same powers that the Board of Revenue had under Regulation VII of 1817, but those powers were primarily powers of supervision and control designed to ensure due appropriation by the existing trustees of temple endowments to the purposes for which they were destined. We may therefore observe that the only relief which it would be proper to award if appellants established their claim is a declaration that the temple in question falls under section 3 of the Act and is subject to their supervision and control. The substantial question, however, for decision in this appeal is whether the finding of the Subordinate Judge, that the temple is not shown to come under section 3 is, as argued by appellants' counsel, contrary to the weight of evidence on the record.

The evidence on which the Subordinate Judge rests his decision is mainly documentary, and he refers further to the evidence of the plaintiffs' tenth witness and of the defendants' first and second witnesses. The main point to be kept in view in coming to a finding upon the evidence is whether at the time of the passing of Act XX of 1863 the nomination of the trustee of the temple was vested in, or exercised by, the Government or any public officer, or whether such nomination was subject to the confirmation of the Government or of any public officer. As observed by the High Court in *Sami* v. *Rajagopala*(1) it was certainly not intended that the wrongful assumption of power either by the

(1) Second Appeal No. 644 of 1884 (unreported).

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Government or by a public officer to constitute a trustee should place the temple in the category of institutions which it was the intention of the Legislature to transfer to the Committee appointed under the Act. The true construction of section 3 is that the power of nomination or confirmation must be lawfully vested in the Government or a public officer or lawfully exercised by them; and it is therefore necessary to see whether the actual exercise of such power is referable to a legal origin, either to the exercise of a like power by the former Government, or to the terms of the deed of endowment or to the grant of endowment made by the Government or to the power to provide a competent trustee when a religious institution has no competent trustee. It must also be borne in mind that acts of public officers done in the exercise of general supervision and control over trustees under Regulation VII of 1817 should be distinguished from the right to nominate a trustee or to confirm such nomination which alone is constituted as the test of the Committee's jurisdiction. With these general observations, we proceed to consider the evidence in this case.

The temple now under consideration came into existence in 1805. Though it existed during the time of Ranee Mangammal, and it might be regarded as ancient on that ground, yet it ceased to be used as a place of public worship in the last century when the district passed under the Muhammadan rule. It had no place even in the list of Hindu temples prepared by Mr. Lushington in 1803 after the introduction of the British rule. Though it is alleged for the respondents that the ancient temple was demolished by the Muhammadans and the place was used for storing gunpowder, yet such oral evidence on the point as we are referred to is merely hearsay and legally inadmissible. On the other hand, there is reliable evidence to show that the stone image was never removed from the place, that both the principal stone and copper images now in existence existed also during the period of Hindu rule, and that at least a portion of the temple as it exists at present is ancient. We can only say upon the evidence that the temple was renewed as a place of public worship in 1805 though with a fresh establishment, organization and endowment. It is not pretended that respondents' family had anything to do with the management of the institution at any time prior to that period, his case being that from the time of his great-grandfather

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who became a trustee in 1805 as shown by exhibit III, the trusteeship has been hereditary in his family. The first trustee of the temple was one Vengu Mudali, the respondents' great-grandfather, and he was dharmakarta of the institution from 1805 to 1829; exhibit III which is a copy of the Collector's order issued to the Tahsildar when the temple was revived in 1805 shows that he offered to perform the *kumbabhishegam* and to take up the position of dharmakarta and conduct the puja and other temple charity properly and to organize a new establishment, and that the Collector accepted the offer and arranged for the *padittaram* or daily allowance being paid, created mirassi right in the establishment which was then about to be newly organized by Vengu Mudali and prescribed the order in which consecrated water was to be served to worshippers. The document conveys the impression that the Collector relied on Vengu Mudali's management as likely to prove efficient, accepted his offer to become dharmakarta and render other service, and revived the ancient temple as a place of worship, thereby carrying out the policy of showing consideration to the religious institutions of the country inaugurated on the introduction of the British rule. The document, however, does not state whether the trusteeship was intended to be hereditary in Vengu Mudali's family or to be a personal recognition of his munificence and piety. Exhibit VI wherein Vengu Mudali's trusteeship was referred to in 1837 states that Vengu Mudali was appointed dharmakarta by the Collector in consideration of the service which he rendered in bringing back the Ramasami idol from Alagia Mannar Covil, locating it in the new devastanam and performing the consecration ceremony at his own expense. It appears from exhibits IV and VII that the grant for *padittaram* or daily puja, the *tasdik* allowance, and the festival allowance were all made by Government, though Vengu Mudali suggested such grants either as necessary or as beneficial to the institution. Though it is alleged for respondent that Vengu Mudali gave a new site for use as a gunpowder magazine and got the site of the temple in exchange for it and that he rebuilt the temple, yet there is no reliable evidence in support of such assertions. He may have possibly improved the temple or repaired it, but we are unable to accept the suggestion that he founded the temple anew, and must, on that ground, be regarded as a huckdar or a trustee

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with inherent heritable interest. We see no sufficient reason for saying that the statement in exhibit VII that Vengu Mudali was appointed by the Collector was incorrect as alleged for the respondent. The next trustee was Giyanasigamani Mudali, the adopted son of Vengu Mudali. There is no evidence to show whether he became a trustee by right of inheritance or whether the Collector appointed him as trustee out of regard for Vengu Mudali's family, and the appellants have not been able to produce any order on the subject from the Collector's record; but exhibit S shows that in 1833 the Collector treated him as the lawful trustee of the temple. It appears further that in 1834 the Collector suspended him from office for neglect of duty on the ground that his conduct was open to suspicion, and that in 1837, the Collector finally dismissed him from trusteeship (see exhibits Y, Z and DD). Although it is alleged that this dismissal was an arbitrary proceeding on the part of the Collector, there is no evidence to show that such was the case and that the Collector passed the order otherwise than in the *bonâ fide* discharge of his duty under Regulation VII of 1817. This shows that even if Giyanasigamani was a hereditary trustee, the hereditary right of the family ceased.

The next trustee was one Arumugam Pillai, and he was appointed by the Collector, when Giyanasigamani was dismissed. The institution was in his charge until 1842, when the Government withdrew from all interference in the management of Hindu temples. Thus, from 1805 to 1842, there were three trustees, and according to the evidence, the first and the third were appointed by the Collector, and the second was dismissed by him for neglect of duty, and the third was in no way connected with the respondents' family.

In 1842, the management of the temple and its properties were made over to three trustees—Giyanasigamani Mudali, Subbramaniya Pillai, and Palaniya Pillai (exhibits A to C). It appears that the three trustees were selected, as was generally the case when there was no hereditary or adinam trustee, with reference to the wishes of the people interested in the institution. Though Giyanasigamani again became a trustee, yet he gained the position as one of three joint trustees, and there is no evidence that he then asserted that the trusteeship was hereditary in his family or that the association of two other trustees with him was incompatible with his hereditary right.

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In 1845, Giyanasigamani died, and his son, Vengu Mudali, took his place, and there is no evidence about his appointment. From 1842 to 1864, the management of the institution was vested in three trustees, and although the Subordinate Judge treats the matter as of no importance and observes that the co-trustees were either servants or dependants of Vengu's family, still we consider it material in relation to the claim of hereditary and sole trusteeship now set up for the respondent. We have also to note that there is no satisfactory evidence that the co-trustees were not men of position and independent judgment and that they were selected in 1842 as men of local influence interested in public estimation in the temple.

Of the three trustees, Subramaniya Pillai died in 1863, and exhibits GG and HH prove that the Collector appointed Periya Tambya Pillai in his stead. Again, it is in evidence that Palania Pillai and Periya Tambya ceased to do their work in 1873, and that, on the suggestion of the respondents' father, the appellants dismissed them. The result of the evidence is that the Collector appointed the first trustee in 1805, suspended and dismissed the second trustee in 1834 and 1837; that he then appointed the third trustee; that he constituted three joint trustees in 1842; and that he appointed a successor to one of them when Act XX of 1863 was about to come into operation. There is not only no public document which contains a recognition that the trusteeship was hereditary in the respondents' family, but the conduct of the respondents' ancestors also negatives such belief in his family. It is not likely that Vengu Mudali would have omitted to obtain a sanad of huckdarship if he had desired to secure it for his descendants. Nor is it likely that the Collector would have directed in August 1805 that a stone be fixed on the land granted as inam to the temple with an inscription that such grant had been made by Government for its support if he had not desired to institute a permanent memorial of the fact that the temple owed its endowment to the Government. Nor would Giyanasigamani have failed to set up his huckdarship when the Government severed its connection with religious institutions in 1842. It is also not likely that in 1873 the respondents' father, who had been a trustee from 1845, and who, as such, must have had adequate means of knowledge, would have submitted to the appellants' jurisdiction from 1864 to 1882 and asked them in 1873 to dismiss his co-trustees for neglect

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of duty. The first time there was any mention of hereditary trusteeship was in 1864, when a statement (exhibit VIII) was filed by Vengu Mudali's agent before the Inam Commissioner. In this Vengu Mudali was described as huckdar, but there is no evidence to prove, as alleged for the respondents, that it was brought to appellants' notice. The next time when the respondents' father claimed huckdarship was in 1872 when he signed an account submitted to the appellants as huckdar. The Committee at once repudiated his statement and called upon him to account for claiming a status which he did not possess. Exhibit I shows that the basis on which the respondents' father rested his claim was that the temple had been in ruins for a long time prior to 1805 and that it had been organized at a considerable expense in 1805 by his grandfather. It appears from exhibit G that the appellants declined to accept the explanation or recognize him as huckdar, and from the accounts and reports which he since submitted that he omitted to sign as huckdar. It is suggested for the appellants that the success of the trustees of two other temples in the district in original suits Nos. 91 of 1867 and 11 of 1871 inspired the respondents' father with a desire to make an attempt to assume a status which he did not possess, and that he abandoned the attempt when the appellants repudiated his claim, and continued to submit to their jurisdiction until his death. The suggestion derives support from exhibits XII to XIV, the attempt made by the respondents' father in 1872, the correspondence which then ensued and the abandonment of that attempt as evidenced by the numerous accounts and reports since submitted by him to the appellants ending with exhibit MM 3, dated December 1880

We are unable to adopt the finding of the Subordinate Judge for several reasons. In the first place, he treats Vengu Mudali of 1805 as if he was the founder of the institution, while all that could be fairly claimed by him was that he rendered important service in connection with its revival. At all events, there is no conclusive indication that his family acquired any inherent interest in the temple as a reward for his munificence. The Subordinate Judge does not give due effect to exhibits III, IV, and VII, and overlooks the fact that the temple owes all its endowments to the Government, and that the Collector appointed Vengu Mudali. He assumes again without any evidence that Giyanasigamani was arbitrarily removed by the Collector, and fails to consider that the

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hereditary right, if any, thereby ceased. He fails further to notice that the constitution of three trustees as a managing body was incompatible with the alleged existence of a competent hereditary trustee in 1842. He fails also to notice the conduct of the family from 1834 to 1880 which discloses no trace of hereditary trusteeship, while there is positive evidence showing that the Collector nominated trustees once in 1805, again in 1837, and again in 1863, besides constituting three trustees in 1842. He does not also attach weight to the fact that the temple owed all its endowments to the Government, and that there is not a single public document which contains a recognition of hereditary trusteeship, and that the Collector's interference in nomination is referable to a legal origin.

We set aside the decree of the Subordinate Judge, declare that the temple in dispute is of the class mentioned in section 3 of Act XX of 1863, and is as such subject to the jurisdiction of the appellants, and direct that the appellants' claim to other reliefs be disallowed, and that the appeal be allowed to the extent indicated above with costs throughout to be paid out of the respondents' estate.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

1889. Apl. 17, 25.

VENKATA NARASIMHA (PLAINTIFF), APPELLANT,

v.

KOTAYYA AND OTHERS (DEFENDANTS NOS. 2 TO 5), RESPONDENTS.*

Defamation—Privilege—Petition to Revenue officer—Presumptions as to malice.

Certain raiyats in a zamindari village addressed a petition to the Tahsildar praying that the Village Munsif might be retained in office notwithstanding the Zamindar's application for his removal. The petition imputed criminal acts to the Zamindar, who now sued the petitioners for damages on the ground that the petition contained a false and malicious libel. It was found that in fact the communication was made *bonâ fide*, and that there was some ground for some of the imputations:

Held, the petition was a privileged communication and the alleged libel was not actionable.

The question when malice may be presumed, discussed.

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* Second Appeal No. 1725 of 1888.

VENKATA NARASIMHA v. KOTAYYA.

SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in appeal suit No. 373 of 1887 reversing the decree of Venkata Ranga Ayyar, Subordinate Judge of Ellore, in original suit No. 5 of 1886.

The plaint alleged that the defendants had presented to the Tahsildar of Bezvada a petition containing a malicious libel on the plaintiff and prayed for damages.

The plaintiff was the Zamindar of Vallur, defendant No. 1 was Munsif of one of the zamindari villages, defendants Nos. 2 to 6 were raiyats of the village. The plaintiff had applied to the District Revenue officers for the removal of defendant No. 1 from his office, and the defendants together with other persons presented a petition to the Tahsildar filed in the suit as exhibit A praying that defendant No. 1 might be retained in his office.

In this petition occurred the following passages, which were the libel complained of:—

"Subsequently the Collector appointed the present Munsif, "Ganna Ganganna. The Stree Zamindar being at enmity with "him (Ganganna), revenged him in many ways and still intends "to do so. Since he came, we, the people, are not put to much "trouble by the Zamindar's people. In case they have recourse to "evil deeds, the Munsif represents the same to the officers like "yourself. For that reason the Zamindar's people bear a grudge. "Owing to the ill-will, the Zamindar was preferring many "charges against him through his servants and others. The "officers like yourself rendered justice and dismissed them. Now "with the intent of getting him removed anyhow from the "office of Village Munsif and conferring the office of Village "Munsif upon the late Munsif or upon any one at his pleasure, "Zamindar continues to cause the like deed to be perpetrated.

"(The Zamindar) has caused several arzees to be presented to "the effect that the present Munsif is unfit and a bad man. The "Zamindar continues to present mahazar arzees in the names of "the people like ourselves forging our signatures and marks with-"out our knowledge. One of them was a mahazar arzee under "date the 28th April 1883 presented to the Head Assistant Col-"lector through post. It was referred to the Tahsildar who "summoned some of those who signed or set marks to it. Then "they gave a kyfeat stating we did not present the arzee. We do "not know its contents. The signatures were not ours. Those

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"who are at enmity with the Village Munsif have signed it. We "do not know that arzee contains the signature of Chirugupaty "Tirupatyrayudu who is a mark man and cannot sign. There-"upon Arni Narayanarow Puntulu Garu, the then Tahsildar, "intimated to the Head Assistant Collector by an arzee No. 2815, "dated 2nd July 1882, to the effect that owing to the ill-feeling "against the Village Munsif (Zamindar) continues to present "arzees forging signatures. This will be evident from a reference "to the arzee which is on the record.

"Many similar false arzees are being fabricated by Palaparty "Nagabhushanam and others who have signed the arzee now "under enquiry. Of all these matters all of the former Tah-"sildars and Mr. J. F. Fydian, the Head Assistant Collector, were "already aware. The Head Assistant Collector passed upon the "petition an order No. 134, under date the 23rd November 1881, "to the effect that the Zamindar causes perpetration of such illegal "deeds and that he wrote to the Zamindar to say that he should "not commit such illegal acts."

Presentation of the petition was admitted, but the defendants pleaded that the statements contained in it were made *bonâ fide* and without malice.

The Subordinate Judge passed a decree for the plaintiff for Rs. 1,000; but this decree was reversed on appeal by the District Judge.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar for appellant.

Ramasami Mudaliar for respondents.

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 Shephard, JJ.).

JUDGMENT.—The appellant before us is the Zamindar of Pungidigudem Vallur, in the Kistna District, and the respondents are raiyats of the zamindari village of Thoutla Vallur. The first defendant, Ganganna, who is not a party to this appeal, is the Munsif of that village, and on 8th June 1885, the respondents, in conjunction with fifty other raiyats, addressed a petition or mahazar to the Tahsildar of Bezvada praying that Ganganna might be retained in his office notwithstanding the appellant's application for his removal. That document contained several statements

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reflecting upon the appellant's character, and so far as they are material for the purposes of this appeal, they are set forth in paragraph 8 of the judgment of the Subordinate Judge. The appellant alleging that they were false and malicious, brought the present suit to recover from respondents and Ganganna Rs. 2,800 as compensation for the libel. The Subordinate Judge considered that indictable offences were imputed from malice and decreed the claim, reducing however the amount of damages to Rs. 1,000. From this decision Ganganna preferred no appeal, but the respondents appealed to the District Court. The Judge set aside the decree on the ground that the communication was privileged, that prior occurrences in the zamindari justified the communication, that the respondents acted *bonâ fide*, that the language employed by them should not be too strictly scrutinized, and that it was not reasonable to expect them to distinguish between the Zamindar and his servants. Hence this second appeal.

It is first contended that exhibit A is not a privileged communication. The removal of a Village Munsif is a matter in which the respondents' interests as raiyats and residents of the village in which Ganganna had jurisdiction as Village Magistrate and Munsif were concerned. They addressed the communication to the Tahsildar in whose jurisdiction they lived when he was considering an application for the removal of the Munsif and in view to protect their interests. We entertain no doubt that the occasion of the publication confers a privilege. The principle is that a communication made *bonâ fide* upon any subject matter in which the party communicating has an interest or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without the privilege, would be slanderous and actionable; *Harrison* v. *Bush*(1). The rule of public policy on which it is based is that honest transactions of business and of social intercourse would otherwise be deprived of the protection which they should enjoy. Another contention is that the reasons assigned by the Judge for setting aside the decision of the Subordinate Judge cannot be sustained in law. In this connection our attention is drawn to the following remark of the Judge: "Taking a wider "view of this question (of privilege), I consider that it is not

(1) 5 El. and Bl., 344.

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"desirable to scrutinize too strictly the language of petitions in "this country. It is very usual for petitioners in villages to "express their grievances in an exaggerated emphasis. An officer "of any experience deducts these exaggerations from a petition "which he reads and usually the opponent does not take any notice "of these exaggerations. If petitioners are obliged to draft their "petitions with the expectation that they will be called on to prove "every expression and every fact alluded to, they will probably "think it safest not to write petitions at all." These observations in the form in which they are made are too general and liable to misconception and there is no distinction, as far as we are aware, in the general principles on which an action of libel is to be dealt with in this country and in England. In both countries malice is a necessary ingredient in every action of libel. When a defamatory communication is unauthorized, malice is presumed; but when the communication is privileged by the occasion on which it is made, the ordinary presumption is repelled and a special presumption takes its place, viz., that the communication is made not with intent to defame but in furtherance of the lawful purpose for which the privilege is recognized to exist. This special presumption may again be displaced in its turn by actual proof that the communication is not fairly and honestly made but that it is made with a malicious spirit or from some indirect motive. The material question always is as to the state of mind with which the imputation is made. If the imputation is made with the knowledge that it is false, there is an end of the privilege. If it is made in a reckless and inconsiderate manner, if means of correct information are available and they are wilfully overlooked and no inquiry is made, there arises a presumption that there can be no honest belief where there is no honest effort to arrive at the truth. But the intrinsic and the extrinsic evidence produced in cases of this kind may suggest several intermediate views of actual facts in regard to malice. The expressions used, motives attributed, the relevancy of the statements made, their total or partial falsehood, the antecedent conduct of the parties in relation to the matter under inquiry, and the state of feeling between them at the time of the libel are all evidence which the Judge or jury may consider in coming to a finding, but the weight due to them depends on the circumstances of each case. The expressions used may be stronger than the exigency of the occasion warrants, the

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imputation may be partly untrue, and the matter imputed may be criminatory, and yet the Judge or jury may say that though when taken alone they may be somewhat in excess of the privilege, the libel is not malicious, regard being had to the communication as a whole, and reasonable allowance being made for the imperfect education and social condition of the defendants, and the feeling under the influence of which the communication is made. Within this limit the observations of the Judge are perfectly legitimate, and we see no reason for saying that they have been misapplied in the present case.

Another point urged upon us is that the Judge is in error in saying that previous occurrences in the zamindari either justify the communication or prove that it was made in good faith. The Judge observes that 7 or 8 years ago there was discord between the Zamindar and some of his raiyats, that there were numerous cases in the Courts, some of which were thrown out, but in one case the Sessions Court convicted one of the zemindari officials of forging a paper purporting to be an agreement by raiyats to cultivate and that the first defendant, Ganganna, was concerned in some of the cases in Court. Having regard to the antecedent state of things found by the Judge, we cannot say that there was no apparent ground for several of the imputations, as to the Village Munsif being obnoxious to the Zamindar, and as to his desire to get rid of him. The imputation that the Zamindar caused false charges to be brought against the Village Munsif and caused mahazars to be presented with forged signatures are the worst of the accusations. As regards even these, the respondents refer to specific occurrences, and the facts they mention afford some ground, though the expressions used are strong and some of the statements are probably not accurate. We cannot say there was no ground at all for any of the imputations and that actual malice must be inferred as a matter of law. As to the Zamindar's connection with the acts imputed to his men, exhibit A refers to a prior conviction for forgery committed in the interests of the Zamindar and to a report made on inquiry that some of the signatures to a mahazar presented against the Village Munsif were not genuine. As to the oral evidence in the case it was conflicting. We are unable to hold under all the circumstances of the case that there are sufficient grounds for interference in second appeal. We dismiss it with costs.

APPELLATE CIVIL.

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

1889. April 10, 12.

KHATIJA AND OTHERS (DEFENDANTS NOS. 3, 8 AND 9), APPELLANTS,

v.

ISMAIL AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 7 AND 10), RESPONDENTS.*

Jurisdiction—Withdrawal of part of claim—Canarese Navayats—Common management of family property—Muhammadan Law—Sale of an undivided share—Limitation—Burden of proving validity of sale by a gosha woman.

Suit for partition and possession of an undivided share of property sold to plaintiff by an aged gosha lady of the class of Canarese Muhammadans called Navayats. The property sold was the vendor's share as heiress of her father, brother and sister who died in 1856, 1866 and 1871, respectively: but it appeared that the property of the family had been in the possession of one managing member since 1856. The plaintiff during the suit withdrew his claim against that part of the immovable property in suit which was within the local limits of the jurisdiction of the Court, having compromised with the defendants who had it in their possession, and pursued his claim against the other immovable property and obtained a decree. On appeal:

Held, (1) that the suit was not barred by limitation;

(2) that the withdrawal of the claim with regard to the property situated within the local limits of the jurisdiction of the Court (the compromise not having been shown to be otherwise than *bonâ fide*) did not operate to take away the jurisdiction of the Court to adjudicate on the plaintiff's suit:

(3) that the plaintiff having discharged the burden of proving that the conveyance to him was voluntarily executed and that the transaction evidenced by it was real and *bonâ fide*, the conveyance was operative.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of South Canara, in original suit No. 18 of 1887.

The plaintiff claimed under a registered sale-deed, dated 10th March 1879, and filed as exhibit A executed to him by one Fatima Bibi, an aged gosha lady. This document recited that she was entitled by inheritance "under the law of our caste" (Navayat) to a share in certain property and acknowledged the receipt of Rs. 2,000 from the plaintiff, and proceeded:—"I have sold to "you for Rs. 2,000 on account of urgency all my right and

* Appeal No. 63 of 1888.

"Swamithva (right of ownership) on the $\frac{75}{640}$ share to which I "am entitled out of the whole immovable and movable property "hereinmentioned." The plaint prayed for the partition and delivery of possession of the above share. Part of the immovable property was at Mangalore which is within the local limits of the jurisdiction of the Subordinate Court and part at Bhatkal which is beyond them. The plaintiff withdrew his claim in respect of the land at Mangalore, having compromised with the defendants in whose possession they were; but he pursued the rest of his claim and obtained a decree in respect of it.

Some of the defendants raised a plea of limitation as to which the Subordinate Judge said:—"As to the second issue, it has to "be remembered that, though these people are Muhammadans by "religion, they conform to Hindu customs and manners to a very "great extent. They belong to a class called 'Navayats' or new-"comers, being the descendants of a party of Arab merchants, who "migrated to Bhatkal near Goa some 770 years ago and took for "their wives converts from the Hindu Konkanis of the place. "Konkani is still the home-language of these people, and it is clear "from the evidence of several witnesses that, like their Konkani "neighbours, they are not overfond of division. Though Sayyed "Mahomed Sahib, the common ancestor, died in 1856, his estate "was never divided among his heirs, but managed quite in the "Hindu fashion by his eldest son Sayyed Mohidin Sahib till his "death in 1866 and since by the first defendant. That such "management was for the benefit of all the heirs of Sayyed Maho-"med Sahib is indeed clear from the admissions of the parties, and "there is no evidence whatever on record that the character of "the management has ever since changed or that the first defend-"ant's management had ever become hostile to her till her death. "First defendant himself admits that his management has always "been on behalf of Bibi Fatima and all other heirs of his father "and does not plead limitation in respect of the plaintiff's claim, "and the defendants Nos. 3, 8 and 9, who now raise the plea, do "not contend that they are in exclusive possession of any portion of "the ancestral estate. If their defence holds good, first defendant's "possession of that estate has been as hostile to them as to deceased "Bibi Fatima, because they were all living apart from that defend-"ant and not allowed any regular allowances out of the common "property, and, though Bibi Fatima and other female heirs were

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"permanently residing in their husband's houses since Sayyed "Mohidin's death, they are also shown to have often been living in "the family-house with the first defendant. Since the first defend-"ant's management of the family-estate admittedly commenced in "1866, in succession to his deceased brother, as manager or agent "for all the heirs of their father, Sayyed Mahomed Sahib, the "presumption of the continuation of such management on their "behalf must necessarily prevail till the contrary is shown, and, as "no hostile possession against Bibi Fatima's interests has been "proved for the last twelve years preceding the institution of this "suit, I would find the second issue for plaintiff."

Defendants Nos. 3, 8 and 9 preferred this appeal against the decree of the Subordinate Judge.

The further facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

Bhashyam Ayyangar and *Narayana Rau* for appellants.

No effect could be given to exhibit A simply because it was signed by Fatima and registered. In the case of a document obtained from a pardah-nashin lady the burden lies on the person claiming under it to show that there was consideration. *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan*(1), *Ashgar Ali* v. *Delroos Banoo Begum*(2), *KalianBibi* v. *Safdar Husain Khan*(3), *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*(4).

In any view of the evidence the suit is in part barred by limitation. For Sayyed Mahomed Sahib, the father of the plaintiff's vendor, died in 1856; Sayyed Mohidin, her brother, died in 1866, and her sister died in 1871; her claim was therefore barred at least in part under section 1, clause 13, of Act XIV of 1859, according to which limitation runs from the date of the death of the person whose property is claimed, or from the date of the last payment on account of the share; and there was no payment on account of the share. If the right is barred under that Act, then it could not revive under the later Act. Under Act XV of 1877, article 123, "for distributive share of the property of an intestate," the time runs from the date when "the share becomes deliverable."

[*Muttusami Ayyar, J.*:—Article 127 applies in the case of joint family property.]

(1) L.R., 1 I.A., 192. (2) I.L.R., 3 Cal., 324.
(3) I.L.R., 8 All., 265. (4) 11 M.I.A., 551.

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The presumption of Hindu law as to joint property is not applicable here although the family may have lived in commensality. *Hakim Khan* v. *Gool Khan*(1).

The *Acting Advocate-General* (Hon. Mr. *Spring Branson*) and *Ramachandra Rau Saheb* for respondents Nos. 1, 3 and 8.

Ambrose for respondent No. 2.

Sankaran Nayar for respondents Nos. 6 and 7.

The further arguments adduced on this appeal appear sufficiently for the purpose of this report from the following

JUDGMENT:—This was a suit to recover from the defendants the distributive share of a Muhammadan lady named Bibi Fatima upon a sale-deed executed by her in the plaintiff's favor for Rs. 2,000 on 10th March 1879. The parties to this appeal belong to that class of Muhammadans on the West Coast who are descendants of Arab merchants that settled several centuries ago at Bhatkal in North Canara and who are designated by the people in that part of the country "Navayats" or new-comers. In course of time the settlers appear to have adopted Konkani, the language of the people, as the language of their homes together, as appears from the evidence in this case, with some of the incidents of the family system obtaining among them. The subject of the sale in suit consists of the shares to which the plaintiff's vendor was entitled under Muhammadan Law in the property of her father, Sayyed Mahomed Sahib, who died in 1856, of her elder brother, Sayyed Mohidin, who died in 1866, and of her sister, Bibi Sha, who died in 1871 or 1872. The plaintiff's case was that the property, part of which he purchased, was that of the family to which his vendor belonged, that, though its devolution and distribution were regulated by the rules of Muhammadan Law, the Hindu system of managing joint family property by a male coparcener was in vogue amongst Navayats, that according to that usage the property now in litigation was managed from 1856 to 1866 by Sayyed Mohidin, then by Sayyed Abdul *alias* Babu Sahib, and afterwards by the defendant No. 1, and that the several managing members were his vendor's brothers and that their management was avowedly on behalf of themselves and their co-heirs under Muhammadan Law. Sayyed Mahomed Sahib, the common ancestor, left three sons and four daughters and their names and those of their

(1) I.L.R., 8 Cal., 826.

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survivors and their connection with the defendants are mentioned in the pedigree set out in the original judgment. After the institution of this suit, the plaintiff entered into a compromise with defendants Nos. 4 to 7 and withdrew his claim in respect of properties specified by the Subordinate Judge in paragraph 8 of his judgment, and the claim therefore that remained to be adjudicated upon by the Court below was as between the plaintiff and defendants Nos. 3, 8 and 9, and in reference to properties at Bhatkal, items 17 to 35 in schedule A and Nos. 1 to 30 and 40 to 49 in schedule B attached to the plaint. The Subordinate Judge disallowed part of the claim and decreed the remainder. From his decision defendants Nos. 3, 8 and 9 appeal so far as it is against them, and the plaintiff objects to it under section 561 so far as it disallows his claim to a share in items of land 15 and 16 and his costs.

Upon the evidence in the case we see no reason to doubt that Bibi Fatima executed exhibit A with full knowledge of its contents. Three witnesses deposed to its execution and it was registered after the Sub-Registrar examined her in her house. She survived its execution for about three years and the appellants who lived at Bhatkal did not impugn it during her life. The terms on which she lived with the plaintiff and his children raise a presumption in favor of its voluntary execution. Though the appellants alleged fraud and undue influence, there is no evidence worth the name in support of their plea. It is true that several witnesses cited by the appellants stated that Bibi Fatima was imbecile, paralytic and of unsound mind, but their evidence, as observed by the Subordinate Judge, is vague and general, and the weight due to it appears to be small when regard is had to their means of knowledge and the probabilities of the case. Considerable stress is laid by the appellants' pleader upon Bibi Fatima's position as an aged gosha lady and he also dwells at great length on the law as to onus of proof as laid down in *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan*(1), *Ashgar Ali* v. *Delroos Banoo Begum*(2), *Kalian Bibi* v. *Safdar Husain Khan*(3), *Moonshee Buzloor Ruheem* v. *Shumsoonnisa Begum*(4). There is of course no doubt that it lies on the plaintiff to show that exhibit A was voluntarily

(1) L.R., 1 I.A., 192. (2) I.L.R., 3 Cal., 324.
(3) I.L.R., 8 All., 265. (4) 11 M.I.A., 551.

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executed and that the transaction which it evidences was real and concluded *bonâ fide*. But there is no reason for the suggestion that the Subordinate Judge has cast the burden of proof on the wrong party. As to the question, whether the burden has been sufficiently discharged by the party on whom it rests, the answer to it must depend on the circumstances of each case. Having regard to the subsequent conduct of the appellants and of several other members of the family concerned in this litigation and to the nature of the evidence on both sides, we are of opinion that the Subordinate Judge rightly came to the conclusion that the plaintiff has sufficiently discharged himself of the burden resting upon him.

It is urged for the appellants that the transaction was not a real sale, but only a semblance of it designed to disguise what was really an invalid gift under Muhammadan Law. It is contended on the other hand by the learned Advocate-General that the transaction was in reality a sale and that the suggestion now made is an after-thought. There was no averment that a gift was disguised as a sale in the written statement nor at the time when issues were settled, though there was an assertion in a general way that the sale was fraudulent. Turning to the mode in which the appellants attempted to establish their case, this view appears to us to receive some corroboration. Their witnesses suggested that exhibit A was concocted in Fatima Bibi's name and advantage was taken of her unsound mind. Though they also deposed that the plaintiff was possessed of land which yielded but 23 muras of paddy and 500 cocoanuts, yet there was evidence that the plaintiff's son who took part in this transaction and the plaintiff's brother were men of means and in a position to lend comparatively large sums of money. We also observe that the plaintiff produced evidence to prove the payment of purchase money. His first witness stated that he saw the money paid and his second and third witnesses deposed that Fatima Bibi acknowledged receipt of the purchase money and their evidence is corroborated by a similar acknowledgment endorsed by the Sub-Registrar on exhibit A. Though there is no distinct evidence on the record as to whence plaintiff obtained the specific sum which he paid to Fatima Bibi or as to what Fatima Bibi did with it after it was paid to her, yet we are not prepared to press this circumstance against the plaintiff as we should be disposed to do if the specific form of fraud now

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suggested were suggested in the Court below and the attention of the parties was directed to it before they went into evidence. There is thus positive evidence as to payment of the purchase money; there is the fact that the plaintiff's son and brother were in a position to advance it; there is also the natural presumption that if as alleged it was then known that a gift would be invalid, the parties concerned would avoid a fraudulent contrivance rather than resort to it, and there is further the presumption arising from the appellants' conduct in not impeaching the transaction during the life-time of Bibi Fatima. Again, the appellants falsely imputed to her unsoundness of mind and alleged coercion and undue influence, and did not set up collusion between her and the plaintiff in the Court below. The Subordinate Judge who had the attesting witnesses before him believed them, and we are unable to say that their evidence is unworthy of credit. As regards the pleas of limitation and self-acquisition, the evidence against them which is sufficiently set out by the Subordinate Judge is documentary and appears to us to be conclusive. We have no hesitation in holding that they were properly disallowed. As to the plea to the jurisdiction of the Subordinate Court, it was raised for the first time in appeal. It is not denied that the Subordinate Judge had jurisdiction over the suit when it was filed. As originally framed, it embodied a claim to a share of immovable property situated partly in Mangalore and partly in Bhatkal. The subsequent withdrawal of the claim in regard to the property at Mangalore on the ground that there was a compromise entered into with the defendants who had it in their possession, could not in the absence of a positive rule of law, operate to take away the jurisdiction which had once vested, unless the compromise was shown to have been otherwise than *bonâ fide* and a mere contrivance to defeat or a fraud upon the policy of the rule of procedure as to local jurisdiction. For these reasons we consider that the appeal cannot be supported and we dismiss it with costs.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

1889. March 8, 15.

SUPPAMMAL (PLAINTIFF), APPELLANT,

v.

THE COLLECTOR OF TANJORE AND OTHERS, (DEFENDANTS), RESPONDENTS.*

Charitable endowment—Trust property sold in execution—Rights of heirs of the creator of the trust against execution purchaser.

A trust-deed of certain property executed by a member of a Hindu family provided that neither he nor his heirs should incumber or alienate it but that in case of necessity his heirs might maintain themselves out of the income while administering the trusts of a certain charity. The provisions of the trust were not proved to have been observed by the settlor or his family, and the settlor on one occasion disclaimed the trust. The trust property was attached and sold in execution of personal decrees passed against the settlor and another member of his family. The widow of the latter, after the death of the settlor, sued to recover the land from the execution purchaser as heir to the settlor:

Held, the plaintiff was not entitled to recover the land. *Rupa Jagshet* v. *Krishnaji Govind* (I.L.R., 9 Bom., 169) distinguished.

APPEAL against the decree of Y. Ramasami Aiyangar, Subordinate Judge of Negapatam, in original suit No. 43 of 1885.

Suit by the plaintiff, who was the widow of one Subramanya Chetti, to recover from the execution purchasers certain land which had been sold in execution of decrees obtained against her late husband and one Ponnusami, who was a member of a Hindu family together with him. The land in question was the property comprised in the following instrument, filed as exhibit A:—

"Deed of charity, executed on 12th December 1861, corresponding to 29th Karthigai, Thunmathi year, of Svasti Sri Salivahana Era, 1784, by one Ponnusami Chettiar, son of Subramanya Chettiar, residing at Nagore, Negapatam Taluk.

"The garden, belonging to me by ancestral right, containing many trees, and worth Rs. 1,500, in Kottam, attached to the said Nagore, lies to the west of road, to the east of Thangachi Thiruvasal garden, to the south of lane leading to the said

* Appeal No. 25 of 1888.

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Thangachi Thiruvasal, to the north of Sivanthilinga Chettiar's garden, and is situated within these. For the chuttram, worth Rs. 5,000, built (on it), I have left permanently for the chuttram charities (the following) :— . . . . . Therefore, with the income of the above-mentioned three kinds of lands, the Brahmans who are allowed to reside in the said chuttram should be given food throughout the year, and Brahman travellers who come daily should be given food; giving meals in the woods and other kinds of giving meals should be conducted. Besides, I and, after me, my descendants, in order of seniority, should conduct the repairs of the said chuttram, and tanks, steps, and bridges, belonging to it, and the expenses for the salaries of agent and officers appointed for it. The said charity should be conducted as long as the sun and moon last. Neither I, nor my heirs, have any right to mortgage, hypothecate, sell, &c., the said properties. But, if it sometimes happens that lands can be got which yield greater income than the above-mentioned nunjai, punjai, &c., lands, I only shall have authority to use the present lands as I like, after I buy them (the late lands) and (leave) permanently for the said charity. If an opportunity sometimes happens when my heirs are to live upon the income of the said charity (they) can maintain themselves in addition to conducting the said charity. If any of my heirs do not conduct the said charity properly, and are careless, the Government which has charitable mind, has a duty to make them to conduct the charities properly and to be careful."

(Signed) PONNUSAMI CHETTIAR.
(„) SUBRAMANYA CHETTIAR (son of said person's elder brother).

Ponnusami, the executant of the above instrument, died before suit, and the plaintiff sued as his heir.

The plaint alleged that the charities at Nagore which had been instituted many years previously, were kept up in accordance with the above instrument until 1873, when the land in question was attached and sold as above. The plaint prayed "for a decree "adjudging that she may be put in possession of the said charity "properties on finding that according to the provisions of the "aforesaid deed of charity plaintiff alone is entitled to maintain "the charities."

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In 1874, Ponnusami disclaimed the trust in a petition to the Sub-Collector of Negapatam.

In 1881, the Collector of Tanjore, as Agent of the Board of Revenue, acting under Regulation VII of 1817 (Madras) instituted a suit for the appointment of a proper trustee of the charities and for the delivery to such trustee of the charity lands;—Subramanya Chetti, the plaintiff's husband, was joined as a defendant in the suit, and on his death, which occurred during the suit, she was brought on the record as his representative. The suit was terminated by a decree in the terms of a compromise between the Collector and the execution purchasers who agreed to perform the charities.

The plaintiff now alleged that the decree did not affect her interests, as she was no party to the compromise.

The Subordinate Judge having dismissed the suit, the plaintiff preferred this appeal against his decree.

Rama Rau for appellant.

Subramanya Ayyar and *Ramachandra Rau Saheb* for respondents.

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 (Parker and Shephard, JJ.).

SHEPHARD, J.—The suit is brought to recover property comprised in an instrument executed in 1861 by one Ponnusami (now deceased) a brother of the plaintiff's late husband. The defendants Nos. 2, 3 and 6 are in possession of this property in virtue of sales held under money decrees obtained against the late Ponnusami and his brother Subramanyan. By the instrument of 1861, Ponnusami declared that, with the income of the property, certain Brahmans should be supplied with food throughout the year, and certain other charities should be conducted. It was also provided that the said charity should be conducted for ever, and neither Ponnusami nor his heirs should have any right to mortgage, hypothecate or sell the said property. In case of necessity, his heirs might live on the income, maintaining themselves in addition to conducting the said charity. It is clear that neither Ponnusami nor the plaintiff, Subramanya Chetti's widow, could have any right to recover this property from the auction purchasers except, for the fact, that it has, by the instrument of 1861, been made the subject of a trust. The only question is whether this circum-

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stance gives the plaintiff as one of Ponnusami's heirs any better right than she would otherwise have had. The plaintiff's case is not based on any complaint that the trusts enjoined by the late Ponnusami have been disregarded; for although the defendants aver and have proved to the satisfaction of the Subordinate Judge that they purchased without any notice of the trust, as a matter of fact they have been since the date of the compromise made in the suit of 1881 and are holding the property as property charged with a charitable trust. The question is therefore not whether the property is still so charged in the defendants' hands, but whether the right of managing it and such right of enjoying the surplus profits as may have been reserved to Ponnusami and his heirs can be recovered by his heir. It is not disputed that Ponnusami, had he been alive, could not have maintained this suit; but it is contended that the plaintiff, though she claims in succession to him, does not claim under him and does not sue as his representative. She was no party, it is argued, to the decrees under which the property was sold, and not being a representative of the judgment-debtors, was not bound to sue to set aside those sales, because the sales did not affect her interest in the property. In support of the argument, our attention was called to the case of *Rupa Jagshet* v. *Krishnaji Govind*(1) where it was held that the plaintiff, although he had been sued as representative of his deceased father and brother, and in execution of the decree passed against him the property sued for had been sold, could nevertheless recover it on the ground that it was property held by himself and his brother on trust for a religious purpose. It was considered that the suit was "not one by a party to the suit in which the sale was made to "set aside the sale but one by the trustee of the endowment to "recover the property." I think the case may be distinguished from the present, because there the plaintiff himself had an actual interest in the property sold, being a co-trustee with his brother, and, as he was not in his own person joined as a party to the suit, that interest was not presented for sale and was not affected by the sale. Having regard to the decision of the Privy Council referred to in the argument (*Chowdry Wahed Ali* v. *Mussamut Jumaee*(2)), and the cases following it in this Court (*Arundadhi* v. *Natesha*(3)),

(1) I.L.R., 9 Bom., 169. (2) 11 B.L.R., 149.
(3) I.L.R., 5 Mad., 391.

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none of which are mentioned in the judgment, I think the case is one which presents some difficulty; but, however, that may be, to my mind it is distinguishable by the circumstance I have mentioned. In the present case, at the time when the property was sold, all the persons necessary to be joined in the suit, in order to make the decree binding on the family, were joined as parties, and the plaintiff had then no interest which could entitle her to question the sale. The circumstance that the property had been made the subject of a trust gave certain rights to the persons entitled as beneficiaries, and to that extent, restricted the powers of the holder for the time being. Further than that, in my opinion, the trust makes no difference; the property remained partible and alienable, and the inheritance of it was governed by the ordinary rules (see Mayne's Hindu Law, 4th edition, §. 397, and cases cited). I can see no foundation for the proposition put forward on the plaintiff's behalf, viz., that the heirs taking under the disposition made by Ponnusami come in not merely as his heirs but by virtue of an independent title, or, in other words, that an heir to property burdened with a trust is in any better position than an heir to other property. Regarded as a mere heir of Ponnusami, the plaintiff is clearly not entitled to recover lands which since 1873 have been in the possession of purchasers who took in execution of decree against him and his brother. I have assumed that at the time of the sale there was a valid subsisting trust to which the lands were subject, and it was apparently on that assumption that the defendants agreed to the compromise by which the suit between them and the Collector was determined. It is, however, by no means clear, that there was any such trust. On the 5th issue, the Subordinate Judge finds that the charities mentioned in exhibit A were not in fact performed in the manner directed, and the conduct of the parties exhibited in the fact of mortgaging the property in 1871 goes to prove, as the Subordinate Judge observes, that they never intended to give effect to the provisions of the deed. This mortgage was outstanding at the date of the defendants' decree, and they were compelled to pay it off. It is true, as argued by the plaintiff's vakil, that neglect or breach of trust on the part of the trustees in acting in accordance with the direction of the founder could not have the effect of annulling a properly constituted trust. But in this case, beyond the fact that Ponnusami executed and had registered the instrument A, the evidence so

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far from indicating an intention to constitute a trust goes to show that he and his brother treated the property as their own, available in the ordinary way for the payment of their debts. In my opinion, however, even if the interest of the judgment-debtors was when sold to the defendants subject to the trust imposed by the instrument A, the plaintiff's suit must none the less be dismissed. The fact would still remain that such interest as the judgment-debtors had was saleable and was sold, and that the plaintiff, inasmuch as her claim is based on inheritance alone, cannot say that she possessed any independent interest which did not pass by the sale. For this reason, I would dismiss the appeal with costs.

PARKER, J.—The plaintiff's rights as trustee, if any, could only accrue on the death of her husband, and I agree that she could not succeed to greater rights than her husband possessed at his death. It is admitted that he could not have maintained this suit.

Independently of this, however, I am satisfied that exhibit A was never carried into effect. It was executed by Ponnusami alone and not by plaintiff's husband. Ponnusami disclaimed it in 1874, and there is no evidence that the income of these particular lands has ever been appropriated to the maintenance of the charities and chuttram at Nagore which were in existence long before the execution of exhibit A.

I do not think the trust was ever carried into effect by Ponnusami, and it may be doubted whether he really intended it should be.

I agree, therefore, in dismissing the appeal with costs.

APPELLATE CIVIL.

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

1889. Mar. 18, 19, 29.

MANJAMMA AND ANOTHER (DEFENDANTS Nos. 1 AND 2), APPELLANTS IN S.A. No. 1115 OF 1888,

v.

PADMANABHAYYA AND ANOTHER (PLAINTIFFS), RESPONDENTS,

KITTI (DEFENDANT No. 3), APPELLANT, IN S.A. No. 1158 OF 1888,

v.

PADMANABHAYYA AND OTHERS (PLAINTIFFS AND DEFENDANTS Nos. 1 AND 2), RESPONDENTS.*

Hindu law—Construction of settlement—Successive interests—Contingent gift to a class—Member of the class in existence on failure of prior interest—Rule in the Tagore case.

A *karar* executed to the father of Sitarama, a minor grandson of the executant, after reciting that the executant had appointed Sitarama to perpetuate his family and had handed over certain property to the father, provided that the property should be delivered to Sitarama on his attaining majority and proceeded as follows :—

"If the said Sitarama shall have descendants, neither your male descendants nor "any one else shall have any interest in any of the property herein-mentioned. "If the said Sitarama happen to be without descendants, the male offspring of my "daughter, Kaveramma, your wife, shall enjoy the property equally, but no others "shall have any interest therein; such is the *swatantra karar* executed with my "free will and pleasure."

Sitarama attained his majority but died without issue. His elder brother sued for possession of the property under the above clause :

Held, that since the plaintiff was a person capable of taking subject to the life interest, at the time when the gift was made, he was entitled to succeed.

Semble : If the gift to the plaintiff had failed the property would have reverted to the heirs of the settlor on Sitarama's death without issue. *Ram Lal Sett* v. *Kani Lal Sett* (I.L.R., 12 Cal., 663) followed.

SECOND APPEALS against the decrees of J. W. Best, District Judge of South Canara, in appeal suits Nos. 207 and 213 of 1887, modifying the decree of K. Krishna Rau, District Munsif of Udipi, in original suit No. 219 of 1886.

Suit to recover certain lands to which plaintiff No. 1 claimed

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* Second Appeals Nos. 1115 and 1158 of 1888.

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title under an instrument, dated 25th October 1868, and described as a *swatantra karar*, filed in the suit as exhibit A; plaintiff No. 2 was a demisee of the land in question from plaintiff No. 1.

The relationship of plaintiff No. 1 and the defendants to Subraya, the executant of the *swatantra karar* (translated "deed conferring full rights or independent power") appears from the following genealogy:—

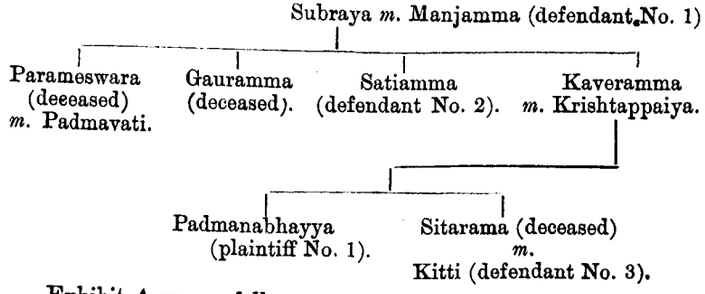

Exhibit A was as follows:—

"Swatantra karar executed on 25th October 1868 by (me) "Subraya, son of Parameswara, Sivalli Brahmin, residing at "Kannar Kudru Kasba village. Kouse Magani, Udipi Taluk, "to Krishnappaiya, my sister's son, and husband of my daughter, "Kaveramma, son of Puttiana Ramappaiya, residing at the said "Kannar Kudru, runs as follows:—

"My son, Parameswara, having died issueless, and, as I am an "old man having no other sons, I have appointed, with my free "will, Sitarama, one of your sons, now aged 7 years, in order to "improve (or continue) my household hereafter, and to perform "all the ceremonies that must take place for me in future, and "have this day made over the undermentioned property to you "with the appointment that until he (Sitarama) comes of age, "yourself, and after he attains majority, the said Sitarama shall "reside in my house carrying on all the charitable actions in my "household which I was hitherto doing, and enjoy the said land.

"Description of the movable and immovable properties made "over:— . . . . . .

"Thus land, buildings, cows, utensils, &c., movable and im-"movable property of the estimated value aggregating Rs. 597, "I have on this date given and put you in possession. You "shall, therefore, enjoy this real property, have the warg and "lavana registry of this real property entered in your name in

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"the Circar until your said son, Sitarama, attains majority, pay "the Government assessment from the ensuing year 1869, and "from the produce of this land, pay annually 2 nijamudis of "paddy for Amirtapady offering at the shrine of Dhurga Para-"meswari Ammah of Kannar Kudru Mutt, and for Jagara Sama-"radane and Arthivadai puja, which take place there in the "months of Ashada Bahula, 12th and Simha months respectively, "as I have done hitherto. You shall also perform mahalia on "the 30th of Bahdrapada Bagula each year in my house from "the profits of this land and maintain me, my wife, and Padma-"vati, the widow of my deceased son Parameswara, so long as "we live and perform our obsequies after (our death), and also "properly maintain Satiamma, my daughter, who has been de-"pendent upon this my land for livelihood. You shall hence-"forward enjoy the said movable and immovable properties as "I have done hitherto until the said Sitarama comes of age, and "after the said Sitarama has attained majority, you should "deliver to him without any objection whatever the aforesaid "land, buildings and movables, and get the warg and lavana "entries of the real property transferred to his name in the "Circar. If the said Sitarama shall have descendants, neither "your other male descendants nor any one else shall have any "interest in any of the property hereinmentioned. If the said "Sitarama happen to be without descendants, the male offspring "of my daughter Kaveramma, your wife, shall enjoy (the pro-"perty) equally, but no others shall have any interest therein, "such is the swatantra karar executed with my free will and "pleasure."

Then follow boundaries.

Plaintiff No. 1 claimed possession on the ground that Sitarama having died without issue, the property devolved on him as sole surviving son of Kaveramma. Defendants Nos. 1 and 2 denied the right of plaintiff No. 1 to alienate the land or to dispossess them. For defendant No. 3 it was claimed that Sitarama had been full owner under exhibit A and had transmitted his right to her.

The District Munsif held that as between plaintiff No. 1 and defendant No. 3 the gift over on the death of Sitarama without issue was good; adding, however, "it is no doubt subject to the "charges of maintenance in favor of defendants Nos. 1 and 2 as

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"provided for in the document." He accordingly passed a decree for the plaintiff.

Against this decree defendant No. 3 preferred appeal No. 207 of 1887, and defendants Nos. 1 and 2 preferred appeal No. 213 of 1887 in the District Court, the plaintiff preferring certain objections against the decree which are not material for the purposes of this report.

The District Judge dismissed both appeals, and modified the decree of the District Munsif in accordance with the plaintiffs' objections.

Defendants Nos. 1 and 2 preferred second appeal No. 1115 of 1888, and defendant No. 3 second appeal No. 1158 of 1888.

Ramasami Mudaliar for appellant in second appeal No. 1115 of 1888.

The provisions of exhibit A cannot be upheld. Under them Sitarama, on coming of age, would have taken a life-estate, and there is a gift over to his descendants, if any, and failing them to the male offspring of his mother—gifts to an unascertained class and not to individuals. But the interest of Sitarama fails, the gift over being bad both for perpetuity, and also as being inconsistent with Hindu law, *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore*(1), *Soudaminey Dossee* v. *Jogesh Chunder Dutt*(2), *Pearks* v. *Moseley*(3).

See also Transfer of Property Act, sections 13, 14, 15 and Succession Act, section 102, which, under the Hindu Wills Act, would apply to a Hindu will.

[*Parker, J.*—Suppose it is conceded that the gift over to the descendants of Sitarama fails, does that prevent the plaintiff from taking] ?

Yes, under the rule in Transfer of Property Act, sections 14 and 15, which is applicable when there is no rule of Hindu law to bar its application. In applying this rule regard must be had to possible events. *Ram Lal Sett* v. *Kanai Lal Sett*(4). Here Kaveramma might have had a son many years after Subraya's death.

[*Parker, J.*, referred to *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*(5).

(1) 9 B.L.R., 377; s.c. L.R., I.A., Sup., Vol. 133.
(2) I.L.R., 2 Cal., 262. (3) L.R., 5 App. Ca., 714, 722-3.
(4) I.L.R., 12 Cal., 663. (5) 9 M.I.A., 123.

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Collins, C.J., referred to the judgment of Wilson, J., in *Ram Lal Sett* v. *Kanai Lal Sett*(1).]

The judgment of Knight Bruce, L.J., in the *Mullick case*(2), is in my favor, and *Ram Lal Sett* v. *Kanai Lal Sett*(1), does not govern this case, it does not carry the matter any further than *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(3), which it follows, and which was decided on facts very different from those of the present appeal. See also *Srimati Bramamayi Dasi* v. *Jages Chandra Dutt*(4), and *Kherodemoney Dossee* v. *Doorgamoney Dossee*(5).

K. Narayana Rau for appellant in second appeal 1158 of 1888.

As soon as the property vested in Sitarama it became his absolutely, and his interest is not affected by the failure of the gift over. It was the intention of Subraya to perpetuate his family, and hence the gift to Sitarama. The property became the self-acquisition of Sitarama. It has not been proved that the plaintiff was alive at the time of the gift.

[*Collins, C.J.*—It seems to have been admitted that he was the elder brother.

Parker, J.—No question arises as to that if the gift over is operative.]

In either view he could not restrain alienations by Sitarama, who took the property absolutely, and on his death it passed to his wife as his heir—*Katama Natchiar* v. *Rajah of Shivagunga*(6), Mayne's Hindu Law, 4th edition, § 487.

Ramachandra Rau Saheb for respondents. Both appeals must fail if the gift over is valid. *Sondaminey Dossee* v. *Jogesh Chunder Dutt*(7) and *Kherodemoney Dossee* v. *Doorgamoney Dossee*(5) are not at variance with *Ram Lal Sett* v. *Kanai Lal Sett*(1), which is an authority applicable to the present circumstances. That case should be followed as it proceeds on the principle laid down by the Privy Council in *Rai Bishen Chand* v. *Mussumat Asmaida*(8).

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

(1) I.L.R., 12 Cal., 663. (2) 9 M.I.A., 123.
(3) L.R., 11 I.A., 164; s.c. I.L.R., 6 All., 560. (4) 8 B.L.R., 400.
(5) I.L.R., 4 Cal., 455. (6) 9 M.I.A., 539.
(7) I.L.R., 2 Cal., 262. (8) I.L.R., 6 All., 560; s.c. L.R., 11 I.A., 164.

MANJAMMA v. PADMANABHAYYA.

JUDGMENT.—The original holder of the plaint property was one Subraya whose only son, Parameswara, predeceased him. On 25th October 1868 Subraya executed a deed called a *swatantra karar* in favor of Sitarama, his younger grandson by his daughter, Kaveramma. The deed is executed to Sitarama's father, Krishnappaiya (Sitarama himself being in 1868 a child of 7 years old), and after providing for the maintenance of Subraya's wife (first defendant), daughter (second defendant) and daughter-in-law Padmavati, enjoins Krishnappaiya to deliver over to Sitarama on his attaining majority the plaint properties. The deed then continues as follows:—

"If the said Sitarama shall have descendants, neither your "male descendants nor any one else shall have any interest in any "of the property hereinmentioned. If the said Sitarama happen "to be without descendants, the male offspring of my daughter "Kaveramma, your wife, shall enjoy the property equally, but no "others shall have any interest therein, such is the swatantra "karar executed with my free will and pleasure."

Sitarama attained majority, but died in 1885, without issue. The third defendant is his widow, and first plaintiff his elder brother who was therefore alive at the date of the swatantra karar in 1868. No other male children have been born to Kaveramma. The second plaintiff is merely a mulgeni tenant under the first plaintiff.

The question for decision is whether the first plaintiff is under the terms of the karar lawfully entitled to take the property on the death of Sitarama without issue. It was contended (1) that the gift over to first plaintiff was invalid as first plaintiff was only one of a class, and (2) that the property had absolutely vested in Sitarama, and that his widow was his heir to his separate property.

Both the Courts below have held that the gift over in first plaintiff's favor was valid and decreed the claim. Defendants Nos. 1 and 2 (widow and daughter of Subraya) appeal in second appeal No. 1115, and third defendant (widow of Sitarama) appeals in second appeal No. 1158 of 1888.

The first point is as to the nature of the interest taken by Sitarama. Having regard to the expression "no others shall have any interest therein" we are of opinion that Sitarama's estate was made defeasible in the event (which has occurred) of the failure of issue living at the time of his death (see *Bhoobun Mohini Debia*

v. *Hurrish Chunder Chowdhry*(1)). If therefore the gift over in the first plaintiff's favor is invalid, the property would revert to the heirs of the donor (defendants 1 and 2) and the third defendant's appeal (second appeal No. 1158 of 1888) must, therefore, be dismissed with costs.

The next point is whether the gift over to first plaintiff and any future male issue of his mother is wholly invalid even as regards first plaintiff himself who was alive at the date of the deed (October 25th, 1868). The learned pleader for the appellants relies upon the following cases:—*Srimati Bramamayi Dasi* v. *Jages Chandra Dutt*(2), *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore*(3), *Soudaminey Dossee* v. *Jogesh Chunder Dutt*(4), *Kherodemoney Dossee* v. *Doorgamoney Dossee*(5), and upon section 15 of the Transfer of Property Act and section 102 of the Indian Succession Act.

As against these we are referred to the more recent decision of the Privy Council in *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(6), and the judgment of Wilson, J., concurred in by Garth, C.J., in *Ram Lal Sett* v. *Kanai Lal Sett*(7).

We do not think that the provisions of the Transfer of Property Act or of the Indian Succession Act will affect the case. In the first place these Acts do not affect any rule of Hindu law, and, secondly, the sections quoted only cause the interest created for the benefit of a class to fail entirely when such interest fails by reason of any of the rules contained in the two preceding sections (which are identical in the two Acts). The present case does not fall within either of those sections.

It may be conceded that the plaintiff's case must fail if the decisions in the earlier Calcutta cases are to be followed; but the question is how far they have been modified by later decisions, and especially by the Privy Council decision in *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(6). That case differs from the present one in that there there was a present gift to a living designated individual capable of taking, followed by actions of a kind which even without a deed might have worked a transfer of property in India. Here on the other hand the gift was

(1) I.L.R., 4 Cal., 23; s.c. L.R., 5 I.A., 138.
(2) 8 B.L.R., 400.
(3) 9 B.L.R., 377; s.c. L.R., I.A., Sup., Vol. 133.
(4) I.L.R., 2 Cal., 262.
(5) I.L.R., 4 Cal., 455.
(6) L.R. 11 I.A., 164; s.c. I.L.R., 6 All., 560.
(7) I.L.R., 12 Cal., 663.

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contingent to a class of persons to be ascertained at the death of Sitarama without issue (which might or might not occur)—a gift to such lawful male issue as might be living at the death without issue of Sitarama, who took only a life estate.

As pointed out by Wilson, J., in *Ram Lal Sett* v. *Kanai Lal Sett*(1) such a gift to a class would be valid under English law, and what we have to consider is, whether there is anything in Hindu law which would make such a gift inoperative either wholly or in part. The *Tagore case*(2) which is relied on by appellant's pleader is authority merely for the proposition that under the special rules of Hindu law the persons capable of taking under a will must be such as could take a gift, *inter vivos*, and must, therefore, either in fact or in contemplation of law be in existence at the death of the testator. This principle would not exclude the first plaintiff, who was in existence at the date of the gift. In *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*(3) it was held by the Privy Council that there was nothing to prevent a Hindu testator devising self-acquired property upon an event which is to happen on the close of a life in being. This is exactly what has been done in the present case, except that the transfer was a gift and not a bequest. The donor gave the property absolutely on the death of Sitarama either to his issue, if any, or failing issue of Sitarama to his brothers, if any, in equal shares. Both in the *Tagore case* and in *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(4), the Privy Council has laid down the principle that the real intention of the donor is to be ascertained and when ascertained is to be carried out to the extent which the law allows. It is not therefore necessary in our opinion to consider whether or not after-born brothers of the first plaintiff would have been excluded provided that first plaintiff himself was a person capable of taking subject to Sitarama's life-estate, at the time the gift was made. It appears to us that he was such a person and that the gift will therefore enure for his benefit even though the gift over to his possible brothers might have been inoperative.

We dismiss the second appeal No. 1115 of 1888 with costs.

(1) I.L.R., 12 Cal., 679, 680.

(2) *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore* (L.R., I.A., Sup., Vol. 133; s.c. 9 B.L.R., 377). [See as to this case and the case next cited, *Kristoromoni Dasi* v. *Narendro Krishna* (in P.C.) I.L.R., 16 Cal., 383, Reporter's note.]

(3) 9 M.I.A., 123.

(4) L.R., 11 I.A., 164; s.c. I.L.R., 6 All., 560.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

THANGAM PILLAI AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

SUPPA PILLAI (PLAINTIFF), RESPONDENT.*

1888. Aug. 2, 14.

Hindu Law—Sudras—Illegitimate son—Suit for partition.

Among Sudras an illegitimate son is entitled to maintain a suit for partition of the family property against his father's legitimate sons: and if his interest is endangered by reason of the property being left under the management of the latter, partition can be claimed during his minority.

SECOND APPEAL against the decree of G. D. Irvine, District Judge of Trichinopoly, in appeal suit No. 42 of 1887, confirming the decree of N. Saminadha Ayyar, Principal District Munsif at Trichinopoly, in original suit No. 733 of 1885.

The plaint stated that the mother of the minor plaintiff (who sued by his mother and next friend) was the concubine of the late father of the defendants, and that the plaintiff was his son; that the plaintiff and his mother had lived under his protection up to the date of his death, and that on his death the defendants refused to protect them and refused to surrender the share of the family property to which the plaintiff was entitled. The plaint prayed for possession of the plaintiff's one-sixth share in the immovable property of the family.

The defendants denied that the plaintiff was the son of their father or was entitled to partition. The parties to the suit were Sudras.

The District Munsif found that the plaintiff was entitled to an illegitimate son's share, and passed a decree as prayed, expressing, however, the opinion that the plaintiff might have claimed a one-fifth share.

The District Judge on appeal upheld the decree of the District Munsif and the defendants preferred this second appeal.

Parthasaradhi Ayyangar for appellants. A partition suit by a minor cannot be maintained unless malversation is proved

* Second Appeal No. 1355 of 1887.

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against the managing members of the family which has not been done here. But in any case a illegitimate son cannot sue for partition; he has not the ordinary rights of a coparcener under Hindu law. *Krishnayyan* v. *Muttusami*(1), *Ranoji* v. *Kandoji*(2), *Parvathi* v. *Thirumalai*(3), *Sadu* v. *Baiza*(4).

Pattabhiramayyar for respondent. The authorities cited do not preclude the present suit, which is against the legitimate sons and not against the father. The illegitimate son is a coparcener with the other sons and has the rights attaching to such a status. *Jogendro Bhuputi* v. *Nittyanund Man Singh*(5). In order to maintain a suit by a minor for partition, it is not necessary to prove malversation: it is enough to show that partition will be for the good of the minor. *Damoodur Misser* v. *Senabutty Misrain*(6), *Kamakshi Ammal* v. *Chidambara Reddi*(7), and cases cited in Mayne's Hindu Law, section 435, 4th edition.

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

JUDGMENT.—The parties to this appeal are Sudras, and the respondent, a minor, claimed partition by his mother and guardian. The plaint stated that he was appellants' illegitimate brother, that the appellants refused to maintain him, and that though partition was demanded on several occasions, yet it was refused. The appellants denied that the respondent was their brother, and contended that his mother was a married woman. It was found by the Courts below that respondent's mother was the continuous concubine of the appellant's father, and that she was not married to another person, and that respondent was entitled to one-fifth share, though he claimed only a sixth share. A decree was accordingly passed in his favour for one-sixth share, and two objections are taken to the decree in second appeal, viz., (1) that an illegitimate son is not entitled to sue for partition, and (2) that no partition can be claimed during his minority without proof of malversation on the part of his legitimate brothers.

(1) I.L.R., 7 Mad., 407.
(2) I.L.R., 8 Mad., 557.
(3) I.L.R., 10 Mad., 334.
(4) I.L.R., 4 Bom., 37.
(5) I.L.R., 11 Cal., 702.
(6) I.L.R., 8 Cal., 537.
(7) 3 M.H.C.R., 94.

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The parties to this appeal are governed by the Mitakshara law. The Smriti of Yagnavalkya directs that "if the father be dead, the brethren should make him (illegitimate son) partaker of the moiety of a share"(1). The author of the Mitakshara commenting on the Smriti says: "If there be sons by the wedded wife, let these brothers allow the illegitimate son half an allotment"(2). The other commentaries of authority in the South give a similar direction and see Vyavahara Mayukha, chapter IV, section IV, paragraph 32(3): Sarasvati-vilasa, sloka 395(4): Madhaviya, paragraph 33(5). In *Rajagopala* v. *Dorasami*(6), this Court recognised the right of an illegitimate son to sue for his share, and the contention that he can claim a share only if his legitimate brothers divide, is not only unreasonable, but is also at variance with the Mitakshara. The text states that when the father is alive, he takes a share by his choice, but directs that after the father's death, his illegitimate (sons) brothers *should* give him moiety of a son's share. It is true that in *Ranoji* v. *Kandoji*(7) and *Krishnayya* v. *Muttusami*(8) this Court held that he was not entitled to claim partition of ancestral estate either from his father's brother or the son of such brother. But those decisions proceeded on the view that he had no claim by survivorship against his father's coparceners by *jus representationis*, and that he was neither a co-heir with his father nor a sapinda in relation to his father's coparceners. It was also observed in the case of *Ranoji* v. *Kandoji*(7), in *Rajagopal* v. *Dorasami*(6), and in *Parvathi* v. *Thirumalai*(9), that the ordinary incident of the *status* of an illegitimate son was a right to be maintained; that among Sudras, a specific share was allotted as a special case on account of the limited importance attached to ceremonial offerings rather than a recognised laxity of marriage tie, and that the inferiority of his *status* in the family was marked by reducing his share and making him a co-heir with the legitimate daughter and her son. It was nowhere held that he was entitled to the share allotted to him only by the choice of his legitimate brother, and that he could not recover that

(1) Yajanavalkya, chapter II, paragraphs 133*a*, 134, Mandlik's edition, p. 220.
(2) Mitakshara, chapter I, section XII, paragraphs 1 and 2, Colebrooke, edition of 1870, pp. 330, 331.
(3) Mandlik, p. 47.
(4) Foulkes' translation, p. 80.
(5) Burnell's translation, p. 24.
(6) Appeal No. 84 of 1885, unreported.
(7) I.L.R., 8 Mad., 557.
(8) I.L.R., 7 Mad., 407.
(9) I.L.R., 10 Mad., 334.

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share by insisting on partition. As regards the second objection, there is the averment in the plaint that the respondent was not maintained. The appellants persistently denied in the suit that the respondent was their brother, and that he was the offspring of adulterous intercourse. We cannot say that the respondent's interest in the joint property was not in danger at the date of the suit in being left under the management of the appellants.

We dismiss this second appeal with costs.

APPELLATE CIVIL.

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

1889. Mar. 12, 22.

THE COLLECTOR OF SALEM (DEFENDANT No. 3), APPELLANT,

v.

RANGAPPA (PLAINTIFF), RESPONDENT.*

Jurisdiction—Suit to cancel patta of Government waste issued by Collector—Power of Collector to cancel patta granted by him—Standing Order.

The plaintiff having obtained from the Revenue officers of the district a patta of Government waste, sued for the cancellation of a patta for the same land subsequently granted to other persons by the Collector who considered that the issue of the plaintiff's patta was not in accordance with the darkhast rules:

Held, (1) it was not competent to the Collector to issue the second patta in supersession of that issued to plaintiff.

(2) it was competent to a Civil Court to pass a decree declaring the second patta null and void, and the plaintiff was entitled to such a decree. *Kullappa Naik* v. *Ramanuja Chariyar* (4 M.H.C.R., 429), followed.

SECOND APPEAL against the decree of C. W. W. Martin, District Judge of Salem, in appeal suit No. 294 of 1886, affirming the decree of P. Ayyavayyar, District Munsif of Namakal, in original suit No. 221 of 1886.

The plaintiff stated that he had obtained from the Collector of Salem, defendant No. 3, a patta for certain land, and sued to cancel a patta granted subsequently by defendant No. 3 to defendants Nos. 1 and 2 for the same land.

* Second Appeal No. 1104 of 1888.

COLLECTOR OF SALEM v. RANGAPPA.

Defendants Nos. 1 and 2 pleaded that the Court had no jurisdiction to pass the decree prayed for on the ground that the land in question was Government waste, and that the Collector had full power to dispose of it under the darkhast rules. Defendant No. 3 pleaded that the issue of the patta to the plaintiff was not in accordance with the rules and was the result of a mistake and that the Government had right to cancel it.

The District Munsif held, on the authority of *Rajagopala Ayyangar* v. *Collector of (Chingleput)*(1) and *Subbaraya* v. *The Sub-Collector of Chingleput*(2), that the Collector had no power to cancel the patta granted to plaintiff and accordingly passed a decree declaring that the patta granted to defendants Nos. 1 and 2 was null and void. This decree was affirmed on appeal by the District Judge.

Defendant No. 3 preferred this second appeal.

The *Acting Government Pleader* (*Subramanya Ayyar*) for the appellant.

Thiruvenkata Charyar for respondent.

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 Shephard, J.).

JUDGMENT.—Two questions were argued in this appeal, viz., (1) whether it is competent to a Civil Court to make a decree declaring a patta issued by a Collector void, and (2) whether it was competent to the Collector to issue a patta to the second defendant in supersession of that issued to the plaintiff. We think the decision in *Kullappa Naik* v. *Ramanuja Chariyar*(3) is a distinct authority with regard to the first question. There the plaintiffs claimed by virtue of their preferential right, as Mirasidars, to the occupancy of waste land and they prayed for, and obtained, the cancellation of a patta issued by the Collector to third persons. That decree was affirmed on appeal in the High Court. Following this decision we think the first question must be answered in the affirmative. With regard to the other question, it has to be seen how it came to pass that the Collector issued a second patta. The plaintiff obtained a patta in his favor in May 1884. In March of the following year, there was an appeal by the second defendant and

(1) 7 M.H.C.R., 98. (2) I.L.R., 6 Mad., 303. (3) 4 M.H.C.R., 429.

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the patta was cancelled on the ground that the darkhast had not been properly published in the village. It is not disputed that the plaintiff had taken possession and is in possession under his patta. It is observed by the District Munsif that, according to the rules, no appeal can lie after the issue of a patta, or as the Judge puts it, that a patta can be issued only after the expiration of the time allowed for appeal. This view seems to be borne out by rule 10, printed at page 37 of the Standing Orders(1). It is not pretended that the patta issued to the plaintiff was issued conditionally, or that it was issued by an officer not competent to act in the matter. Nor is it alleged in the written statement that there was any fraud practised by the plaintiff on the defendant or the Collector. The case was simply one of mistake; the Tahsildar would not have issued the patta had he known all the facts. In our opinion allegation and proof of such mistake does not justify the cancelment of a patta issued by a competent officer in favor of one who has come into occupation of the land under it, when once possession has been taken under a patta unconditionally issued by a competent officer the pattadar can, we think, be evicted only under the provisions of the Revenue Act. Under these circumstances as the settlement with the defendant and the granting of a patta to him may have prejudiced the plaintiff's title, he was entitled to maintain the suit and we therefore dismiss the appeal with costs.

(1) Standing Order of the Board of Revenue, No. 32, "Disposal of assessed lands," paragraph 10.—"Applications admitted by the Tahsildar are to be considered only conditionally granted, pending an appeal from any party, either to the Divisional officer, or to the Collector. From the Tahsildar's decision an appeal will lie to the Divisional officer if made within thirty days. As in the case of appeal in a civil suit the days will be reckoned from, and exclusive of, the day on which judgment was pronounced, and also exclusive of such time as may have been requisite for obtaining a copy of the decree appealed against. The date of the decision, the date of application for copy, and the date of copy being ready for delivery, should all be posted up on the back of the copy by the Tahsildar, with a note of the day on which appeal time expires. An appeal may be admitted after the period of limitation in this order prescribed for that purpose when the appellant satisfies the appellate authority that he had sufficient cause for not presenting the appeal within such period, and provided that a patta has not been issued for the land by a competent officer. Any person interested in the matter may appeal. A special appeal will lie from the decision of the Divisional officer to the Collector of the district. The time allowed will be thirty days, with the same provisions. In the case already named, a third appeal to the Board of Revenue will not be allowed; but in cases where a Collector has passed the decision on appeal from a Tahsildar within his own division, a special appeal will lie to the Board if made within forty days, that is to say, if the petition is received at the Board's office within that time, reckoning as aforesaid."

APPELLATE CIVIL.

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

VENKATAPPAYYA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

THE COLLECTOR OF KISTNA (DEFENDANT No. 2), RESPONDENT.*

1889. March 5. April 29.

Act VII of 1865 (*Madras*), *s.* 1—*Water-cess—Overflow from Government works —water supplied or used for purposes of irrigation.*

Surplus water from Government irrigation works flowed on to land of the plaintiffs which they were in the habit of cultivating with dry crops and stagnated there rendering such cultivation impossible. The plaintiffs did not want the water to flow on to their land, but being unable to exclude it, planted paddy as the best crop to cultivate under the above circumstances. Water-cess was levied on the plaintiffs under color of Act VII of 1865:

Held, the water was not supplied or used for purposes of irrigation within the meaning of Act VII of 1865, s. 1, and the plaintiffs were not liable to pay the water-cess.

SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in appeal suit No. 292 of 1886, reversing the decree of M. B. Sundara Rau, District Munsif of Bapatla, in original suit No. 50 of 1886.

Suit to declare that the plaintiffs were not liable to pay a water-cess, and to recover a sum of money paid by them as water-cess under protest. The circumstances giving rise to this suit appear sufficiently for the purpose of this report from the following judgment.

The District Munsif passed a decree for the amount sued for and declared that, "so long as the drainage water of its own "accord inundates and stands on the plaintiffs' land without any "action on plaintiffs' part to bring it on to it, they are not liable "to be assessed with water-tax."

The District Judge reversed the decree of the District Munsif holding it to be immaterial, "that an individual may be unwilling "to take water and that the water comes to his field against his

* Second Appeal No. 1148 of 1888.

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"wish, and that Government have a legal right to levy wet rates "upon every field the water reaches."

The plaintiffs preferred this second appeal.

Subba Rau for appellants.

The *Acting Government Pleader* (*Subramanya Ayyar*) for respondent.

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 Muttusami Ayyar, J.).

JUDGMENT.—The appellants hold land at Zupudi in the Bapatla Taluk of the Kistna District, and it was formerly cultivated with dry crops. Lately, the villages lying above Zupudi were irrigated from the Krishna canal, and the excess water flowing from them submerged the appellants' land and stagnating upon it, rendered it impossible to raise dry crops. The appellants could not prevent the water from flowing to their land except by erecting a dam at a heavy cost and they did not do so. In Fasli 1294 they showed a species of paddy, called tiruvarangam paddy, and thereby attempted to raise a crop which might not perish from the land being inundated with excess water in the months of October and November. According to the evidence the crop failed that year and yielded no profits owing to the inundation. The Collector levied water-cess at 2 rupees per acre under (Madras) Act VII of 1865, and the appellants paid it under protest and brought the present suit to obtain its refund. The contention for the respondent was that tiruvarangam being a wet crop, the water-tax of Rs. 2 per acre was imposed on the land in accordance with rule and the practice of the district. It was alleged for the Collector that the excess water flowed on to appellants' land, stagnated upon it, that no wet crop could be raised upon it solely with the aid of rain water, and that the appellants cultivated tiruvarangam crop in the expectation that excess water would flow on to their land, and utilized the excess water when it did flow as anticipated. But the appellants denied their intention to depend on drainage water, and the District Munsif found that, although the crop might be planted without the aid of the surplus water, it could not ripen and grow well without such aid. He observed, however, that in Fasli 1294, the appellants sustained loss rather than derived any benefit. On appeal, the Judge concurred in the finding that the rice crop could not have been raised on the land in question by

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rain water alone. The District Munsif considered that the appellants were not liable for water-cess, but the Judge held that no option was given to cultivators under the Act; that the water was either supplied or used; that Madras Act VII of 1865 only declared the existing revenue practice, and that they were liable for water-cess whenever water was supplied or used. On this ground he was of opinion that it was immaterial that the appellants were unwilling to take the water, and that it came on to their land against their wish, and that the Government had a right to levy wet rates upon every field the water reached, and he dismissed the suit with costs. It is urged in second appeal (1) that no water-cess could be lawfully levied under Madras Act VII of 1865, (2) that water was neither supplied nor used voluntarily, (3) that in the circumstances of this case, the levy of water-cess was not in accordance with revenue practice or custom, and (4) that it was competent to the Civil Courts to take cognizance of the suit.

The water-cess in question was levied under Madras Act VII of 1865, and it is therefore competent to the Civil Courts to see whether it was levied in accordance with the provisions of that Act. It is provided by section 1 that "whenever water is sup-"plied or used for purposes of irrigation from any river, stream, "channel, tank, &c., or work belonging to, or constructed by, "Government, it shall be lawful for the Government to levy at "pleasure on the land so irrigated a separate cess for the use of "the water, which cess shall be additional to any land assessment "that may be leviable on the said land as unirrigated or punjah; "and the Government may prescribe the rules under which, and "the rates at which, such water-cess as aforesaid shall be levied, "and alter or amend the same from time to time."

The point for decision is whether water was, upon the facts found in this case, either supplied or used within the meaning of the section. The appellants did not apply for the water, and it was not allowed to flow to their land by reason of such application, and we cannot therefore say that water was supplied, inasmuch as the expression implies in its ordinary sense a previous request express or implied. Was it then used? The term ordinary presupposes freedom either to use or to abstain from using the water, and the language of the section does not suggest an intention to exclude this freedom. The preamble states that large expenditure has been, and is still being, incurred in the construction and

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improvement of works of irrigation and drainage to the great advantage of proprietors and tenants of land, and that it is right and proper that a fit return should, in all cases alike, be made to Government on account of the increased profits derivable from lands irrigated by such works. It discloses only an intention that those who obtain a supply or use the water in view to deriving increased profits should be under an obligation to pay the water-cess. Can it be said when the Government or one or more of its tenants to whom water is supplied for profit, inundates a raiyat's dry land against his will for about two months every year, and thereby renders it unfit for dry cultivation, and when the raiyat in endeavouring to use his land sows tiruvarangam paddy trusting to the precarious chance of raising a crop which may grow in spite of the inundation, and when that crop fails, that he uses the water in view to profit by it? If he uses it, he uses it as the only mode of repairing the injury to his land and averting the loss likely to arise from it, and we cannot say that he uses the water within the meaning of the Act, if regard is to be had to the rule that the construction we are bound to place upon statutes must be reasonable. It is urged by the Government Pleader that the appellants may recover compensation for the injury done to their land from the party who is answerable for it, and that they must be taken to use the water within the meaning of the Act; though their land is flooded against their will and though tiruvarangam paddy was sown because there was a chance of its yielding a crop notwithstanding the inundation. We are unable to accede to this contention. If it were to prevail, the Government might be enabled to take advantage of their own wrong if they were under an obligation to protect the appellants' land against its being periodically flooded with the water which they bring in the canal. If holders of lands above Zupudi are the cause of the injury and are liable for the loss arising therefrom, even then the Government would be in the position of a landlord who supplies water to his tenant for their mutual profit with the knowledge that the tenant usually allows it to inundate the land of another tenant and to stagnate thereon so as to become a nuisance and without arranging for the abatement of the nuisance or providing against its recurrence. In either view of the case, we must decline to accept the suggestion. The reasonable construction is that the use contemplated by the Act is a voluntary use, though not preceded by an application, and

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that it presupposes a freedom either to take or refuse the water. We are aware of no usage whereby a raiyat's land can be held to be lawfully inundated every year. We are unable to concur in the opinion of the Judge that the appellant used the canal water within the meaning of Madras Act VII of 1865.

It is then urged that the Collector was at liberty to claim wet assessment on the ground that a wet crop was raised, that a wet assessment was due by virtue of the right of the Crown to a share of the produce, and that any assessment imposed or levied in the exercise of the prerogative of the Crown is not open to be revised by a Court of Justice. But it is not denied that the water-cess was levied under the color of the Act in the case before us, and it is not therefore a case in which either a share of the wet crop has been claimed or a wet assessment has been demanded as an equivalent by virtue of the prerogative of the Crown. When a special cess is demanded in the professed exercise of a special power conferred by a legislative enactment and when that enactment directs when and how it is to be collected, Courts of Justice are bound to see that the power is exercised in accordance with the provisions of the Act, unless their jurisdiction is expressly or by necessary implication taken away by the Act.

We set aside the decision of the Judge and restore that of the District Munsif with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

SRINIVASA (PLAINTIFF), APPELLANT,

v.

DANDAYUDAPANI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1889. April 24. May 1.

Hindu law—Will—Gift to class—Vested and contingent interest.

A will, made by a Hindu, contained the following clause: "I bequeath to my elder daughter Rs. 25,000, subject to the condition that she shall invest the same in lands . . shall enjoy the produce . . and shall transmit the *corpus* intact to her male descendants."

* Appeal No. 165 of 1888.

SRINIVASA v. DANDAYUDAPANI.

Within a month after the testator's death his eldest daughter was delivered of a son, who died in a few months. She died subsequently, leaving the plaintiff, her husband, but no male issue her surviving. The plaintiff sued as heir of his son to recover the amount of the above bequest:

Held, that as the daughter's son never acquired a vested interest in the bequest, the plaintiff's suit must be dismissed.

APPEAL against the decree of K. R. Krishna Menon, Subordinate Judge at Tanjore, in original suit No. 22 of 1887.

The plaintiff sued as the heir of one Chinnasami deceased, to recover Rs. 25,000 and interest from the estate of N. Subramanya Ayyar deceased, under his will and codicil dated respectively 24th October and 1st November 1884.

The testator died on 1st November 1884, leaving his widow, two daughters, and an adopted son named Sundram, who was joined as defendant No. 3 in this suit. The elder daughter Subbalakshmi Ammal, the wife of the plaintiff, on the 20th November 1884, gave birth to a son, who died on 15th July 1885; and on 14th May 1886 Subbalakshmi Ammal died, leaving no male issue surviving her. The plaintiff claimed as heir to Chinnasami, the infant son mentioned above.

By the will referred to above the testator appointed defendants Nos. 1 and 2 to be executors, and made bequests (among others) in the following terms:—

"1. The jewels of my house, excepting my personal ornaments, shall be divided equally between my two daughters, and they shall absolutely enjoy their respective shares.

"2. I bequeath to my second daughter the lands I own in the village of Malathukuruchy, Kombakonam taluk, the bungalow in Govinda Row's Street, Kombakonam, and the site I bought of one Ramachandra Ayyar in the same street, to be enjoyed by her during her life-time without power of alienation, and to be transmitted to her male descendants on her death.

"3. I bequeath to my elder daughter Rs. 25,000 (twenty-five thousand), subject to the condition that she shall invest the same in lands or Government promissory notes, shall enjoy the produce or interest accruing thereon, and shall transmit the *corpus* intact to her male descendants.

"4. The lands held by me in the village of Thennalore, Kombakonam taluk, have been already gifted to my elder daughter, and those in the village of Nazahudy, Kombakonam taluk, to my

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younger daughter, and they shall enjoy their respective donations absolutely."

The will further provided for the payment of Rs. 3,000 to the testator's sister as stridhanam; and the residue of the testator's property was bequeathed to Sundram.

The question raised in the present suit was whether the plaintiff was entitled to the sum of Rs. 25,000 disposed of in clause 3 of the will as heir to his son Chinnasami. The Subordinate Judge answered this question in the negative, saying:—

"It is clear from the words used that the testator intended to "create a life estate in favour of his daughter and a remainder to "her male descendants, and whether he intended to create a "vested remainder or contingent one is the sole question for "consideration. If the bequest in question created a vested "remainder, the residuary estate became vested in Chinnasami at "the death of the testator, and upon his death it passed to the "plaintiff. If on the other hand a contingent remainder alone "were created, it could not take effect till after the death of the "life-tenant, and Chinnasami having predeceased her, took no "interest whatever and passed none to the present plaintiff..... "Subramania Ayyar could have hardly intended to create a vested "remainder in favour of persons who were not then in existence. "It is true that Chinnasami was then in existence in contempla-"tion of law, but the bequest is not made to a single descendant "of Subbalakshmi Ammal, but to her descendants as a class. "The use of the plural shows that one person of a class was not to "take the whole, but all the members thereof were to enjoy it "equally. If the remainder be regarded as a vested one, this "intention of the testator to benefit them equally would have been "completely defeated, seeing that, in that case, the male descend-"ant, who was in existence at the death of the testator, will alone "become the remainder man, and that the after-born sons of "Subbalakshmi Ammal will altogether be excluded. This the "testator never intended. He himself was a good lawyer and "cannot therefore be expected to have made a disposition to which "no effect can be given in the manner he intended. He must "have known that a bequest to a class of persons, some of whom "were at least incapable of taking as they were not in existence, "would be wholly invalid under the Hindu law of gifts. If it be "shown, on the other hand, that he intended to create a contingent

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"remainder, it would precisely be the same as the estate of a "daughter's son under the Hindu law. During the life-time of "the daughter, the daughter's sons have no vested interest in the "property, and upon her death they take it jointly, and as a "general rule she is to transmit the *corpus* intact to them. This "is precisely what the testator directed in his will, and this is "rendered more clear by the preceding disposition in favour of "the younger daughter, and I am therefore of opinion that he "intended to create a mere contingent remainder, which was to "take effect only upon the death of the life-tenant. Chinnasami "having predeceased her, he acquired no right whatever, and "consequently the plaintiff, as his heir, has no right to ask for "the legacy, and upon this ground I dismiss the suit with costs."

The plaintiff preferred this appeal.

Ramachandra Rau Saheb (with Mr. *N. Subramanyam*) for appellant.

Though Chinnasami was not actually in existence at the time of the testator's death, he was at any rate in contemplation of law in existence at such time, and was therefore not debarred from taking the benefit of any devise in his favour. *Juttendromohun Tagore* v. *Ganendromohun Tagore*(1).

The next point is whether Chinnasami was prevented from taking by reason of the provisions of section 102 of the Indian Succession Act under the rule that where a devise is made to a class of persons and it fails in regard to a portion of the class it fails in regard to the whole.

The Privy Council in *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(2) regret the extension of the provisions of sections 100, 101, and 102 of the Indian Succession Act to Hindu wills. In any case section 102 applies only where the devise fails with regard to a part of the class by reason of the violation of the rules contained in the preceding sections. The present case does not fall within either of those sections and therefore section 102 does not apply. Moreover the Hindu Wills Act is made applicable only to wills made in the Presidency town, whereas the will under consideration is a mufassal will. *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(2) and *Ram Lal Sett* v. *Kanai Lal Sett*(3) (which merely follows the

(1) 9 B.L.R., 377; s.c. L.R., I.A., Sup. Vol., 133.
(2) I.L.R., 6 All., 560; s.c. R.L., 11 I.A., 164.
(3) I.L.R., 12 Cal., 663.

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former case) are authorities for the proposition that the intention of a testator must be given effect to so far as is possible, and that though a part of a class to whom a devise is made could not take, the rest, if otherwise competent, could take the benefit of the devise.

The third question is whether Chinnasami took a vested interest capable of being transmitted to his heirs so as to give the present plaintiff a right to sue. If Chinnasami was capable of taking, and did take, a beneficial interest in the devise, the mere fact of his enjoyment being postponed to a prior life interest, could not make his interest a contingent one. The words, at or after the death of the person, do not denote the condition that the legatee shall survive such person, but only mark the time at which the legacy shall take effect in possession. The bequest should, therefore, be construed to mean a vested remainder. Chinnasami's interest being thus a vested remainder, the plaintiff is entitled to succeed. See *Rewun Persad* v. *Mussumat Radha Beeby*(1), *Hallifax* v. *Wilson*(2), and *Blamire* v. *Geldart*(3). The Subordinate Judge has failed to draw the distinction between vesting in possession and vesting in interest, and hence all the confusion in the judgment between vested and contingent remainders. The possession alone was postponed, but the interest accrued immediately. Williams on Real Property, 241, 244, 252, and 7th edition of Williams' Executors, Vol. II, pp. 1239, 1244-5, 1247-8.

Reference was also made to Sugden's Law of Property, pp. 286, 287 and to *Mussumat Bhoobum Moyee Debia* v. *Ram Kishore Acharj Chowdhry*(4), *Visalatchi Ammal* v. *Annasamy Sastry*(5). *Raikishori Dasi* v. *Debendra Nath Sircar*(6).

Bhashyam Ayyangar for respondents.

As to the Rs. 25,000 the intention of the testator was either (1) to create a daughter's estate or (2) to create an estate unknown to Hindu law. But reading clauses 3 and 4 of the will together it would appear that having already given stridhanam to his daughter he desired to make a further provision of the same nature. See *Lakshmibai* v. *Hirabai*(7), on appeal *Hirabai* v. *Lakshmibai*(8) where it is laid down that no further departure

(1) 4 M.I.A., 137.
(2) 16 Ves. Jun., 168.
(3) 16 Ves. Jun., 314.
(4) 10 M.I.A., 279.
(5) 5 M.H.C.R., 150.
(6) I.L.R., 15 Cal., 409.
(7) I.L.R., 11 Bom., 69, 72.
(8) I.L.R., 11 Bom., 573, 579.

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from Hindu law is to be presumed than is clearly expressed. See also *Mahomed Shumsool* v. *Shewukram*(1), *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*(2), *Mussumat Bhoobum Moyee Debia* v. *Ram Kishore Acharj Chowdhry*(3), *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore*(4).

It is enough for me to show that there is not a devise to the son such that the plaintiff as his representative could take under it. But I go further and show that the gift to the daughter conferred on her a daughter's estate. Taking together the two principles, that the testator can make a valid devise, and that he cannot create an estate unknown to Hindu law, it follows that in spite of the existence of his widow and his adopted son he can make for his daughter, either a daughter's estate or an absolute estate, but in neither case can he prescribe a peculiar mode of succession on her death, so as to preclude the ordinary rules of stridhanam descent. If the attempt was made to prescribe a novel mode of descent I say the daughter would take a life estate, and as to the reversion no question need arise here because the adoptive son is the residuary legatee.

It is erroneous to suppose that a daughter's son's son is no heir under Hindu law. *Rewun Persad* v. *Mussumat Radha Beeby*(5) proceeded on a different set of facts. There was definite devise to definite persons. *See* Succession Act, section 106. Both parties proceeded on the assumption that the devise was vested, and the decision went on the ground that there was division between the two brothers. *Rai Bishen Chand* v. *Mussumat Asmaida Koer*(6) was a case of a devise to a class: specific members of a class may take although a gift to a class as such would fail. *Soudaminey Dossee* v. *Jogesh Chunder Dutt*(7), *Kherodemoney Dossee* v. *Doorgamoney Dossee*(8), *Ram Lal Sett* v. *Kanai Lal Sett*(9). After-born sons would not take. *Raikishori Dosi* v. *Debendra Nath Sircar*(10).

The passage in II Williams on Executors, pp. 1247-8, referred to for appellant shows that even assuming the *corpus* went

(1) L.R., 2 I.A., 7, 14. (2) 9 M.I.A., 123. (3) 10 M.I.A., 279.
(4) 9 B.L.R., 377; s.c. L.R., I.A., Sup. Vol., 133.
(5) 4 M.I.A., 137. (6) I.L.R., 6 All., 560; s.c. L.R., 11 I.A., 164.
(7) I.L.R., 2 Cal., 262. (8) I.L.R., 4 Cal., 455.
(9) I.L.R., 12 Cal., 663. (10) I.L.R., 15 Cal., 409.

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to the daughter only, her children alive at the death of the testator would take after her.

To sum up:—(i) There was no devise to Chinnasami. It would be absurd to take it that the testator wished to make the daughter's children legatees with a life estate interposed, because the one alive at the testator's death would take, and if he died either before or after the daughter, and he left a widow, the widow would take in preference to all others of the daughter's sons. (ii) The testator could make daughter's estate prescribing a line of succession to be construed as a reasonable limitation in conformity with Hindu law; he wanted only to make it plain that it was not to be stridhanam. (iii) Taking it at the worst for the respondents it was on the appellant's case a devise of the income to the daughter and of the *corpus* to her children after her death.

Ramachandra Rau Saheb in reply.

The words are plain, "to enjoy for life and transmit to descendants." The argument for the respondents is that only the sons of Subbalakshmi should take: but the word descendants include son's sons, and the testator's intention was clearly that an interest should vest on the birth of each of the daughter's children, thus there would be a deviation from Hindu law. The case is governed by *Rewun Persad* v. *Mussumat Radha Beeby*(1), which proceeded on two grounds, one of which was because the gift was a vested gift (*see* especially at p. 173 of the report) and not by *Sreemutty Soorjeemoney Dossee* v. *Denobundo Mullick*(2) and *Mahomed Shumsool* v. *Shewukram*(3), which was decided with reference to a very different set of facts.

The rule that the whole bequest fails on failure of a part is new and foreign to Hindu law, and section 102 of the Succession Act only applies when the provisions of sections 100 and 101 are contravened. See *Ram Lal Sett* v. *Kanai Lal Sett*(4), and also *Manjamma* v. *Padmanabhayya*(4).

This appeal having stood over for consideration, their Lordships delivered the following judgments:—

WILKINSON, J.—It is argued in appeal that exhibit A, the will executed by N. Subramanya Ayyar, has been misconstrued

(1) 4 M.I.A., 137. (2) 6 M.I.A., 526.
(3) L.R., 2 I.A., 7. (4) *Ante*, p. 393.

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and that the Lower Court ought to have held that Chinnasami took a vested interest under the will.

The portion of the will which has to be interpreted runs thus: "I bequeath to my elder daughter Rs. 25,000, subject to the condition that she shall invest the same in lands or Government promissory notes, shall enjoy the produce or interest accruing thereon, and shall transmit the *corpus* intact to her male descendants."

The will bears date 24th September 1884. It was confirmed by a codicil executed on the day of the testator's death, 1st November 1884. The testator's elder daughter, on 20th November 1884, gave birth to a son, Chinnasami, who died on 15th July 1885. The daughter herself died on 14th March 1886, and the plaintiff, her husband, now claims the estate purchased as the heir of his son Chinnasami.

It is argued on behalf of the appellant that Chinnasami was a legatee under the will and that the right to receive having become vested in him on the testator's death, it passed to his representative, he having died without receiving the legacy. There might be force in the argument if the testator had in any way specified Chinnasami as the legatee, but what he did was to bequeath certain money to his daughter subject to the condition that she should invest the same and transmit the *corpus* intact to her male descendants if she had any. The ascertainment of the persons to whom the estate was to descend in succession to the daughter was postponed until the death of the daughter. Now on the death of the daughter there were no male descendants of hers capable of taking, and the bequest therefore was void and the property reverted to the family of the donor.

Moreover, it is contended on behalf of the respondents that the will of a Hindu must not only be construed consistently with Hindu law, but that in the absence of express words showing such an intention, a devise to a daughter does not confer an estate of inheritance, but only carries a daughter's estate as understood by Hindu law. The testator made three bequests to each of his two daughters. In the first place he directed his household jewels to be divided equally between them and to be taken by them as their absolute property. He also confirmed certain gifts of land already made to them, declaring the property to be theirs absolutely. Thirdly, to his eldest daughter he bequeathed as above

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noted Rs. 25,000 to be invested by her in land or Government paper with remainder over to her male descendants, if any; and to his younger daughter he bequeathed certain land to be enjoyed by her during her life without power of alienation and to be transmitted to her male descendants. If the testator by these provisions did not intend to create a daughter's estate as known in Hindu law, then he must have intended to create an estate which is unknown to Hindu law, and so far his devise would be null and void. The testator left a widow and an adopted son who was appointed residuary legatee. He left certain property to his daughters absolutely which property would descend as stridhanam. But the property which he left to his daughters for their life would on the death of the daughter revert to her father's heirs. As remarked by the Privy Council, "if a private individual attempts by will to make property heritable otherwise than the law directs, the gift must fail," and it is well established that the estate of a daughter exactly corresponds to that of a widow, both in respect of her restricted power of alienation and to its succession after her death to her father's heirs and not her own—*Sengamalathammal* v. *Valayuda Mudali*(1), *Kattama Nachiar* v. *Dorasinga Tevar*(2), *Ram Lal Mookerjee* v. *Secretary of State*(3). The devise of the daughter's estate to her male descendants was therefore contrary to law and as such void.

On these grounds I would affirm the decree of the Lower Court and dismiss this appeal with costs.

SHEPHARD, J.—The plaintiff claims, as the heir of one Chinnasami, deceased, property in which Chinnasami is alleged to have acquired an interest under the will of his grandfather, N. Subramanya Ayyar.

The latter's will was made on the 24th September 1884, and by it the defendants are appointed executors. The testator died on the 1st November 1884. The clause of the will under which the plaintiff claims is as follows:—"I bequeath to my elder daughter Rs. 25,000, subject to the condition that she shall invest the same in lands or Government promissory notes, shall enjoy the produce or interest accruing thereon, and shall transmit the *corpus* intact to her male descendants." His case is that inasmuch as the testator's elder daughter, Subbalakshmi, was delivered of a

(1) 3 M.H.C.R., 312. (2) 6 M.H.C.R., 310. (3) L.R., 8 I.A., 46.

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son on the 20th November 1884, and that son, named Chinnasami, was in the eye of law alive at the testator's death, he then became entitled to the legacy subject only to the life interest of his mother and that inasmuch as Chinnasami took a vested interest in the property on his birth, it is immaterial that he predeceased his mother. In support of this contention it was argued that the words referring to male descendants should be treated as creating a gift in favour of a class and that, as Chinnasami was a person answering the description and ready to take at the testator's death, the Subordinate Judge was wrong in holding that his interest was a contingent one only. The case for the plaintiff assumes that there are words in this will, as in the cases reported in *Rewun Persad* v. *Mussumat Radha Beeby*(1) and *Mahomed Shumsool* v. *Shewukram*(2), indicating persons ascertainable at the testator's death, to whom Subbalakshmi should transmit the property on her death. The persons indicated are her "male descendants." In the event which happened, viz., in the case of Subbalakshmi surviving the testator, it is evident that it could not at the time of his death be said who were her heirs or descendants. *Nemo est hæres viventis.* As long as she lived, Chinnasami had indeed a presumptive claim to be called her legal descendant; but in my opinion, he never acquired a vested interest inasmuch as it was uncertain whether he would be the actual heir of his mother, and in fact he did not live to become so. In my view, therefore, it is a mistake to suppose that there was here any gift to persons designated as belonging to a class in such sense that they could be ascertained and take at the date of the testator's death. To construe the will as creating such a gift would, moreover, as it seems to me, involve consequences which would be wholly foreign to the probable intentions of the testator. In construing a will it is right to have regard, among other circumstances, to the law under which the will is made, and if the language of a will made by a Hindu is susceptible of a meaning which will make it consonant with the principles of Hindu law, that meaning is generally to be adopted in preference to any other. See *Mahomed Shumsool* v. *Shewukram*(3), *Hirabai* v. *Lakshmibai*(4). According to the plaintiff's construction, if Subbalakshmi's son had died sonless,

(1) 4 M.I.A., 137. (2) L.R., 2 I.A., 7. (3) L.R., 2 I.A., 14. (4) I.L.R., 11 Bom., 573.

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leaving a widow, that widow, and, for the same reason, a widow of any other son who was alive at the testator's death and died in Subbalakshmi's life-time, would on her death have been entitled to the property; or, it might be that a surviving son and the widow of a deceased son might have claimed. On the principle that every possible male descendant acquired a vested interest, any person who could claim to be heir of a male descendant of Subbalakshmi, alive at the testator's death, could substantiate his or her claim to the exclusion of any sons that might be born after that date. Had the testator, who was a Vakil of learning and great experience, desired to bring about such a result, it is reasonable to suppose that he would have used apt language for that purpose. His daughter was pregnant at the time when he made his will, and, if his intention had been that imputed to him by the plaintiff, it is reasonable to suppose that he would have made special reference to the son or sons of that daughter and would not have used general words like "male descendants" which he must have known might be taken merely to indicate his intention that the property should not on his daughter's death devolve as her stridhanam. If it is necessary to put a construction on the words referring to male descendant, I think that suggested by the Subordinate Judge and maintained in the argument by Mr. Bashyam Ayyangar is the most reasonable one. An intention that the property should be held by his daughter for life, and after her death, devolve after the manner of daughter's estate, seems to me as probable as the intention that it should pass exclusively to any one or more sons of his daughter who happened to be alive at the date of his own death is improbable. This construction puts the testator's disposition on a footing familiar to Hindu law and does not involve the idea that he desired to prescribe a new mode of devolution of his property. For these reasons, I would dismiss the appeal with costs.

APPELLATE CIVIL.

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

1888. Nov. 2, 20.

SUBBARAYA (DEFENDANT No. 1), APPELLANT,

v.

KRISHNAPPA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Evidence Act—Act I of 1872, s. 116—Estoppel—Landlord and tenant—Kumaki land—Unassessed waste reclaimed by plaintiff—Patta granted to defendant.

The plaintiff, who was the holder of a *warg* in Canara, demised adjacent waste land to one who brought it into cultivation and remained in occupation for two years. The land was not assessed to revenue in the name of either of these persons. At the end of two years the tenant let into occupation a sub-tenant who subsequently assigned his right to the defendant the holder of a neighbouring *warg*. The defendant obtained a *patta* for the land from the revenue authorities. In a suit by plaintiff to eject the defendant:

Held, (1) That the defendant was not estopped from setting up a title adverse to the plaintiff and that his possession became adverse when the *patta* was granted to him;

(2) That the plaintiff was not entitled to eject the defendant.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Mangalore, in appeal suit No. 278 of 1887, reversing the decree of K. Krishna Rau, District Munsif of Udipi, in original suit No. 210 of 1886.

Suit to recover possession of certain land. The land in question was *kumaki* waste land adjacent to the *wargs* of plaintiff No. 1 and defendant No. 1, respectively. The *warg* of plaintiff No. 1 was an old *warg*, while the *warg* of defendant No. 1 was *hosagame* or new *warg* created out of waste lands granted by Government to him and one Sankaranarayana in 1857 and 1865, respectively. In 1880 plaintiff No. 1 granted a *mulgenichit* of the land in question which was then a barren sand hill to Ranga Bhatta, the father of plaintiff No. 2, who converted it into paddy fields and remained in occupation until 1882; the land not being assessed in the name of any of these persons. In 1882 plaintiff No. 2 let into possession defendant No. 2, who subsequently assigned his rights to defendant No. 1. In 1885 a

* Second Appeal No. 128 of 1888.

revenue enquiry took place, and the tahsildar finding that the land was *kumaki* to the first plaintiff's *warg* and partly reclaimed by him or his tenant, ordered that the revenue should be assessed in his name; but the Collector reversed this order and granted the patta to defendant No. 1.

The plaintiff now sued to eject the defendants, the Collector not being brought on to the record.

The District Munsif dismissed the suit; but on appeal the Subordinate Judge passed a decree in favor of the plaintiffs, against which defendant No. 1 preferred this second appeal.

Narayana Rau for appellant.

Subba Rau 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 Parker, J.).

JUDGMENT.—We are constrained to hold that defendant No. 1 is not estopped by the provisions of section 116 of the Evidence Act from denying the title of the plaintiffs. It may be true that he originally got in with the connivance of defendant No. 2 who had obtained possession by permission of plaintiff No. 2, but the tenancy of defendant No. 2, if not determined before, was at any rate determined when the plot was declared by the revenue authorities to be at the disposal of Government and granted to defendant No. 1. Since that date the interest of defendant No. 1 has been adverse. See *Ammu* v. *Ramakishna Sastri*(1).

It may be true, as pointed out by the Subordinate Judge, that had the Collector rightly understood all the facts of the case he would have granted the lands in dispute to the plaintiffs instead of to defendant No. 1. The question for us however is whether plaintiffs had acquired any legal right.

The principle to start from is that waste lands belong to the State. (See *Vyakunta Bapuji* v. *Government of Bombay*(2), *Bhaskarappa* v. *The Collector of North Canara*(3), and in this case it is not denied that the land was a bare sand hill up to 1880. The plaintiffs then cultivated it, but did not get it assessed in their names, and it is impossible to hold that such cultivation for a couple of years will take away from the State its right to grant the land to such applicant as it pleases. It may be that accord-

(1) I.L.R., 2 Mad., 226. (2) 12 Bom., H.C.R., App. 1. (3) I.L.R., 3 Bom., 452.

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ing to departmental rules the plaintiffs should have had the land, but the breach of a departmental rule will not create a legal cause of action.

We are of opinion therefore that the District Munsif was right in holding that plaintiffs have no title to the disputed land either by grant or prescription. The appeal must be allowed and the decree of the Lower Appellate Court reversed, the suit being dismissed with all costs throughout.

ORIGINAL CIVIL.

Before Mr. Justice Handley.

1889. July 26.

THE MADRAS HINDU UNION BANK (LIMITED) (PLAINTIFF),

v.

C. VENKATRANGIAH AND OTHERS (DEFENDANTS).*

Transfer of Property Act—Act IV of 1882, s. 78—Priority of mortgages—Gross negligence—Estoppel—Agency.

On the 20th of February 1888, defendant No. 1 executed a mortgage in favor of the plaintiff Company. Defendants Nos. 2 and 3 bound themselves as sureties for the due payment of the mortgage amount, on default by the mortgagor. This mortgage had not been registered at the date of the execution of the mortgages next referred to.

On the 27th of April 1888, the Secretary of the plaintiff Company handed over to defendant No. 1 most of the title-deeds which had been delivered to the plaintiff Company on the execution of the mortgage, and defendants Nos. 1 and 3 undertook that they would raise a loan thereon and discharge the debt due to the plaintiff, or return the title-deeds if they failed in raising the loan. On the 28th April 1888 defendant No. 1 deposited the title-deeds with defendant No. 4 and executed a mortgage to her for Rs. 4,000; and on the 7th May 1888 he executed an instrument creating a further charge in her favor for Rs. 1,000. These two sums were applied by defendant No. 1 to his own use, and not in discharge of the prior mortgage. The mortgages to defendant No. 4 described the mortgage premises as being then free from incumbrances:

Held, that the plaintiff Company had been guilty of gross negligence in letting the title-deeds out of their possession and that the mortgages of defendant No. 4 had accordingly priority over the mortgage to the plaintiff Company.

THIS was a suit in which the plaintiff Company alleged *inter alia* that by an instrument, dated the 20th February 1888, defendant No. 1 mortgaged to the plaintiff Company certain of his immovable

* Civil Suit No. 140 of 1888.

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property to secure payment of the sum of Rs. 8,000 with interest thereon. By a further instrument, dated the 2nd March 1888, defendants Nos. 2 and 3 bound themselves to pay to the plaintiff Company the said sum of Rs. 8,000 with interest on default by defendant No. 1. According to the averments in the plaint, defendants Nos. 1 and 3 requested the Secretary of the plaintiff Company on the 27th April 1888 to give them the title-deeds of the mortgaged premises agreeing that they would either raise a fresh loan on them and repay the mortgage amount with interest up to date or return the title-deeds; and the Secretary believing the request to be made *bonâ fide* sent a portion of the title-deeds to defendants Nos. 1 and 3 in charge of a clerk in the employ of the plaintiff Company; and defendants Nos. 1 and 3 obtained possession of the deeds from the clerk representing to him that they wished to show the same to a third party for the purpose of raising a loan thereon to pay off the plaintiff's mortgage. The plaint further alleged that the amount due was not discharged nor the title-deeds returned. Defendant No. 4 was joined because she claimed priority in respect of a mortgage and instrument of further charge executed in her favor by defendant No. 1 on the land mortgaged to plaintiff.

Defendant No. 4 in her written statement claimed priority over the mortgage in favor of the plaintiff Company on the ground that the said mortgage and further charge respectively were taken by her *bonâ fide* for consideration and without notice of the plaintiff's mortgage. To this part of the pleadings the fourth issue related. It was framed as follows:—

Whether defendant No. 4 is by reason of the circumstances mentioned in her written statement entitled in respect of her mortgage and further charge to priority over the plaintiff's mortgage.

The Acting Advocate-General (the Hon. Mr. *Spring Branson*), (Mr. *W. Grant* with him) for the plaintiff.

The Bank is not bound by the act of the Secretary in parting with the title-deeds, for it was not within the scope of his authority. But if the Bank were bound, the Secretary's conduct did not amount to such gross neglect as to deprive the Bank of priority. The gross neglect must amount to fraud. Even if there were neglect on the part of the plaintiff's Secretary, there was contributory negligence on the part of defendant No. 4. The whole of

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the title-deeds were not handed to defendant No. 4, and she was accordingly put on enquiry. *Northern Counties of England Fire Insurance Company* v. *Whipp*(1), and *Mutha* v. *Sami*(2).

Mr. *Johnstone* (Mr. *R. F. Grant* with him) for defendant No. 4.

The Secretary represented the Bank, and the Bank is bound by his acts. The delivery of the title-deeds was within the scope of his authority. He was the ostensible Agent of the Bank and the Bank is estopped from questioning his authority. The conduct of the Secretary did amount to gross negligence. It placed defendant No. 1 in a position to perpetrate a fraud, and section 78 of the Transfer of Property Act applies. The deeds delivered to defendant No. 1 were practically all the title-deeds. *Perry Herrick* v. *Attwood*(3), *Briggs* v. *Jones*(4), *Northern Counties of England Fire Insurance Company* v. *Whipp*(1).

The further arguments adduced at the hearing with reference to the above issue appear sufficiently for the purpose of this report from the following passage extracted from the judgment:—

His Lordship, having taken time to consider, delivered judgment with reference to the fourth issue as follows:—

JUDGMENT.—The fourth issue raises a difficult question as to the priority of the mortgages to the Bank, and the fourth defendant. The facts appear to be as follows:—On 27th April 1888 the title-deeds relating to the mortgaged property, with the exception of some unimportant papers, were given by the Secretary to the first and second defendants,—he taking from them two letters,—for the purpose of enabling them to raise a loan elsewhere to pay off the mortgage. These letters contemplate some person being sent with the deeds on behalf of the Bank, and the case set up in the plaint is that a clerk and bill collector of the Bank were sent with the deeds. This however was given up in the course of the case, and it was admitted that nobody on behalf of the Bank was sent with the deeds. The first and third defendants took the deeds next day to the fourth defendant's son who managed her business, and a mortgage for Rs. 4,000 was executed that day, and that sum, less a small deduction for cost of stamp and charity, was paid to the first defendant. On 7th May a further mortgage to the fourth defendant for Rs. 1,000 was executed, and that sum was received

(1) 26 Ch. D., 482. (2) 8 I.L.R., Mad., 200.
(3) 2 De G. & J., 21. (4) L.R., 10 Eq., 92.

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by the first defendant. At the time of the execution of these mortgages the plaintiff's mortgage was not registered. Both the mortgages to the fourth defendant contain certain statements that no prior mortgage existed and I am satisfied on the evidence that the fourth defendant, or rather her son who managed the transaction for her, advanced the money and took the mortgage *bonâ fide* and without any notice of the plaintiff's mortgage. The question I have to determine is whether under these circumstances the plaintiff's mortgage is to be postponed to the fourth defendant's. The first question which arises is how far the plaintiff Bank is liable for the Secretary's acts or omissions, and I think they are liable in this case. They left the deeds in the custody of the Secretary, and it would, I think, be well within the scope of his business as Secretary to allow them to go out of his possession for the purpose of enabling the mortgagor to raise a loan elsewhere to pay off the Bank's mortgage. If he did not take proper precautions in doing this and enabled the mortgagor to defraud others the Bank is responsible for his carelessness. This is not like the case of *Northern Counties Fire Insurance Company* v. *Whipp*(1). There the manager of a Company having mortgaged his own property to the Company, and being in custody of the title-deeds as manager, fraudulently executed a mortgage to a third party without notice of the Company's mortgage, and it was held that the Company did not lose their priority. But there the manager was certainly acting outside the scope of his duties. He was not the agent of the Company for the purpose of defrauding them, and they could not have anticipated that he would use the possession of the title-deeds to do so. Then in this case assuming that the acts or omissions of the Secretary are such as the Bank is responsible for, are they such as entitle fourth defendant to priority? Section 115 of the Evidence Act as to estoppel is relied on by fourth defendant's Counsel, but I think it has no application to the case as there is nothing to show that the Secretary had any intention to join in the fraud on the fourth defendant. The provision of law affecting the case is section 78 of the Transfer of Property Act, and the question to be decided is whether the acts or omissions of the Secretary amount to gross negligence within the meaning of that section. Apart from

(1) L.R., 26 Ch. D., 482.

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authority, I should consider that a prior mortgagee parting with the title-deeds to the mortgagor for the purpose of raising money by another mortgage, is guilty of gross negligence unless he takes ordinary precautions that any person advancing money on the security of the deeds should know of his mortgage, such as sending some person with the deeds, insisting that they should be inspected in his presence or otherwise. Non-registration would not of itself be gross negligence as the law allows four months, but it is a reason for extra caution. Registration would be notice to subsequent lenders, but without it how is a prior mortgage to be discovered ?

The cases of *Perry Herrick* v. *Attwood*(1), *Briggs* v. *Jones*(2), are directly in point and confirm this view. In the case of the *Northern Counties of England Fire Insurance* v. *Whipp*(3) before referred to, all the decisions upon this subject are reviewed and certain principles are laid down which certainly seem rather to affect the doctrine of *Perry Herrick* v. *Attwood* (1), and *Briggs* v. *Jones*(2), and to require that there should be an element of fraud in the negligence of the prior mortgagee to constitute such gross negligence as would postpone him to the subsequent incumbrancer. But both the cases above-mentioned are referred to in the Judgment in the later case and not dissented from, and it must be taken that they were held to be well decided, and in neither of these cases there was any suggestion of fraud on the part of the first mortgagee. I have been referred by the learned Counsel for the fourth defendant to a decision of Kernan, J., in *Damodara* v. *Somasundara* (4), where the learned Judge seems to have followed *Briggs* v. *Jones*(2), taking the same view as I now take of what constitutes gross negligence for which a prior mortgage will be postponed. For the plaintiff the case of *Mutha* v. *Sami* (5) is relied on, but in that case the Court really found that the prior incumbrancer was guilty of no negligence at all and did nothing but deal with his own mortgage document as he had a perfect right to do, and *Briggs* v. *Jones*(2) is quoted in the judgment without dissent. Some stress is laid by the plaintiff's Counsel on the fact that the Secretary of the Bank kept back some of the papers relating to the mortgaged property. But I think there is nothing in this.

(1) 2 De G. & J., 21. (2) L.R., 10 Eq., 92.
(3) L.R., 26 Ch. D., 482. (4) See judgment printed below.
(5) I.L.R., 8 Mad., 200.

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The documents he parted with carried the title as far back as 1825, and there was nothing in them to put the fourth defendant upon enquiry for further papers. It is argued for the plaintiff that the negligence and undue haste of the fourth defendant's son in concluding the transaction conduced to the fraud practised upon him by the first defendant, and that the fourth defendant is therefore not entitled to priority. I cannot see that there was any negligence on the part of the fourth defendant's son. The title-deeds were on the face of them all in order, and there was nothing to excite a suspicion that there was a prior incumbrance, and enquiry at the Registration Office would have shown nothing. The mortgagor declared in the mortgage deeds there was no prior incumbrance and there was apparently no reason why he should not be believed. I find upon the fourth issue that the fourth defendant is entitled, in respect of her mortgages of 28th April 1888 and 7th May 1888, to priority over the plaintiff's mortgage.

Branson and *Branson*—Solicitors for plaintiff.

Grant and *Laing*—Solicitors for defendants.

ORIGINAL CIVIL.

Before Mr. Justice Kernan.

DAMODARA (PLAINTIFF),

v.

SOMASUNDARA AND OTHERS (DEFENDANTS).*

Transfer of Property Act—Act IV of 1882, s. 78—Priority of mortgages—Gross negligence—Registration.

A mortgagee at the request of the mortgagors returned to them their certificate of title to the mortgage premises to enable them to raise money to pay off his mortgage. This mortgage was duly registered. The mortgagors, who remained in possession of the mortgage premises throughout, having shown the certificate to a third person whom they informed of the existence of the first mortgage, and borrowed Rs. 400 from him, subsequently informed him that the first mortgage was paid off, delivered the certificate to him, and executed to him a mortgage of the same premises to secure the sum of Rs. 400, and a further sum of Rs. 800:

Held, that though the second mortgagee had been wanting in caution, yet since he had been thrown off his guard by the conduct of the first mortgagee, in returning to the mortgagors their certificate of title, the second mortgagee was entitled to priority in respect of his security over the first mortgagee.

* Civil Suit No. 152 of 1883.

DAMODARA v. SOMA-SUNDARA.

THIS was a suit by a prior mortgagee against the mortgagors and a puisne mortgagee who claimed to be entitled to priority in respect of his security over the mortgage to the plaintiff under the circumstances which are set out in the judgment.

The suit came on before Kernan, J., who, after taking time to consider, delivered the following

JUDGMENT.—The plaintiff's mortgage of 1879 from defendants Nos. 1 and 2 was duly registered, and there is now due on it Rs. 400. The certificate was put in the plaintiff's possession, and defendant No. 1 signed a rent agreement, remaining in possession. The mortgage to defendants Nos. 3 and 4 is dated 1st July 1880 and is registered, and Rs. 1,200 is due on it. The plaintiff admits that on the 6th May 1880, he, at the request of defendants Nos. 1 and 2, handed to them the certificate of the house which was the subject of his mortgage for the purpose of enabling the defendants to raise money on the security of the property. Defendants Nos. 1 and 2 signed and delivered to the plaintiff, on the 6th May, exhibit A. On the 6th May, defendants Nos. 1 and 2 applied to defendants Nos. 3 and 4 for a loan of Rs. 1,200 on the security of the house, and they produced the certificate, but stated that there was a mortgage on the house which defendant No. 1 intended to pay out of the loan. Defendants Nos. 3 and 4 accordingly advanced to defendants Nos. 1 and 2 Rs. 800 on their promissory note, and they, defendants Nos. 1 and 2, took away the certificate. In July 1880, defendant No. 1 brought to defendants Nos. 3 and 4 the certificate and stated that the mortgage was paid off, and asked for the further loan of Rs. 400 on giving a mortgage for the full sum. Defendants Nos. 3 and 4 believing the statement that the mortgage was paid, advanced Rs. 400, and defendants Nos. 1 and 2 executed a mortgage for Rs. 1,200 which was registered. Defendants Nos. 3 and 4 did not ask defendants Nos. 1 and 2 before the mortgage was executed or afterwards, who the mortgagee was, or the amount of his mortgage, or whether it was registered, or for a copy of it, nor did they ask for possession of that mortgage, or take possession of it: but the defendant No. 1 was in possession, and defendants Nos. 3 and 4 were not informed that defendants Nos. 1 and 2 had possession under a rent agreement with the mortgagee. After possession of the certificate was obtained by defendants Nos. 1 and 2 from the plaintiff, they did not either of them return to the plaintiff within the five days mentioned in exhibit A, and plaintiff says he was unable to find them; but they returned at the end of November and did not produce the certificate nor mention the fact of the borrowing of the money, or of the execution of the second mortgage, nor promise to pay the amount. . . .

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This suit is filed by the plaintiff to recover the amount of his mortgage, and defendants Nos. 3 and 4 on their application were made supplemental defendants. They contend that their mortgage is prior to the plaintiff's on the ground that the plaintiff was guilty of gross negligence in placing the certificate in the hands of defendants Nos. 1 and 2 and thus enabling them to obtain a loan on the mortgage of the house, and they rely on section 78 of the Transfer of Property Act. The plaintiff contends there was no gross negligence on his part and that the defendants were not induced to advance money by any negligence of the plaintiff, but that the defendant's advance of money was owing to their own negligence in not inquiring in respect of the prior existing mortgage of which they had express notice. The equitable doctrine as to gross neglect, embodied in section 78 of the Transfer of Property Act is well established and what conduct amounts to gross neglect has been considered in many cases. No general definition of gross neglect has been nor can be laid down. Each case must depend upon the facts proved in it and reasonable inferences from such facts. [His Lordship then stated the facts of *Evans* v. *Bicknell*(1), and having summarized the judgment in that case, proceeded as follows:—] If, therefore, the negligence of the plaintiff amounted to constructive fraud he was guilty of gross neglect within the rule of equity and of the Act. Constructive fraud is defined in Story at paragraphs 258 and 390—see *Colyer* v. *Finch*(2); *Perry Herrick* v. *Attwood*(3); *Hewitt* v. *Loosemore*(4); *Espin* v. *Pemberton*(5); *Layard* v. *Maud*(6). Here the plaintiff is a legal mortgagee, and the question is whether the second mortgagee has a good equitable defence—a right to have the plaintiff's mortgage postponed.

In considering the evidence, the exhibit A, the letter of the defendants Nos. 1 and 2, though important on the question of negligence, suggests the defence that the plaintiff, in fact, authorized defendants Nos. 1 and 2 to raise money on mortgage, and that defendants Nos. 1 and 2 acted on that authority in executing the mortgage to the defendants. There is no doubt that the plaintiff delivered the certificate to the mortgagor on the terms contained in exhibit A.

Under those terms defendants Nos. 1 and 2 were authorized to place the title-deeds in another place, *i.e.*, to raise money on it from some other person, and they undertook to pay the plaintiff the amount of the principal remaining due and interest, and get back the mort-

(1) 6 Ves. Jun., 173.
(2) 5 H.L.C., 905.
(3) 2 De G. & J., 21.
(4) 9 Hare, 449.
(5) 4 Drew, 333. This decision was affirmed on appeal, see 3 De G. & J., 547.
(6) L.R., 4 Eq., 397.

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gage deed. The plaintiff relied on the agreement of defendants Nos. 1 and 2 to raise the money in five days and pay the remainder of his demand. During those five days defendants Nos. 1 and 2 were authorized to raise money on the security, and if they had executed the mortgage within those five days, could the plaintiff have disputed the security? On the same day the plaintiff gave to the defendants the certificate they obtained from defendants Nos. 3 and 4 Rs. 800, on a promissory note, part of Rs. 1,200, agreed to be lent on mortgage of the property, stating that there was a mortgage on the property, and that they would pay it off. The mortgage was not then executed, but it was agreed by defendants Nos. 1 and 2 to be executed when the balance of Rs. 1,200 was advanced. The plaintiff did not take any active steps after the five days to get back the deed, and even when he saw defendants Nos. 1 and 2 at the end of two months, he does not appear to have demanded or insisted on the production of the deed. The existence of exhibit A does not appear to have been known to defendants Nos. 3 and 4. Still the authority to pledge had been given to the plaintiff. This case is in principle, though not in circumstances, the same as *Brigas* v. *Jones*(1). In the view expressed in that case I think the plaintiff's mortgage should be postponed.

The question of the gross negligence attributed to plaintiff cannot be considered apart from the authority to pledge given by the plaintiff. The plaintiff most negligently placed the certificate in the hands of defendants Nos. 1 and 2 and allowed them to represent themselves to defendants Nos. 3 and 4 as the owners. The certificate was in their name. In *Evans* v. *Bicknell*(2) the essential question was whether there was an intention by *Bicknell* that Shapnell might represent himself as owner. Here such an intention is established beyond doubt. The plaintiff took no steps to ask for the certificate at the end of the five days. The plaintiff says that defendants Nos. 1 and 2 did not return after they got the certificate for two or three months. .... He says defendants Nos. 1 and 2 did not say they had raised money, but they did not produce the certificate, and the plaintiff appears to have accepted their promise to pay the balance. There is no evidence of any active steps taken until this suit is filed in May 1883, and even then the plaintiff apparently was not aware of the claims of defendants Nos. 3 and 4. I think therefore that gross neglect is attributable to the plaintiff in delivering the deed to defendants Nos. 1 and 2 under the circumstances.

The plaintiff however contends that defendants Nos. 3 and 4 had admittedly express notice on the 6th May 1880 that there was a

(1) L.R., 10 Eq., 92. (2) 6 Ves. Jun., 173.

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mortgage, and as they made no inquiry on the subject either as to the mortgagee or after the mortgage or any copy of it, or whether it was registered, and as they did not get the possession of it, or any release of it, the defendants have been grossly negligent.

The plaintiff's mortgage is prior in point of time and registration ..... There is no doubt that defendants Nos. 3 and 4 could have ascertained who the mortgagee was, if they had chosen to inquire, and if they had inquired of the mortgagor at any time before 1st July, the date of their mortgage, they would have been informed that the sum of the mortgage was not paid, and it would have been their duty to see that it was paid, or to have got a receipt or discharge from the mortgagee for the amount. They were wanting in caution in not making the inquiry; but I see no reason to think that they wilfully abstained from inquiry. They were informed by defendants Nos. 1 and 2 who had the deed and were in possession, that the mortgage was paid out of the loan.

The mortgagors' representations could not bind the prior mortgagee; but the fact that defendants Nos. 1 and 2 produced the deed on the 6th May and again on 1st July, and their representations to defendants Nos. 3 and 4 on both occasions, and the possession by them of the property I think may be fairly considered to have thrown the defendants off their guard. They did not abstain from all inquiry, but were misinformed by the party whom the plaintiff enabled by his negligence to commit the fraud. I do not see that under the circumstances defendants Nos. 3 and 4 are guilty of gross negligence, though no doubt there was some negligence.

The plaintiff is no doubt the legal mortgagee, but I think he was guilty of gross neglect (see *Hewitt* v. *Loosemore*(1)) and as such neglect was much greater than that of defendants Nos. 3 and 4, if one of two parties must suffer for the acts of the third party, he who has enabled the third party to occasion the loss must sustain it. The plaintiff is therefore not entitled to the benefit of the rule "*qui prior est in tempore, potior est in jure.*"

(1) 9 Hare, 449.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

1889. Feb. 26. March 20.

SANKARAN (DEFENDANT No. 1), APPELLANT,

v.

PARVATHI AND OTHERS (PLAINTIFF AND DEFENDANTS, Nos. 2 TO 22), RESPONDENTS.*

Malabar Law—Decree against karnavan—Representative of tarwad—Limitation Act, 1877, *s.* 14, *exp.* 1, *sch. II, art.* 11.

The karnavan and an anandravan of a Malabar tarwad were authorized by a karar to manage the affairs of the tarwad. A decree was obtained against them, and land belonging to the tarwad was attached and sold in execution. The plaint did not describe the defendants otherwise than by their individual names; but the plaintiff's claim was, *inter alia*, in respect of the breach of a contract by the defendants to put him into possession of certain land which was expressed to be "the jenm of the defendants' tarwad." It was found in the present suit that the amount decreed in the prior suit constituted a debt due by the tarwad:

Held, the decree and the execution sale did not bind the tarwad—*Daulat Ram* v. *Mehr Chand*(1) distinguished.

This suit was brought on 8th August 1884 to declare that the sale in execution was not binding on the tarwad. The present plaintiffs being members of the tarwad intervened in execution of the decree, but their claim was dismissed on 5th September 1882. On the 27th September 1882 they filed a suit in the Court of the District Munsif, praying for the relief now sought. The District Munsif dismissed the suit on the ground that he had no jurisdiction. On appeal the District Judge made an order directing him to dispose of it, which he accordingly did; and he passed a decree against which an appeal was pending on 17th August 1883. But on the last-mentioned date the High Court set aside the order of the District Judge and directed him to ascertain the market-value of the land and make a fresh order, and the enquiry, directed by the High Court, did not terminate until 30th October 1883 when another order was made by the District Judge by which the original decision of the District Munsif was confirmed:

Held, that the prior suit terminated only on the 30th October 1883, and that the present suit was not barred, under Limitation Act, 1877, sch. II, art. 11.

APPEAL against the decree of V. P. deRozario, Subordinate Judge of South Malabar, in original suit No. 37 of 1884.

Suit by members of a Malabar tarwad for a declaration that the sale of certain tarwad property in execution of a decree passed in original suit No. 4 of 1881, on the file of the Subordinate Court at Calicut, against defendants Nos. 2 and 3 does not bind the

* Appeal No. 144 of 1887.

(1) I.L.R., 15 Cal., 70.

tarwad. The then defendant No. 1 was acting as karnavan, and the then defendant No. 2 was an anandravan of the plaintiff's tarwad.

Defendant No. 1 was the assignee of the decree referred to above. He raised *inter alia* a plea of limitation which the Subordinate Judge dealt with as follows:—

"First defendant contends that defendants Nos. 4 to 13 are barred from suing to set aside the sale of the plaint properties under article 11 of schedule II of the Limitation Act, and that as the present plaintiffs could only enforce this claim in conjunction with these defendants and the latter's claim is barred, plaintiff's claim is also barred—*Ramsebuk* v. *Ramlall Koondoo*(1), *Kalidas Kevaldas* v. *Nathu Bhagvan*(2). But in this suit the plaintiffs do not sue to set aside the sale. They merely ask for a declaration that the sale is invalid. The claim falls under article 120 and is not barred."

The Subordinate Judge held that the debt sued on in original suit No. 4 of 1881 was contracted by the defendants for proper tarwad purposes, but passed a decree for the plaintiffs on the ground that they were not bound by the decree passed in that suit against defendants Nos. 2 and 3.

Defendant No. 1 preferred this appeal.

Sankaran Nayar for appellant.

Bhashiyam Ayyangar, *Sankara Menon* and *Sundara Ayyar* for respondents.

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

JUDGMENT.—The first question for decision is whether the decree in original suit No. 4 of 1881 made by the Subordinate Judge of Calicut binds the tarwad of the plaintiffs in this suit and of the other members of the tarwad who are defendants. The defendants in that suit were the karnavan of the tarwad and an anandravan, who were by karar executed by the family authorized to manage their affairs and to raise money on security of the properties of the tarwad or otherwise. It is found in this suit that the amount decreed in suit No. 4 of 1881 is a debt due by the tarwad.

(1) I.L.R., 6 Cal., 815.

(2) I.L.R., 7 Bom., 217.

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But the defendants in suit No. 4 of 1881 were not described in the plaint as karnavan or anandravan, nor is any reference made in the plaint to the karar. The plaint states that the defendants agreed to grant the plaintiffs an *ubhayapattam* demise of certain lands therein specified and which the plaint alleges "are the jenm of the defendant's tarwad" on a kanom of Rupees 3,000 advanced by plaintiffs to the defendants, and that the defendants agreed to put the plaintiffs in possession of the property to be demised and that the defendants by deed agreed to pay interest. The plaint then states that the defendants did not act up to the stipulation, and the plaintiffs claimed the principal sum and interest, and were not willing to take possession. The total claim set out in the plaint is Rupees 7,560.

The decree in suit No. 4 of 1881, dated the 4th June 1881, orders the defendants in that suit to pay the plaintiffs Rupees 5,200 and costs and further interest on Rupees 3,000 at 12 per cent.

Under that decree immovable properties of the tarwad were attached, and the plaintiffs in this suit presented to the Subordinate Court in suit No. 4 of 1881 a claim to the properties attached which, they alleged, were tarwad properties, and requested removal of the attachment. That claim was disallowed by the Court under section 281 of the Civil Procedure Code. The property attached belonged to the tarwad. No members of the tarwad were parties to the suit No. 4 of 1881 except the two defendants thereto, who were not described in the plaint or decree as karnavan or anandravan, but were merely described by their individual names. The money alleged to have been advanced by the plaintiffs is not in the plaint stated as advanced to or for the purposes of the tarwad. No relief is either sought in the plaint against the tarwad or their properties or given by the decree. But it is contended that from the statement in the plaint that the properties agreed to be demised by the defendants in suit No. 4 of 1881 "are the jenm of the defendants' tarwad," it appeared that the plaintiffs sought to affect the tarwad and their properties and that the defendants, therefore, represented in that suit the tarwad.

We are unable to agree to this contention, looking to the other allegations in the plaint and to the relief sought. The statement referred to merely describes whose the properties were which the defendants contracted to demise. The plaint states the defendants

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broke that contract. The plaintiffs did not state a case against the tarwad, but stated a case of breach of contract against the defendants alone. There is nothing on the face of the plaint in suit No. 4 of 1881 to show that the defendants were sued as representatives of the tarwad or to show that the tarwad or their properties were intended to be affected by that suit, and as the decree is one against the defendants only by their individual names, we think the tarwad was not bound by the decree within the principle of the decisions of the Full Bench of this Court (see *Ittiachan* v. *Velappan*)(1), in reference to suits in which the question may be whether under certain circumstances, the karnavan represented the tarwad—*Daulat Ram* v. *Mehr Chand*(2), *Kombi* v. *Lakshmi*(3), *Bissessur Lal Sahoo* v. *Maharajah Lachmessur Singh*(4).

It was then contended that the effect of the decision by the Privy Council in *Daulat Ram* v. *Mehr Chand*(2) shows that the principle laid down in *Ittiachen* v. *Velappen*(1) should no longer be considered as correct, and that if the karnavan was a defendant in a suit, even though he was not sued as karnavan, and though there was nothing on the face of the plaint to show that he was sued as representative of the tarwad or that it was intended to affect the tarwad, or the property of the tarwad, still, that the tarwad would be bound by the decree. But we do not accede to this contention. What was decided in that case was that the manager of a Hindu trading family, who had authority to grant a mortgage, represented the family in a suit by the mortgagee to enforce the mortgage, and that the other members of the family, not parties to the suit, were bound by the decree subject to their right to prove that the debt was not of a nature that they should be bound thereby. That case is not in conflict with the principles decided in *Ittiachan* v. *Velappan*(1) relating to suits against karnavans of tarwads. We think that case does not in its facts or in effect go the length contended for.

The next question in this case is whether this suit is barred by limitation on the ground that it was not filed within 12 months from the 5th of September 1882, the date of the order disallowing the plaintiffs' claim in suit No. 4 of 1881 under Limitation Act, 1877, schedule II, article 11.

(1) I.L.R., 8 Mad., 488. (2) I.L.R., 15 Cal., 70.
(3) I.L.R., 5 Mad., 201. (4) L.R., 6 I.A., 233.

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The answer of the plaintiffs is that after the date of the order of the 5th of September 1882 the plaintiffs within 12 months from the date of that order filed a suit in the Munsif's Court, No. 640 of 1882, on the same cause of action as that on which this suit is founded, but that Court from defect of jurisdiction was unable to entertain such suit; and that the time the plaintiffs were prosecuting that suit in good faith and with due diligence should be excluded from the computation of 12 months, and therefore this suit is not barred.

The facts are as follows: When the attachment was laid on, the plaintiffs lodged a claim under Civil Miscellaneous Petition No. 959 of 1882, claiming the property as tarwad property. That claim was disallowed by order on the 5th September 1882. On the 27th September 1882 the plaintiffs filed original suit No. 640 of 1882 in the Munsif's Court, praying to establish the right of the tarwad to the property attached and have the attachment set aside. On the 16th December 1882 the Munsif held the suit was outside his jurisdiction and returned the plaint to be presented to the proper Court. On appeal the District Judge on the 16th February 1883 held that the Munsif had jurisdiction, and directed him to try the case. The High Court by order, dated 17th of August 1883, set aside the order of the District Judge and directed him to ascertain the market-value of the land and pass a fresh order. After the District Judge set aside the order of the Munsif, the plaint was filed in the Munsif's Court and the Munsif heard the suit and made a decree thereon. An appeal was filed in the District Court and was pending when the High Court made the order of the 17th August 1883.

If the 17th August 1883 is to be taken as the date upon which the proceedings in suit No. 640 of 1882 ended under explanation 1 to section 14 of the Limitation Act, then excluding the term from the 27th September 1882 to the 17th of August 1883, the plaintiffs should be barred. This suit was filed on the 8th of August 1884 in the Subordinate Judge's Court, a new plaint being filed. The explanation limits the time allowed to the date when the proceedings in the first suit were ended. The order of the High Court did not end the prior suit. That order referred it to the Judge to ascertain the market-value of the land and directed him to pass a fresh order.

The order of the High Court was sent from the High Court to the Judge, and the enquiry directed by High Court having been

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made, the Judge, by an order, dated the 30th of October 1883, confirmed the original order of the Munsif, and the prior suit was then terminated only on the 30th of October 1883. The suit therefore is not barred by limitation.

We believe, however, that up to the date of the 30th of October 1883 the plaintiff did prosecute the prior suit with due diligence in good faith and that the cause of action in the first suit, and that in this suit is the same. The addition of members of the family as defendants does not affect the question of limitation. Being of opinion that defendants in suit No. 4 of 1881 were not sued in that suit as representatives of the tarwad and that the decree in this suit does not bind the tarwad, and being also of opinion that this suit is not barred by limitation, we dismiss this appeal with costs.

APPELLATE CIVIL.

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

1889. April 5, 13.

VYTHINADAYYAN AND ANOTHER (DEFENDANTS NOS. 3 & 4), APPELLANTS,

v.

SUBRAMANYA (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, s. 52—Lis pendens—Partition suit—Decree by consent.

Pending a suit for partition of land, &c., two of the parties to the suit sold part of the land in question to a stranger who was not brought on to the record. After the execution of the sale-deed the parties to the suit entered into a compromise and a decree was passed by consent accordingly. In a suit by the purchaser for possession of the land sold to him:

Held, the purchaser was not bound by the decree passed by consent.

APPEAL under section 562 of the Code of Civil Procedure against the order and decree of K. R. Krishna Menon, Subordinate Judge of Tanjore, in appeal suit No. 744 of 1887, reversing the decree of T. A. Krishnasami Ayyar, District Munsif of Mannargudi, in original suit No. 360 of 1886, and remanding the suit to the Court of the District Munsif to be tried on the merits.

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* Appeal against Order No. 142 of 1888.

VYTHI-NADAYYAN v. SUBRAMANYA.

Suit for partition and possession of land conveyed to the plaintiff by defendant No. 1 and one Ramanna Ayyan by a sale-deed, dated 17th September 1874. At the time when this sale-deed was executed original suit No. 26 of 1874 was pending in the Subordinate Court of Tanjore. The above-mentioned vendors and other members of their family were parties to that suit, and the prayer of the plaint therein was for the partition of the family property including the land in question in the present suit. Original suit No. 26 of 1874 was determined on 27th February 1875 by a decree passed by consent of the parties.

The District Munsif held that the plaintiff was bound by the above decree as a purchaser *pendente lite*, and passed a decree accordingly. On appeal, the Subordinate Judge reversed the decision of the District Munsif observing:—

"It is admitted that the suit in which the decree was passed "was not a contentious one, and that the decree was not the result "of the investigation of the merits of the suit. It proceeded "simply upon a razinama filed by the present plaintiff's "vendors and the then plaintiffs in the suit. It seems to me "that a purchaser *pendente lite*, ought to be bound only by such "results which, from the nature of the suit, and from the relief "prayed, he might expect would take place. He had no reason "to expect that his vendors would be treacherous enough to give "up certain property to their opponents which they had already "sold to plaintiff. The force of *lis pendens* applies only to an "adjudication which is the natural result of the investigation of "the merits of suits and not to mere agreements which the parties "chose to make during the pendency of the suits. If a purchaser "*pendente lite*; did not think fit to become a party to the suit, he "cannot be held bound by any agreement which the parties chose "to make or any order that may be made thereon—*Kasumunnissa* "*Bibee* v. *Nilratna Bose*(1). The plaintiff is not therefore "bound by the razi decree in original suit No. 26 of 1874. "The Munsif's decree, which proceeded upon this preliminary "point, is reversed and the suit remanded for trial on its merits."

Defendants Nos. 3 and 4, who were in possession of the land in question, preferred this appeal.

Pattabhiramayyar for appellants.

(1) I.L.R., 8 Cal., 79, 85.

VYTHI-NADAYYAN v. SUBRAMANYA.

Bhashyam Ayyangar 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 Parker, J.).

JUDGMENT.—The facts are as follows:—The plaintiff purchased the property in dispute on 17th September 1874 from defendant No. 1, and his brother, Ramannah, during the pendency of a partition suit (original suit No. 26 of 1874) to which defendant No. 1 and Ramannah were parties, that suit being brought by the present defendant No. 2 and Nagu. The sale-deed purported to convey to the plaintiff plaint items 1, 2 and 3. The plaintiff was not made a party to suit No. 26 of 1874, and it was compromised by the parties. The razinama decree gave to defendant No. 2 and Nagu (plaintiffs in that suit) the western two-thirds in items 1 and 2 and the whole of item No. 3. The defendants contend that the plaintiff is bound by the decree in that suit being a purchaser *pendente lite*; that he can take the eastern one-third in items 1 and 2, but that he can have no portion of No. 3. The plaintiff on the other hand claims one-third in each item according to quality.

The District Munsif held that the plaintiff as a purchaser *pendente lite*, was bound by the decree in suit No. 26 of 1874 and gave him a decree for the eastern one-third in items 1 and 2 and dismissed his claim to No. 3. On appeal the Subordinate Judge held that the doctrine of *lis pendens* applied only to an adjudication on the merits, and not to mere agreements which the parties chose to make during the pendency of the suit. He therefore remanded the suit for trial on the merits. The present appeal is against that order.

The following cases were referred to in argument:—*Munisami* v. *Dakshanamurthi*(1), *Brahannayaki* v. *Krishna*(2), *Kasumunnissa Bibee* v. *Nilratna Bose*(3), and *Jenkins* v. *Robinson*(4).

We are of opinion that the order of the Subordinate Judge is right. The true rule as to *lis pendens* as laid down in *Bellamy* v. *Sabine*(5) is that neither party can alienate the property in dispute so as to affect his opponent, and the foundation for the rule is that it would be impossible any suit should be brought to a

(1) I.L.R., 5 Mad., 371.
(2) I.L.R., 9 Mad., 92.
(3) I.L.R., 8 Cal., 79.
(4) L.R., 1 Scotch Appeals, 117.
(5) 1 De G. & J., 566.

VYTHI-NADAYYAN v. SUBRAMANYA.

successful termination if alienations, *pendente lite*, were permitted to prevail. Hence it was held that the necessities of mankind require that the *decision of the Court* in the suit shall be binding not only on the litigant parties but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings.

According to Roman Law after *litis contestatio*, the subject in dispute became litigious and passed into quasi-judicial custody; but where a suit is compromised by the act of the parties we think the *litis contestatio* has ceased, and the Court performs no judicial function, but only an administrative one in recording the compromise. This is the view taken by Couch, C.J., in *Kailas Chandra Ghose Fulchand Jaharri*(1) and is consistent with the principle laid down by Chelmsford, L.C., and Lord Romilly in *Jenkins* v. *Robinson*(2); see also the use of the terms "contentious suit or proceedings" in section 52 of the Transfer of Property Act.

We therefore confirm the order of the Subordinate Judge and dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

1889. March 7, 12.

RAMAKRISTNA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

SUBBAKKA (DEFENDANT), RESPONDENT.*

Hindu Law—Inheritance—Illatam—Burden of proof.

N, a Hindu, who had admittedly been taken as *illatam* into the family of his father-in-law died, leaving property which he had acquired by virtue of his *illatam* marriage. He was succeeded by his son, who died without issue, leaving only a sister surviving him. In a suit by the brother of N, who was the managing member of his family, to recover the property from the sister of the last holder:

Held, that the plaintiff was *primâ facie* entitled to recover, notwithstanding the admission, and that it was for the defendant to establish any special circumstances to rebut his claim.

APPEAL against the decree of L. A. Campbell, District Judge of Nellore, in original suit No. 27 of 1887.

(1) 8 B.L.R., 474, 489. (2) L.R., 1 Scotch Appeals, 117.

* Appeal No. 136 of 1888.

RAMAKRISTNA v. SUBBAKKA.

This was a suit to establish the plaintiffs' right to and to obtain possession of the movable and immovable property of one Pichi Reddi, deceased.

Plaintiff No. 1 was the brother of one Narasa, the late father of the deceased, and sued as the managing member of his undivided Hindu family, of which plaintiffs Nos. 2 and 3 were also members; he further claimed as heir to the deceased.

The defendant was the only sister of the deceased whose only brother had predeceased him leaving no issue. She was in possession of the property in dispute and claimed to be entitled to it—(1) upon the fact which was set forth in the plaint, that her father, Narasa, had been taken as *illatam* into the family of his father-in-law, and subsequently had become possessed of all the property of that family, and (2) upon the allegation, which was not tried, that her husband had been taken by Narasa as *illatam* son-in-law.

The District Judge framed the following among other issues: "Are the natural brother and nephews of an *illatam* son-in-law "heirs at law of that *illatam* son-in-law's sons, who, survived him, "in respect of the property of the family to which he was affiliated "in preference to his daughter?"

Upon this issue, the District Judge, after considering the two cases referred to in the judgment of Shephard, J., and *Chenchamma* v. *Subbaya*(1) recorded a finding in the negative, and without proceeding to try the other issues raised on the pleadings he dismissed the plaintiffs' suit.

The plaintiffs preferred this appeal against the decree of the District Judge.

Mr. *Subramanyam* for appellants.

Mr. *Wedderburn* for respondent.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the following judgments:—

PARKER, J.—The District Judge has decided the suit upon the first issue only, and we are of opinion that he has placed the *onus probandi* on the wrong side.

It appears that Narasa Reddi predeceased his wife, but that, at her death at any rate, their sons Venkata Reddi *alias* Pichi Reddi, and Rami Reddi took jointly as full owners. The younger brother died first without issue, and elder brother was

(1) I.L.R., 9 Mad., 114.

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then the last full owner. According to the ordinary rule of Hindu Law his paternal uncles are nearer reversioners than his sister, and it is for those who allege a special custom or a special arrangement at variance with the ordinary rule of law to prove the same. Treating the property as self-acquired, the origin of the self-acquisition would not *primâ facie* affect the right of inheritance.

The defendant alleges that her husband was taken as *illatam* son-in-law into her father's family, in order that after the death of her last surviving brother, the entire family property should be enjoyed by her as of right. This plea it is for her to prove.

I would reverse the decree of the District Court and remand the suit to be heard on the merits. The costs will abide and follow the result.

SHEPHARD, J.—The last holder of the property sought to be recovered was Venkata Reddi *alias* Pichi Reddi, who died in November 1886, leaving him surviving his sister, the defendant, and the plaintiff, his father's brother. Apart from any special custom, there is no doubt that the plaintiff is entitled to recover. The suit has been dismissed on the ground that the plaint discloses the fact that the defendant's father, Narasa, who died 30 years ago, was taken by one Putta Venkata Reddi as his *illatam* son-in-law, and it has been held that the plaintiff who belongs to Narasa's original family cannot take property, which came to him by virtue of his *illatam* marriage, to the exclusion of a member of the family into which he married. I am of opinion that this decision cannot be supported. It has been held that a person who is taken as *illatam* into another family does not thereby lose his right of inheritance in his natural family—*Balarami* v. *Pera*(1). The tie of relationship between him and his natural family is not severed as it is when there is an adoption under Hindu Law. From this, I think, it must follow that the members of his natural family must equally have such rights in respect of property acquired by him as they would otherwise have had. The circumstance of being taken as *illatam* constitutes a mode whereby the person taken acquires property—*Challa Papi Reddi* v. *Challa Koti Reddi* (2), and if that circumstance is not inconsistent with the person affected still remaining a member of his own family, I cannot understand why it should affect the rules which would ordinarily

(1) I.L.R., 6 Mad., 267. (2) 7 M.H.C.R., 25.

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govern the devolution of his property on his death. It may seem hard that a member of the family into which the *illatam* son-in-law was taken should be ousted from the property originally belonging to that family in favor of one who belongs to another family. But that is a necessary consequence of the alienation in favor of the *illatam* son-in-law. It was competent to him or at any rate to his last surviving son who was sole owner of the property to alienate, and it must equally be an incident of the property that on the death of the last sole owner it should, in the absence of special custom to the contrary, go to his heirs according to Hindu Law.

In my opinion the decree of the Court below must be reversed and the case remanded for trial on the merits. Costs to be provided for in revised decree.

APPELLATE CIVIL.

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

1889. Jan. 14. March 5.

MEKAPERUMA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

THE COLLECTOR OF SALEM AND OTHERS (DEFENDANTS), RESPONDENTS.*

Revenue Recovery Act (Madras), Act II of 1864, *ss.* 25, 27—*Regulation V of* 1804, *s.* 20—*Notice on minor defaulter—Irregularity in revenue sale.*

A *mitta* consisting of an unsurveyed village, of which the plaintiffs (minors) were the registered proprietors of an undivided moiety, was brought to sale for arrears of kist and was purchased for the plaintiffs by their guardian, duly appointed under Regulation V of 1804, s. 20. The sale was subsequently cancelled; and further arrears having accrued, the mitta was attached again. Before the second attachment took place, the guardian died, and no one having been appointed to succeed him, though an application was made to the Court for that purpose, a written demand under Revenue Recovery Act, s. 25, was tendered to the plaintiffs' mother and affixed to the wall of the house on 17th January, and notice under s. 27 was served on 17th February. The sale took place in September and defendant No. 2 became the purchaser. It was admitted that a division of the village was impracticable. In a suit by the plaintiffs by their mother and next friend to set aside the sale:

* Appeal No. 96 of 1887.

MEKAPERUMA v. THE COLLECTOR OF SALEM.

Held, since service of a demand upon the defaulter is an essential preliminary to sale, the sale was invalid so far as the share of the plaintiffs was concerned, and the sale as a whole was vitiated by the irregularity.

APPEAL against the decree of C. W. W. Martin, District Judge of Salem, in original suit No. 9 of 1884.

Suit by two minor plaintiffs, suing by their mother and next friend to set aside a sale of their undivided share in a mitta for arrears of revenue. The District Judge dismissed the suit and the plaintiffs preferred this appeal against his decree.

The *Acting Advocate-General* (Hon. Mr. *Spring Branson*) and *Subramanya Ayyar* for appellants.

The *Acting Government Pleader* (*Subramanya Ayyar*), *Bhashyam Ayyangar* and *Kalianaramayyar* for respondents.

The 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 Parker, J.).

JUDGMENT.—The plaintiffs' father, Mekaperuma Oodayan, was the owner of half the Senthamangalam mitta. He died in 1876 and the plaintiffs were then registered as owners of his moiety. The other sharers were defendant No. 2, who owned $\frac{1}{12}$, which he purchased in 1880; defendants Nos. 4 and 6, who jointly owned another $\frac{1}{12}$; defendant No. 7, who owned $\frac{1}{4}$, and defendant No. 8, who owned the remaining $\frac{1}{12}$.

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

The plaintiff's guardian died on 1st December 1882, and shortly afterwards a fresh attachment of the mitta was made for the old arrears and for arrears which had accrued subsequently. At the date of this attachment no new guardian had been appointed by the District Court for the minor plaintiffs under section 20, Regulation V of 1804. The first notice under section 25, Act II of 1864, was tendered to the minors' mother on 17th January 1883, but she refused to receive it, and it was then affixed to the wall of the

house. The second notice under section 27 is said to have been served on 17th February 1883, but it does not appear in what mode service was effected. On 2nd March 1883, the Collector wrote to the District Judge suggesting that the Court should appoint a fresh guardian for the minors. From the endorsement made by the District Judge upon the letter (dated 16th July 1883), it would appear that the Judge prepared to consult the Collector as to the fitness of Subbaraya Oodayan (plaintiffs' brother-in-law) to be appointed guardian; but there is nothing to show whether any further steps were taken. At any rate when the mitta was brought to sale a second time on 14th September 1883, no fresh guardian had been appointed by the Court.

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

The plaintiffs' mother (the unsuccessful bidder) now sues on their behalf to set aside the sale on the ground that the whole proceedings were illegal and not binding on the plaintiffs. It is alleged among other things that the Collector (defendant No. 1) was bound to have attached the movable property of the registered holders in the first instance; that the demand notice was not served upon any properly-constituted guardian of the minor plaintiffs, nor was it legally served; that the sale of the whole mitta for so small an arrear was unnecessary and illegal; and that defendant No. 1 improperly refused to receive the arrears on the day of sale.

The District Judge overruled all the objections of the plaintiffs and dismissed the suit with costs.

The first objection taken in appeal is that under the terms of the sunnud the personal property of the defaulters should have been first sold. It appears that some of the movables of defendant No. 2 were released on his electing that the land should be proceeded against. The other proprietors had concealed their movables. This provision in the sunnud was no doubt meant to

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save landed proprietors from losing their estates for non-payment of kist if the sale of their movable properties, which could more easily be replaced, would suffice to satisfy the demands of the State; but in this instance it is clear that all the proprietors wished the estate to be sold. The reason is obvious;—one $\frac{1}{12}$ share had been bought by the defendant No. 2, a man of different caste, and it was felt on all sides that the only way to prevent constant quarrels was to allow the estate to be sold and endeavour to outbid the outsider who had thus intruded into the family estate. The defendant No. 2 on his side was equally anxious for a sale, being desirous of purchasing the whole mitta. The District Judge has, we think, shown that a division of the mitta was impracticable, nor indeed did any of the parties really desire any division.

The only sound ground on which the sale can be impugned is the absence of any demand legally served upon the minors preliminary to the sale of September 1883. The service of such demand upon the defaulter is a legal and essential preliminary to sale, and the plea that the sale of September 1883 was only a re-sale will not avail since the demand then included arrears which had accrued subsequent to the first sale and for which a fresh attachment was necessary. The District Judge held that though the Collector might have exercised a more proper discretion had he waited until the Court's guardian was appointed, he had not acted illegally in dealing with the mother, the natural guardian. For the Government it was contended that section 20, Regulation V of 1804, only threw upon the Collector the duty of reporting the case to the Judge in the first instance; that the Collector had done his duty and that Varada Peruma Oodayan had been appointed; and that though the Collector had, as a matter of courtesy and for convenience, informed the Court of the death of the guardian, he was not bound so to do. The fault, if any, it was urged was that of the District Judge.

In this view we are not able to concur. The omission of the District Court to appoint another guardian is no doubt unexplained, though possibly it may have been due to the sudden illness and death of the then presiding Judge. It would have been open, however, to the Collector to have reminded his successor of the duty which had devolved upon him, or in case of neglect to have moved this Court for a direction. But in any case it was certainly incumbent upon the Collector to see that the demand

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notice was served upon some person legally entitled to represent the minor defaulters.

It is then urged that it is the usual practice of the Revenue Department to serve such notices upon the natural guardians of the minor heirs of deceased landholders, and that such notices are usually accepted as valid. No doubt this may be so, but in the case before us the procedure of section 20, Regulation V of 1804, had been actually adopted and a guardian had been appointed by the Court. The guardian had died and application had been made to the Court to appoint another guardian. The mother declined to act herself and disclaimed all right to look after the interests of the minors with reference to the mitta, and petitioned the Collector prior to the sale to undertake the management of the estate under section 28, Act II of 1864, since there was no one to look after the interests of the minors. Under these circumstances we cannot hold that the service of the demand notice upon the mother was a valid service upon the minor defaulters.

The sale of the minors' interests is therefore invalid, and this being so it appears to us that the irregularity must vitiate the whole sale. The minors are entitled to a joint undivided one-half share in a mitta which consists of a single village unsurveyed and the division of which is admitted to be impracticable. The appeal must therefore be allowed and the sale of the mitta set aside. The appellants are entitled to their costs from respondent No. 1 in this Court and the Court below, but the other respondents will bear their own costs.

APPELLATE CRIMINAL.

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

1889. April 10.

QUEEN-EMPRESS

v.

JAMMU AND ANOTHER.*

Abkári Act—Act I of 1886 (Madras), ss. 55 (a), 69—Rules notified by Government under Abkári Act—Rules for "immediate" removal of toddy.

Toddy-drawers failing to remove their toddy to a shop or distillery "within a reasonable time" after it is drawn, are punishable under section 55(*a*) of the Abkári Act, though their licenses do not refer to the Government notification, made under the Act, prescribing its immediate removal.

CASE reported for the orders of the High Court under section 438 of the Code of Criminal Procedure, by H. S. Wynne, Acting District Magistrate of South Canara.

The case was stated by the Acting District Magistrate as follows:—

"The accused are both licensed toddy-drawers and the charge in both cases is that they after drawing toddy left it for some hours in the gardens, which is found to be an offence under section 55 (*a*) of the Abkári Act, in that paragraph 6 of the Government Notification No. 220, dated 28th July 1888, issued in *Fort St. George Gazette*, dated 31st July 1888, Part I, page 548, directs that toddy is to be 'immediately' conveyed to a distillery or shop.

"But the same notification (*vide* page 551) contains the form of the license issued to these tappers under sanction of which they draw toddy, and nothing is said in it of carrying the toddy 'immediately' to the shop or distillery, nor is the Government notification referred to in any way in the said license so that it could be held to be incorporated in it. The section under which they have been convicted runs: 'whoever in contravention of this Act, or of any rule or order made under this Act, *or of any license or permit* obtained under this Act . . . . possesses liquor.' It seems to me doubtful whether under the circumstances the convictions are legal."

* Criminal Revision Cases Nos. 96 and 97 of 1889.

The *Acting Government Pleader* (*Subramanya Ayyar*) for the Crown.

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

ORDER.—We are unable to concur with the District Magistrate that the conviction was wrong. The rules framed by the Governor in Council have the force of law, and in accordance with them, the holder of a tree-tapping license is bound to convey the pots containing toddy to the shop immediately after removal from the trees. As remarked by the Sub-Magistrate the word "immediately" must be held to be equivalent to "within a reasonable time," and what is a reasonable time must depend on the facts of each case, care being taken that opportunity for illicit sale is not encouraged. We decline to interfere.

APPELLATE CRIMINAL.

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

1889. July 11, 17.

QUEEN-EMPRESS

v.

SUBBAYYA.*

Penal Code, ss. 181, 182—Examination on affirmation of one preferring a criminal appeal — Verification of petition of appeal—Criminal Procedure Code, ss. 342, 428, 540.

In a petition of appeal from a conviction, the appellant falsely stated that the convicting Magistrate declined to summon his witnesses. The Magistrate to whom the appeal was preferred called upon the appellant to verify the allegations in the petition of appeal on solemn affirmation, and he did so:

Held, that the appellant had not committed an offence under s. 181 or 182 of the Penal Code.

CASE reported for the orders of the High Court under section 438 of the Code of Criminal Procedure, by E. J. Sewell, the Acting District Magistrate of Cuddapah.

The accused was charged under sections 181 and 182 of the Penal Code under the circumstances set out in the judgment of the High Court.

* Criminal Revision Case No. 241 of 1889.

QUEEN-EMPRESS v. SUBBAYYA.

The Magistrate before whom he was charged discharged him under section 253 of the Code of Criminal Procedure on the grounds (1) that his examination on affirmation was illegal and (2) that the information given by him was not intended by him to injure the Magistrate referred to but to procure a reversal of his sentence.

As to these grounds the District Magistrate said in his report to the High Court:—

"Neither of these reasons for dismissal seem to me valid. "Section 428 of the Code of Criminal Procedure authorises a "Magistrate hearing an appeal to take any additional evidence "he may consider necessary, and section 540, Criminal Procedure "Code, authorises him to examine any person at any stage of "any proceeding under the Code. Unless therefore the appellant "was an accused person (when section 342 prevents his examina-"tion on oath) the Head Assistant Magistrate was authorised to "examine him on oath or affirmation. I can see no ground for "the Magistrate's opinion that Appireddi Subbayya, when appeal-"ing against his conviction, was in the position of an accused "person. Moreover, the point on which he was examined had "nothing whatever to do with his guilt or innocence of the charge "against him, but was only relevant to the question whether he "had been fairly and legally tried.

"As to the charge under section 182, the section includes the "giving of false information to a public servant ..... knowing "it to be likely that he will thereby cause such public servant to "use his lawful power to the injury or annoyance of any person, "or to do or omit anything which he ought not to do, or omit if "the true state of facts .... were known by him.

"In this case the statement that the witnesses were not sum-"moned was false, and there is evidence that Appireddi Subbayya "knew it to be false, it was evidently both intended and known to "be likely to cause the Head Assistant Magistrate to order a new "trial or further inquiry which he certainly would not have done "if he had known the true state of the facts."

Counsel were not instructed.

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

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JUDGMENT.—The accused appealed against his conviction by the Sheristadar-Magistrate of Jammalamadugu, and, in his petition of appeal, stated, among other things, that the Sheristadar-Magistrate had declined to summon the witnesses cited for the defence. On being required to give a statement to that effect on solemn affirmation by the Head Assistant Magistrate, he did so. On inquiry it appeared that that statement was false. Thereupon the accused was prosecuted for offences under sections 181 and 182, Indian Penal Code. The Second-class Magistrate, who inquired into the case, discharged the accused under section 253, Code of Criminal Procedure, on the ground that the appellant in a criminal case was not liable to be examined on oath or solemn affirmation, and that he gave information not with any intent to injure the Sheristadar-Magistrate, but in order to secure his own acquittal. The Acting District Magistrate refers the order of discharge to this Court, and suggests that it should be set aside as illegal. It was not the intention of the legislature that the accused should be called upon during the trial of a criminal case to make a statement on oath, or that he should be liable to punishment for giving false answers to questions put to him (section 342). The Code does not require that the appeal petition should be verified; sections 428 and 540 do not seem to us to authorise the examination of the accused as a witness. A criminal appeal is a continuation of the criminal case, and, except so far as there is a provision to the contrary, the appellant has the privilege of the accused and cannot be punished for making a false statement (section 342, Criminal Procedure Code).

On these grounds we are of opinion that the acquittal was right and that we cannot interfere on revision.

APPELLATE CIVIL.

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

1889. April 4, 30.

VALLABHAN (PETITIONER), APPELLANT,

v.

PANGUNNI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, ss. 244, 293, 306, 309, 588—*Court-sale—Liability of defaulting purchaser—Appeal from order under s.* 293—*Resale.*

At a sale in execution of a decree a decree-holder, who had obtained leave to bid, was alleged to have made a bid through his agent of Rs. 90,000, but he shortly afterwards repudiated the bid and did not pay the deposit. The property was put up for sale again on the following day under s. 306 of the Code of Civil Procedure and was in due course knocked down for a smaller sum. The judgment-debtor filed a petition under s. 293 to recover from the decree-holder the loss by resale; the petition was rejected. On appeal:

Held, (1) that the question at issue was one arising between the parties to the suit and that an appeal lay against the order rejecting the petition;

(2) that the property having been forthwith put up again and sold under s. 306 of the Code of Civil Procedure was resold within the meaning of s. 293.

APPEAL against the order of E. R. Krishnan, Subordinate Judge of South Malabar, on miscellaneous petition No. 60 of 1888.

In original suit No. 28 of 1879, a decree was passed in favor of the plaintiff (the present counter-petitioner No. 1), and certain forest land, the property of the family of the judgment-debtors, (of whom the present petitioner was one,) was brought to sale in execution. The present counter-petitioners Nos. 2—4 were the holders of other decrees, in execution of which they claimed rateable distribution of the proceeds of the above sale. At the sale counter-petitioner No. 5, who was alleged to be the agent for counter-petitioners Nos. 1—4, bid Rs. 90,000, and the property was knocked down in the name of counter-petitioner No. 1, who had obtained leave to bid; counter-petitioner No. 1, however, in a few minutes repudiated the bid. The matter having been at once reported to the Subordinate Judge, he on the same day made the following order:—

* Appeal against Order No. 76 of 1888.

"The withdrawal cannot be permitted. The nazir is directed "to levy 25 per cent. of the purchase money or get such of the "purchasers as hold decrees against the judgment-debtors to put "in satisfaction of decree to that extent. In default the property "is to be forthwith put up again and sold. The deficiency, if "any, will be recovered from the purchasers under the ruling in "*Javherbai* v. *Haribhai*(1)."

No deposit was paid: the property was put for sale again on the next day, 13th December, and on the 19th it was knocked down to petitioner No. 6, the Collector of Malabar, for Rs. 42,100.

In the present petition it was sought to recover from the counter-petitioners Rs. 47,900, being the difference between the two sums above referred to. The Subordinate Judge held that counter-petitioners Nos. 2—4 had not authorized the first bid, and rejected the petition, expressing his reasons as follows:—

"From all the circumstances, I find that there was no sale as "contemplated by section 306, because there was no payment of "25 per cent. and poundage. The ruling in *Intizam Ali* v. *Narain* "*Singh*(2) appears to me in point, and there was certainly no "resale under section 293, because the property was not again "proclaimed. The sale, as a matter of a fact, took place on the "19th December, on which date it was adjourned by the Court "under the discretion vested in it by section 291. I therefore "think that the order which I endorsed on the nazir's report, dated "12th December, based on *Javherbai* v *Haribhai*(1) cannot be "enforced. It is cancelled, and the petition is rejected."

The petitioner preferred this appeal.

Mr. *W. Grant* for appellant.

The *Acting Government Pleader* (*Subramanya Ayyar*) *Bhashyam Ayyangar*, *Sundara Ayyar* and *Govinda Menon* 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 (Collins, C.J., and Parker, J.).

JUDGMENT.—The application now under appeal was made under section 293 of the Code of Civil Procedure by the third defendant in original suit No. 28 of 1879 on the file of the Calicut

(1) I.L.R., 5 Bom., 575. (2) I.L.R., 5 All., 316.

VALLABHAN v. PANGUNNI.

Subordinate Judge's Court to recover from the counter-petitioners Rs. 47,900 being the difference between the sum of Rs. 90,000 bid by counter-petitioner No. 5 as agent for the other counter-petitioners, and Rs. 42,100 the sum for which the properties were ultimately sold.

Counter-petitioners Nos. 1—4 were decree-holders entitled to rateable distribution, and counter-petitioner No. 5 is alleged to have been their agent. The property was put up on 12th December 1887, the upset price in the proclamation being given as Rs. 5,000; but on it being represented to the Subordinate Judge that at the last auction which had been stopped, the Collector had bid Rs. 84,000 for the same property, the Subordinate Judge ordered the nazir to cry up the property at that price. The only bid after that was for Rs. 90,000 which was bid by counter-petitioner No. 5 as the agent for counter-petitioner No. 1, Pangunni Menon, in whose name the property was knocked down. Pangunni Menon failed to deposit the 25 per cent. of the purchase money, or to pay the poundage; and on it being reported to the Subordinate Judge by the nazir, that all the judgment-creditors withdrew from the sale, he passed an order directing that the property be forthwith put up again and sold and that the deficiency, if any, might be recovered from the purchasers, under the ruling in *Javherbai* v. *Haribhai*(1). The property was put up again on the following day (13th December) and purchased by the Collector for Rs. 42,100 on 19th December 1887. The sale was confirmed on 20th February 1888.

The Subordinate Judge found that counter-petitioners Nos. 2—4 had not authorized counter-petitioner No. 5 to bid for them; that there was no sale as contemplated by section 306 of the Civil Procedure Code since there was no deposit *Intizam Ali* v. *Narain Singh*(2) and that in any case there was no resale under section 293, because the property was not again proclaimed. On these grounds he dismissed the judgment-debtor's petition.

It is first objected that there is no appeal, since section 588 of the Code of Civil Procedure does not provide any appeal from an order under section 293 of the Code of Civil Procedure, and it is argued that the question is not one arising between the parties to the suit or their representatives, but between the judgment-debtor

(1) I.L.R., 5 Bom., 575. (2) I.L.R., 5 All., 316.

VALLABHAN v. PANGUNNI.

and the auction-purchasers, and that the summary order can only be set aside in a regular suit.

Pangunni Menon, counter-petitioner No. 1, had obtained leave on 12th December to bid at the sale, and as far as this Court is concerned, the first question appears to have been decided in *Viraraghava* v. *Venkata*(1). In that case it was held that a judgment-debtor, who claimed to have a sale set aside on the ground of fraud, the judgment-creditor having procured a sale without advertisement and purchased without leave of the Court, was debarred from bringing a separate suit to set aside the sale, inasmuch as the question arose between the parties to the suit and related to the execution of the decree within the meaning of section 244 of the Civil Procedure Code. The decision in *Pachayappan* v. *Narayana*(2) was referred to as against this view, but in that case it does not appear that the auction-purchaser was a party to the suit. We are therefore of opinion that an appeal does lie.

We agree with the Subordinate Judge that the evidence does not show that counter-petitioner No. 5 had authority to bid for counter-petitioners Nos. 2—4, and we observe that the Collector, counter-petitioner No. 6, has been improperly made a party in this appeal. As against counter-petitioners Nos. 2—4 and 6, the appeal must therefore be dismissed with costs. The appeal must also fail as regards counter-petitioner No. 5, who only bid as Pangunni Menon's agent in the presence of his principal.

The decision in *Intizam Ali* v. *Narain Singh*(3) does not appear to us to affect the present case. There the bidder did not pay the deposit till some days subsequent to the sale, and the Court held on the application of the judgment-debtor that the sale was invalid since the property should have been forthwith put up again and sold; hence the judgment-debtor was held entitled to have the sale set aside. In the case before us there is no question whether Pangunni Menon is entitled to claim the benefit of the sale. The only question is whether the judgment-debtor is entitled to recover from him the deficiency of price which has happened on a resale.

In this case the Subordinate Judge ordered the precedure laid down in section 306 of the Civil Procedure Code to be observed, and the property to be forthwith put up again and sold. But it

(1) I.L.R., 5 Mad., 217. (2) I.L.R., 11 Mad., 269. (3) I.L.R., 5 All., 316.

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required on the whole merits of the case, this opinion might be modified.

"I have been present in Court the whole of to-day, and have heard the evidence given by the witnesses. I find from the evidence that the prisoner had been sick of fever for six days previous to the occurrence; that he had had very little food during that period; and that whilst in this enfeebled condition, he had fever on the night previous to the deed, and that during the period when he was supposed to have had fever he used words in a manner which renders it possible that he was then suffering from delirium. I consider that the abusive tendency taken by the delirium is a matter of great importance. He was evidently suffering from the opinion that some one had injured him, and I find that the prosecution offers no theory of intention whatever. It is shown that the sword or swords with which the deed was committed were in the same hut. It is also admitted that he lived affectionately with the child he killed, and that none of the abuse of the previous evening was directed towards her. It is an established fact that during and after paroxysms of intermittent fever, there occasionally arises a want of mental control known as *post febrile lunacy*. I consider that the chances are that the prisoner was laboring under the impression that some one had injured him and under this opinion and incited thereto by the fact of the sword being at hand without in all probability knowing that this was a child had started at unknown enemies. The fact of the goat having been wounded also helps the theory to some extent, especially if the Head Constable's theory is correct that the wound was not caused by a slash but by a thrust. A thrust would show more deliberate intention to kill what was in reality only a harmless goat. Had he slashed the goat, the theory that the Head Constable suggested that he missed the girl and hit the goat would be more tenable. The prisoner is now in feeble state of health, and has an enlarged spleen, from which I infer that he has suffered from malarial fever recently. He has also suffered from fever in jail.

"*By Court.*—I have had no reason to suppose that the prisoner had suffered from epileptic fits; but if he had been subject to them, it would greatly favor the theory of a homicidal impulse: and such impulse would be greatly aggravated by the existence of fever at the time. If the prisoner had committed the deed in

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a state of febrile delirium, it is quite consistent that after the delirium had left him he would be aware of what he had done. It depends greatly on the degree of delirium: but it would quite consist with delirium that he should know what he had done."

Mr. *Subramanyam* for the accused.

The *Acting Government Pleader* (*Subramanya Ayyar*) for the Crown.

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

JUDGMENT:—We are not satisfied that at the time the appellant committed the act, he was by reason of unsoundness of mind incapable of knowing the nature of the act and did not know that the act was wrong or contrary to law. No motive has been suggested for his killing the child. The appellant was suffering from fever and had taken little food for some days. When the Village Magistrate arrived, he asked the appellant—Who killed the girl? and the appellant replied "I killed her," and answered the questions the Magistrate put to him rationally. The appellant undoubtedly acted very strangely a short time before the murder. He abused his father and brother for not returning from the hills where they had gone some days before, and he also abused some women the same morning. The wounding of the goat is strange, but the circumstances under which he stabbed the goat are not fully explained or can be accepted as sufficient evidence of insanity. We observe that there is no positive evidence that the appellant was suffering from delirium at the time he committed the murder, or that he was unconscious of the nature of the act he had committed.

The abuse of his relations was most likely due to irritability of mind caused by the fever he was suffering from. The medical officer's evidence does not amount to more in our opinion than that there is the possibility of a sudden attack of homicidal mania; but judging the evidence by the ordinary judicial tests which we are bound to apply, we cannot say that it warrants a finding that the appellant did not know that what he was doing was wrong within the meaning of section 84 of the Indian Penal Code. The case of *Queen-Empress* v. *Lakshman Dagdu*(1) cited by the Acting Government Pleader contains, in our opinion, the points

(1) I.L.R., 10 Bom., 512.

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of law to be decided in such cases. While, however, confirming the conviction, we decline to confirm the sentence of death, and direct that in lieu thereof the appellant be transported for the term of his natural life; and we direct that the evidence in the case and this judgment be brought to the notice of His Excellency the Governor in Council in order that he might, if he think fit, reduce the sentence under the special circumstances of this case.

APPELLATE CIVIL.

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

1889. March 13.

MAHALINGA (DEFENDANT No. 1), APPELLANT,

v.

MARIYAMMA AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Aliyasantana law—Yajaman—The rights of the senior member of the family being a female.

The senior member of an Aliyasantana family, if a female, is *primâ facie* entitled to the yajamanship: and in the absence of a special family custom or a binding family arrangement to the contrary, the management of the family affairs by another member is to be presumed to be by the sufferance of the yajaman for the time being.

SECOND APPEAL against the decree of J. W. Best, District Judge of South Canara, in appeal suit No. 140 of 1886, confirming the decree of C. Venkobacharyar, Subordinate Judge of South Canara, in original suit No. 37 of 1885.

The plaintiff as senior member of an Aliyasantana family sued to remove her younger brother, defendant No. 1, from the management of the family and to recover possession of the family property.

Both the Subordinate Judge and, on appeal, the District Judge decreed as prayed by the plaintiff. Defendant No. 1 preferred this second appeal.

Ramasami Mudaliar for appellant.

Ramachandra Rau Saheb for respondents.

The 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.).

* Second Appeal No. 73 of 1888.

MAHALINGA v. MARIYAMMA.

JUDGMENT.—Respondent No. 1 is the senior member of an Aliyasantana family in South Canara and the appellant is her younger brother and has been the *de facto* manager of the family for upwards of 20 years. Respondent No. 1 brought the present suit on the death of her uncle to establish her right to assume management of the family property, and to remove the appellant from possession. She rested her claim on two grounds, namely, that as the senior member of the family, she was the lawful yajâman, and that the appellant was guilty of misconduct. The Subordinate Judge considered that the misconduct imputed to the appellant was not proved. Though the District Judge did not concur in that opinion, yet he preferred to rest his decision mainly on the ground that respondent No. 1 was the lawful yajaman of the family, and that the appellant's management was liable to be put an end to at her pleasure. It is urged in appeal that this view of the case is contrary to law.

The first point argued before us is that exhibit K and the appellant's evidence in this case have been misunderstood. In exhibit K the appellant stated that he had been managing according to the instructions of the females of the family, but that his management was not liable to be set aside except for fraud. In his evidence he said that he had been managing the affairs of the family with the consent of respondent No. 1 and the other females and his uncle Teampa Hegade. Though these statements, as urged for the appellant, do not amount to a clear and unequivocal admission that the appellant's management was by sufferance, yet they certainly afford some evidence of it, inasmuch as he distinctly admitted in exhibit B that he had been in management during the lifetime of his uncle, who was both his senior and a male member of the family.

The next contention is that the decision ought to be in accordance with the special usage of the family. The question of a family usage was raised by the first issue in the case, and the finding is that no such usage has been established. It appears further that no special family karar or arrangement has been set up. The substantial question then for decision was whether, according to the general Aliyasantana usage, the senior male excludes from management the senior member of the family when she is a female. We are of opinion that the decision of the Judge on this point is correct. It is in accordance with the decisions of

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this Court in *Subbu Hegadi* v. *Tongu*(1), *Devu* v. *Deyi*(2) and *Govindan* v. *Kannaran*(3). Though it was considered not yet settled whether the senior female might not exclude the senior member of the family from management if he is a male, still it was never doubted that the senior member, if a female, is entitled to the yajamanship. It is true that females are generally excluded from management in Malabar by reason of their sex, but it is the incident of a special usage which has been recognized to obtain in that district. As observed by the Judge, the Aliyasantana system of inheritance as well as the marumakkatayam usage has probably originated from a type of polyandry which prevailed in ancient times, and the natural result of that system would lead to the senior female being the yajaman of the family. We agree in the opinion of the Judge that the practice obtaining in Malabar whereby females are excluded from management cannot be extended to the Aliyasantana families in South Canara. In the absence of a special family custom or a binding family arrangement, the Judge was right in presuming that the appellant's management was by the sufferance of yajaman for the time being, and that it did not preclude the yajaman from resuming the management at his or her pleasure at any time. It has been held by this Court that such a presumption is legal, with reference to a Malabar tarwad(4), the constitution of which is similar to that of an Aliyasantana family.

We are of opinion that the second appeal cannot be supported and dismiss it with costs.

(1) 4 M.H.C.R., 197. (2) I.L.R., 8 Mad., 353. (3) I.L.R., 1 Mad., 351.
(4) See *Nambiatan* v. *Nambiatan* (2 M.H.C.R., 110), Reporter's Note.

APPELLATE CIVIL.

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

THAYAMMA (DEFENDANT), APPELLANT,

v.

KULANDAVELU AND OTHERS (PETITIONERS), RESPONDENTS.*

1889. Jan. 24. April 11.

Rent Recovery Act—Act VIII of 1865 (*Madras*), *s.* 17—*Attachment and sale of the tenants' interest in the land for arrears of rent.*

When default has been made in the payment of rent and the saleable interest of the defaulting tenant in the land is attached, the attachment cannot be declared invalid in a summary suit, under s. 17 of the Rent Recovery Act.

Under s. 38 of the same Act, a landlord cannot attach the saleable interest of a defaulting tenant in the land, until the expiry of the current revenue year.

SECOND APPEAL against the decrees of R. S. Benson, Acting District Judge of South Arcot, in appeal suits Nos. 190 to 193 of 1887, confirming the decisions of T. V. Narayanasami Ayyar, Temporary Deputy Collector of South Arcot, in summary suits Nos. 19 to 22 of 1886.

Summary suits against a mittadarni by three tenants. The mittadarni having attached the tenants' interest in the land for arrears of rent accrued due had obtained an order that it be brought to sale. The tenants now objected to the sale on the following grounds:—

"(i) That the attachment, if true, has been made on the 4th June 1880, which is one year after the arrears became due and that the application for sale does not lie under section 2.

"(ii) That the original pattadars have not been served with notices under section 39.

"(iii) That the application for sale has not been made in time."

The Lower Courts held the first objection to be valid and passed decree in favor of the tenants.

The mittadarni preferred this second appeal.

Mr. *Subramanyam* for appellant.

Respondents were not represented.

* Second Appeal Nos. 1135 and 1138 to 1140 of 1888.

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The further facts of the case and the arguments adduced on these second appeals appear sufficiently for the purpose of this report from the order of the Court (Collins, C.J., and Parker, J.).

ORDER:—Two objections are taken to the decree of the Lower Appellate Court. First, it is argued that section 17 of the Act had no application and that the Courts below were not authorized to declare the attachment invalid under that section. We are of opinion that this contention must prevail. The District Judge appears to think that the words "and sale" in section 15 render the provisions of sections 15–17 applicable to sales of the interest in land. We observe that the words quoted are superfluous, the rules in section 15 having nothing to do with sales. Section 15 deals with the demand and its service. Section 16 provides for notice to the Collector and the appraisement of the property. Section 17 deals with the effect of any irregularity in the distraint of movable property. Section 18 is the first section which lays down any rules as to sale, and it is this and the subsequent sections 33–36 which appear to be referred to in section 40. The tenants' remedy against a notice under section 39 is by preferring a summary suit within one month. Whether the present is such a suit has not been decided.

It is then argued that the Courts below were wrong in deciding that the landlord was bound to take proceedings within one year from the date on which the rent fell due, and that the true explanation of section 38 is that for the purposes of that section, rent becomes due at the end of the current revenue year. We are unable to accede to this argument. Section 2 of the Act lays down in general terms that process against a tenant must be taken within one year from the time when the rent became due. It is admitted that in this case the rent became due in March 1879, and that the attachment, if any, was not made until June 1880. In our judgment the provisions of section 38 are clear and the Legislature thereby intended to give a defaulting tenant the opportunity of making good the arrears within the current revenue year. The landlord has, by section 14, the right to proceed against the crops and movable property of the tenant as soon as rent is unpaid; but, if he wishes to attach the saleable interest of the defaulter, he must wait to do so, until the expiry of the current revenue year. It is argued that thereby his right is

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considerably curtailed. This no doubt is so, but such appears to us to be the intention of the Legislature in favor of the tenant.

We shall call upon the Lower Appellate Court to return a finding upon the following issues:—

(1) "Whether the notice required by section 39 was duly served.

(2) "Whether the present suit was brought within time."

Fresh evidence may be taken.

[The District Judge having reported that neither party called any evidence, these second appeals were dismissed at the final hearing.]

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

KULLAYAPPA (PLAINTIFF), APPELLANT,

v.

LAKSHMIPATHI (DEFENDANT), RESPONDENT.*

1889. Jan. 18. March 20.

Limitation Act—Act XV of 1877, *ss.* 4, 6, 14—*Proceedings* bonâ fide *prosecuted in a Court without jurisdiction—Rent Recovery Act (Madras)—Act VIII of* 1865, *s.* 78—*Rent claimed by landlord not having tendered legal patta.*

A landlord not having tendered a legal patta to his tenant made a demand on him as for rent, and on his refusal to pay attached his holding. The tenant, to release the attachment, paid the sum demanded under protest on 23rd September 1885. On 22nd March 1886 the tenant filed a suit on the small cause side of the District Munsif's Court to recover the amount so paid: that suit was dismissed for want of jurisdiction on 2nd September 1886. On the last-mentioned date the tenant filed the present suit on the same cause of action:

Held, (1) the suit was not barred by limitation under the six-months' rule in s. 78 of the Rent Recovery Act by reason of the provisions of s. 14 of the Limitation Act, 1877;

(2) the landlord not having tendered a legal patta was not in a condition to establish any right to recover rent directly or by way of set off.

SECOND APPEAL against the decree of S. Gopalacharyar, Subordinate Judge of Madura (East), in appeal suits Nos. 374 and 478 of 1887, reversing the decree of M. A. Tirumalacharyar, District Munsif of Dindigul, in original suit No. 438 of 1886.

Suit to recover, together with interest, Rs. 71-2-3 being a sum paid under protest by the plaintiff to the defendant to release

* Second Appeal No. 1166 of 1888.

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the attachment of the plaintiff's land by the defendant for arrears of rent wrongly alleged to be due by the plaintiff to the defendant for Fasli 1293.

The District Munsif held that no proper patta having been tendered by the defendant to the plaintiff for Fasli 1293, the attachment was illegal; finding, however, that on the footing of a proper patta there would have been due by the plaintiff to the defendant Rs. 48-9-8, he passed a decree for the plaintiff for Rs. 22-8-7 only.

Both parties appealed against this decree, and on appeal, the Subordinate Judge held that the suit was barred by limitation, and accordingly passed a decree dismissing it.

The facts supporting the plea of limitation appear sufficiently for the purpose of this report from the judgment of Kernan, J. Upon this plea the Subordinate Judge said :—

"Section 78 above referred to prescribes that Civil Courts shall not take cognizance of such a suit unless it be instituted within six months from the time at which the cause of action arose. Here the cause of action is admitted to have arisen on 25th September 1885, when the money was paid by the plaintiff, see *Hanuman Kamut* v. *Hanuman Mandur*(1), and this suit was instituted on 2nd September 1886; but the intervening time between 22nd March 1886 when the plaint was presented treating the claim as a small cause suit, and 2nd September 1886 when it was returned, is sought to be excluded from calculation under section 14 of the Limitation Act, 1877. Section 4 of that Act lays down that subject to the provisions contained in sections 5 to 25, every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule thereto annexed shall be dismissed. It is therefore clear that under ordinary circumstances recourse could be had to the provisions of section 14 only in a case where the limitation for the suit is provided by the second schedule annexed to the Act. But here the period of limitation has been provided by a special enactment and not by the Limitation Act. That enactment contains no saving provision of the kind, nor entitles the parties to claim the benefit of section 14 of the Limitation Act. On the authority of the rulings in *Mohummud Buhadoor Khan* v. *The Collector of*

(1) I.L.R., 15 Cal., 51.

Bareilly(1), *Gobindo Coomar Chowdhry* v. *Manson*(2), and *Timal Kuari* v. *Ablakh Rai*(3), and on the *ratio decidendi* of the ruling in *Syed Mohidin Hussen Saheb* in re(4), I must hold that the advantage of section 14 of the Limitation Act cannot be claimed by the plaintiff, and that his suit must be deemed to have been instituted more than six months after the date on which the cause of action arose."

The plaintiff preferred this second appeal.

Mahadeva Ayyar for appellant.

Subramanya Ayyar for respondent.

KERNAN, J.—The appellant was the plaintiff in the original suit No. 438 of 1886. The respondent was the defendant in that suit.

The appellant is a tenant of the respondent, who attached the holding of the former, under the Rent Recovery Act, in order to recover Rs. 71-2-3 alleged to be due for rent for Fasli 1293. The respondent did not tender to the appellant a proper patta and was therefore not entitled to proceed to attach or sell the appellant's land. The respondent was about to set up for sale the land under the attachment and the appellant under protest and to prevent the sale, paid the respondent on the 23rd September 1885 Rs. 71-2-3 claimed for rent. This suit was filed on the 2nd September 1886 praying for a decree directing the repayment by the respondent to the appellant of the sum paid under protest and interest amounting in all to Rs. 75. The Munsif decided that as no proper patta had been tendered by the respondent, the attachment was illegal.

But he allowed the respondent to set off as against the appellant's claim, the sum which he found would be a proper sum to be paid by the appellant if a proper patta had been tendered. The sum so allowed was Rs. 42-5-10 and interest amounting to Rs. 6-3-10 in all to Rs. 48-9-8 and the Munsif made a decree for the appellant for Rs. 22-8-7 and proportionate costs.

Both plaintiff and defendant appealed to the Subordinate Judge against the Munsif's decree. The plaintiff appealed on the ground that the set off should not have been allowed, and the defendant appealed on the ground that the plaintiff's entire claim should have been disallowed and that his suit was barred by limitation.

(1) L.R., 1, I.A., 167.
(2) 15 B.L.R., 56.
(3) I.L.R., 1 All., 254.
(4) 8 M.H.C.R., 44.

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The Subordinate Judge dismissed the plaintiff's appeal, and allowing the defendant's appeal, reversed the Munsif's decree and dismissed the suit, principally on the ground that it was barred by limitation.

The appellant has appealed to this Court on the ground that the suit is not barred by limitation, and that the set off should not have been allowed. The facts on which the question of limitation has been raised are these, viz., the cause of action arose to the appellant on the 23rd September 1885,—that being the day on which the money was paid by him; the plaint in this suit was filed on the 2nd of September 1886 in the Munsif's Court under Act VIII of 1865, section 78; but that section limits the time for bringing an action under it to six months from the date of the cause of action; the period of six months from the cause of action expired on the 23rd of March 1886. But the appellant had filed in the Munsif's Court on the small cause side on the 22nd of March 1886 a suit under section 78 of the Act for the same cause of action as in this suit, and that suit was on the 2nd of September 1886 dismissed on the ground that the Court had no jurisdiction to hear the suit. In *Shaunkara Subbien* v. *Vellayan Chetty*(1) it was held that a suit on the small cause side filed under circumstances like those here, was not maintainable by the Small Cause Court for want of jurisdiction. Section 14 of the Limitation Act, 1877, provides as follows:— "In computing the period of limitation prescribed for "a suit, the time during which the plaintiff has been prosecuting "with due diligence another civil proceeding whether in the Court "of first instance or in appeal against the defendant shall be "excluded when the proceeding is founded on the same cause of "action and is prosecuted in good faith in a Court, which from "defect of jurisdiction or other cause of the like nature is unable "to entertain it." Section 4 of the Limitation Act, 1877, is as follows:—"Subject to the provision contained in sections five to "twenty-five (inclusive) every suit instituted after the period of "limitation prescribed therefor by the second schedule hereto "annexed shall be dismissed." Section 6 provides that when by any special law a period of limitation is specially prescribed for any suit, nothing in the Limitation Act shall affect or alter the period so prescribed.

(1) 5 M.H.C.R., 179.

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It has been several times decided that the general sections of the Limitation Act from 5 to 25 are applicable to suits for which periods of limitation are prescribed other than those described in the second schedule to the Limitation Act—See *Nijabutoola* v. *Wazir Ali*(1) and *Khetter Mohun Chuckerbutty* v. *Dinabashy Shaha*(2) as to registration: and *Guracharya* v. *The President of the Belgaum Town Municipalities*(3) and *Reference under Forest Act V of* 1882(4), as to a suit brought before a Court which had no jurisdiction to try it.

Therefore this suit, which was filed on the 2nd of September 1886, being the day of the dismissal of the prior suit, was not barred by limitation as regards time, as the previous suit was filed one day before the expiry of six months from the date, 23rd September 1885, when the cause of action accrued.

The Judge observed that the plaintiff did not act in good faith as it had been decided long before he filed the suit that such suit would not lie in a Small Cause Court. No doubt every one is supposed to know the law, and the law is always certain; but if that principle was to be strictly applied, then section 14 of the Act would be useless, so far as regards defect of jurisdiction. I think the Judge was in error in this respect. The Judge also observes that the plaintiff did not prosecute the prior suit with due diligence, but we do not see evidence of any want of due diligence.

The Munsif was wrong in allowing credit to the respondent for any sum as for rent, as the respondent not having tendered a patta was not in a condition to establish any right to recover rent directly or by way of set off.

I think the decree of the Lower Appellate Court should be reversed, and a decree should be made for plaintiff for the sum claimed, Rs. 71-2-3, and interest up to the date of this decree at 6 per cent. per annum, with cost of this suit throughout, including the costs of the appeal.

MUTTUSAMI AYYAR, J.— I concur.

(1) I.L.R., 8 Cal., 910.
(2) I.L.R., 16 Cal., 265.
(3) I.L.R., 8 Bom., 529.
(4) I.L.R., 10 Mad., 210.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

1889. May 2.

SITHARAMA (COUNTER-PETITIONER No. 4), APPELLANT,

v.

VYTHILINGA (PETITIONER), RESPONDENT.*

Civil Procedure Code of 1882, *s.* 589—*Civil Procedure Code Amendment Acts—Act VII of* 1888, *s.* 56—*Act X of* 1888, *s.* 3—*Appeal against order of a Subordinate Court on a petition of insolvency.*

The judgment-debtor having been arrested in execution of a decree passed by the Small Cause Court at Madras, which was transferred for execution to the Subordinate Court of South Malabar, applied to the District Court to be declared an insolvent. The District Court transferred the application for disposal to the Subordinate Court, and the application was granted on 25th July 1888. On 5th November 1888 one of the opposing creditors appealed to the High Court:

Held, that the appeal did not lie.

APPEAL against the order of E. K. Krishnan, Subordinate Judge of South Malabar, on insolvent petition No. 4 of 1888, granting the prayer of the petition.

One of the opposing creditors presented this appeal to the High Court.

Ramachandra Ayyar for appellant.

Sundara Ayyar for respondent.

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

JUDGMENT.—A preliminary objection is taken on the ground that no appeal lies to this Court. We are of opinion that this objection must prevail. The decree of the Madras Court of Small Causes was transferred for execution to the Subordinate Court of South Malabar. In execution the judgment-debtor was arrested, and applied to the District Court to be declared an insolvent. The District Judge in virtue of the powers conferred by section 360 transferred the application to the Subordinate Court of South Malabar for disposal, and on the 25th July 1888, the judgment-debtor was declared an insolvent. This appeal to this

* Appeal against Order No. 141 of 1888.

Court was presented on 5th November 1888. The first clause of section 589, Act XIV of 1882, by which appeals from orders in cases of insolvency lay to this Court was repealed by section 56 of Act VII of 1888, which came into force on the 1st July 1888. An appeal from such orders was, however, allowed by section 588 (17), and the question is, to what Court did the appeal in this case lie? It certainly did not lie to the High Court, because the first clause of section 589, which constituted the High Court the Court of appeal, had been repealed. Inasmuch as the suit in which the decree was passed was a small cause suit from which no appeal lay, clause 2 of the former section 589 did not apply. In the absence of any special provision as to the forum, the District Court would be the Court to which an appeal from an order passed by a Sub-Judge would lie. The proviso added to section 589 by section 3 of Act X of 1888 appears to us to explain what was intended to be the law when the first clause of section 589 was repealed.

The appeal therefore must be dismissed with costs.

APPELLATE CRIMINAL.

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

1889. April 10.

QUEEN-EMPRESS

v.

SITHARAMAYYA AND OTHERS.*

Arms Act—Act XI of 1878, *s.* 19(*a*)—*Sale of sulphur and ammunition by agent of a license-holder.*

Sale of sulphur and ammunition by the agent of one holding a license (in form VI) under Act XI of 1878 is not illegal.

CASE reported for the orders of the High Court under section 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 Senior Assistant Magistrate convicted two "persons: the first under section 19(*a*) of the Arms Act, Act XI "of 1878 (offering for sale without license) and the second under

* Criminal Revision Case No. 51 of 1889.

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"sections 19(*a*) of Act XI of 1878 and 109 of Penal Code, and "sentenced them to Rs. 5 and 15, fines, respectively. The second "of these was a licensed sulphur and ammunition dealer at Parva-"tipur, and the first was his gumasta. The circumstances under "which they were convicted are briefly these :—

"In the latter part of March last, the second accused, having "had occasion to go to Vizagapatam, applied to the Taluk "Magistrate of Parvatipur for one month's leave, proposing at "the same time that his gumasta, the first accused in the case, "should be allowed to conduct his business during his absence. "The Taluk Magistrate sent on the application with his recom-"mendation to the Senior Assistant Magistrate, who informed the "Taluk Magistrate that the applicant might, if he liked, leave the "place, closing his shop, but that if he wished to have his business "carried on during his absence by his gumasta, he must apply to "the District Magistrate for a temporary transfer of his license to "that individual. Meantime, that is, before the Taluk Magistrate "communicated to him the Senior Assistant Magistrate's order, "the second accused had left Parvatipur in anticipation of his "leave, leaving the business of his shop in the hands of his "gumasta, the first accused, as originally proposed.

"Some time after this, the Police Inspector of Parvatipur "requested the Senior Assistant Magistrate to inform him whether "a license-holder could, during his absence from the station at "which he was licensed, have his business carried on on his behalf "by his gumasta, and his reply that he could not, without a "temporary transfer of the license by the District Magistrate, "resulted in the Police charging the two accused before him as "above.

"On these facts, I doubt the legality of the Senior Assistant "Magistrate's conviction of the accused. Though rule 24 of the "Arms Act rules says in general terms that a license granted "under the rules covers only the articles and the persons named "therein, the restriction is distinctly stated in the instructions "given in the cases of licenses in forms VIII and IX and not in "that of license form VI which forms the subject-matter of this "reference. This shows that in respect of this restriction the "latter class of licenses was intended to be treated differently from "the former class. Regarding a license issued under the old "Abkári Act (Madras Act III of 1864), the High Court have

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"decided that the license covers the agent also. See High Court's "Proceedings, 11th December 1871, No. 1982, printed at page "405 of Weir's Criminal Rulings, 3rd edition. The Senior "Assistant Magistrate seems to think that, if the transactions are "carried on by an agent while the license-holder is present in the "station, though not in the shop, the requirements of the law "are fulfilled, but I do not see how his (the license-holder's) "temporary absence elsewhere could affect the question when by "the steps he took he sufficiently declared to the authorities that "the transactions would be carried on on his behalf and on "his responsibility."

The *Acting Government Pleader* (*Subramanya Ayyar*) for the Crown.

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

JUDGMENT.—We can see nothing in the Act or the rules which renders sale by the agent of a license-holder illegal. The Government Pleader supports the reference and contends that the conviction is illegal. Although in the rules endorsed on the license the words "or his authorized agent" are not to be found, yet from the wording of rule 6 it would appear that as the license is intended to cover sales effected upon the premises, and as it cannot reasonably be insisted that every sale on the premises of a license-holder must be conducted by the license-holder in person, the sale by an agent was contemplated.

We set aside the conviction and order the fines to be refunded.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

QUEEN-EMPRESS

v.

NARAYANA.*

1889. May 3. July 10.

Penal Code, s. 188—*Criminal Procedure Code, ss.* 133, 134, 135, 136—*Service of notice of orders under s.* 133.

A Magistrate made an order under s. 133 of the Code of Criminal Procedure requiring N. to fence a certain well in a public street or to appear before him and

* Criminal Revision Case No. 159 of 1889.

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move to have the order set aside; a copy of this order was affixed to the house of N., but he did not appear. The Magistrate then adopted the procedure prescribed by ss. 136, 140, and made an order requiring N. to fence the well by a certain date. N. who was personally served with notice of the above order did not comply with it. The Magistrate then sanctioned the prosecution of N. under s. 188 of the Penal Code. N. appeared and produced evidence to prove that he was not liable to fence the well:

Held, that the accused was guilty of the offence of disobedience to an order duly promulgated by a public servant and was not entitled to go behind the order and show that it was one which ought not to have been made.

The mode of service of notice of an order under s. 133 considered.

PETITION under sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order of H. J. Joseph, Acting Joint Magistrate of Kumbakonam, dated 10th January 1889, made in appeal case No. 91 of 1888, confirming the finding and sentence of the Second-class Magistrate of Kumbakonam Taluk in calendar case No. 186 of 1888.

Mr. *Parthasaradhi Ayyangar* for the petitioner.

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

JUDGMENT.—There is a well in a public street at Swamimalai in the Kumbakonam Taluk, Tanjore District, which required to be fenced in order that no danger might arise to the public. On the 21st July 1888, the Sub-divisional Magistrate of Kumbakonam made an order under section 133, Criminal Procedure Code, calling upon the accused, Narayana Rao Peshwa, either to fence the well or appear before the Second-class Magistrate of Kumbakonam on 10th August and to move to have the order set aside. A copy of the order was affixed to his house, but the accused neither fenced the well nor appeared in accordance with such order either to show cause against it, or to move for the appointment of a jury to try whether it was reasonable and proper. The order was made absolute under section 136 on 30th August, and a notice was thereupon issued as directed by section 140 requiring the accused to fence the well before the 25th September 1888, and informing him that in case of disobedience he would be liable to the penalty provided by section 188, Indian Penal Code. This notice was personally served on the accused, and as he did not fence the well within the time specified, the Sub-divisional Magistrate sanctioned his prosecution on 26th September. Accordingly the accused was charged with an offence punishable under section 188, Indian

Penal Code. His defence was that he was not the owner of the well, that he was not liable to fence it, and that it belonged to one Govinda Ayyan. The accused cited four witnesses, and they, as well as the fifth and seventh witnesses for the prosecution, supported his statement. The Tahsildar-Magistrate, however, observed that their evidence did not appear to be true, and that even if it were otherwise, the accused was liable to the penalty prescribed by section 188, Indian Penal Code. He convicted the accused and sentenced him to pay a fine of Rs. 15 or to suffer simple imprisonment for 15 days. On appeal, the Acting Joint Magistrate upheld the conviction and the sentence, and considered that the accused was not at liberty to go behind the order and to show that it was one which ought not to have been made as he was not the owner of the well. It is urged in revision that the conviction is illegal. We see no reason to interfere. It is not denied that the order in question was made by a Sub-divisional Magistrate, and that such Magistrate was lawfully empowered to make it. Nor is it suggested that the well is not in a public street or that the safety of the public does not require that it should be fenced. Though the conditional order made under section 133 was not served personally on the accused, yet there is nothing on the record before us to show that personal service was practicable, or that service in the mode prescribed by section 71 was not legal in the special circumstances of the case. The main question then is whether the accused is entitled to an acquittal, if he shows in answer to the charge preferred under section 188, Indian Penal Code, that he had no control over the well either as owner or possessor or otherwise, and that the order was made on an erroneous view of his relation to the property in question. We are of opinion that he is not, for the imputability consists, not in the actual existence of any jural relation between the accused and the well ordered to be fenced, but in wilful disobedience of the order lawfully made by a competent Magistrate under section 133. Section 135 imposes on the person against whom such order is made an obligation either to do the act which the order directs him to do or to appear to show cause against it or to ask for a jury to try its validity, and section 136 makes an intentional omission to comply with such direction penal by declaring him liable to the penalty provided by section 188 of the Indian Penal Code and directing that the order shall be made absolute. It is

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true that under section 133 the conditional order can only be made against a person owning, possessing, or exercising control over the well according to the information then before the Sub-divisional Magistrate, but it must also be remembered that when the Magistrate accepts the information and bases a conditional order upon it, and when the party against whom the order is made neither does the act commanded nor takes action to vacate the order, the *ex parte* information becomes conclusive evidence and the omission becomes penal and subjects the party concerned to the penalty prescribed by section 188, Indian Penal Code. Though section 188 refers to the offender as a person directed to abstain from a certain act or to take certain order with certain property *in his possession* or *under his management*, yet it is not competent to the accused to re-open the question of possession, &c., by reason of section 136 which conclusively presumes that the conditional order was correctly made and directs that he shall be liable to the penalty prescribed by section 188. We take the words "in that behalf" to mean, for his failure to comply with the requirements of section 135, and they do not therefore support the accused's contention. The provisions of section 136 are stringent, because the intention is to create facilities for conditional orders, which Magistrates are authorized to pass under Chapter X in order to prevent danger to the public, becoming final without needless delay and thereby promptly to ensure public safety.

We have no doubt that the accused was properly convicted, and we therefore dismiss this application.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

MUTHU (PLAINTIFF), APPELLANT,

v.

CHELLAPPA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1889. July 10.

Limitation Act—Act XV of 1877, *sch. II, art.* 179—*Appeal against part of decree—Execution against judgment-debtors whose interests were not sought to be affected by the appeal.*

In a suit for land against several defendants, plaintiff obtained, on 14th June 1884, a decree against the shares of defendants Nos. 3 and 4, the shares of defendants Nos. 5 and 9 being exonerated. The decree-holder appealed against that portion of the decree which exonerated the shares of defendants Nos. 5 and 9, defendants Nos. 3 and 4 being brought on to the record of the appeal as respondents. The appeal having been dismissed, the decree-holder applied on 20th October 1887 for execution against the shares of defendants Nos. 3 and 4:

Held, the application for execution was barred by Limitation Act, 1877, sch. II, art. 179.

APPEAL against the order of H. T. Ross, Acting District Judge of Madura, on civil miscellaneous appeal No. 2 of 1888, reversing the order of M. A. Tirumalacharyar, District Munsif of Dindigul, on civil miscellaneous petition No. 490 of 1887.

Application for execution of the decree in original suit No. 133 of 1882.

On the 14th April 1883, plaintiff obtained a decree for certain lands under a sale-deed executed by defendant No. 2, father of defendants Nos. 3 to 9. Defendants Nos. 3 and 4 had consented to be bound by the plaintiff's oath, and defendants Nos. 2 and 5 to 9 were *ex parte*.

On the 14th June 1884 a revised decree was passed exonerating the shares of defendants Nos. 5 to 9, and confirming the original decree as against defendants Nos. 3 and 4.

Plaintiff appealed against this decree, and on 20th October 1884 his appeal was dismissed.

On 20th October 1887, plaintiff applied for execution of his decree against third and fourth defendants' three-eighth share.

* Appeal against Appellate Order No. 30 of 1888.

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The plea of limitation was set up. The District Munsif overruled this plea, holding on the authority of *Sangram Singh* v. *Bujharat Singh*(1), that the plaintiff was compelled to join defendants Nos. 3 to 9 as parties to his appeal, and granted the petition. The District Judge, on appeal, reversed this order, holding that defendants Nos. 3 and 4 were not necessary parties to the appeal, and that the petition was therefore barred under Limitation Act, 1877, sch. II, art. 179.

The decree-holder preferred this appeal.

Ramachandra Ayyar for appellant.

Subramanya Ayyar for respondents.

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

JUDGMENT.—The decision of the Judge is clearly right. The decree obtained by the plaintiff (appellant) against the shares of defendants Nos. 3 and 4 was in no way imperilled by the appeal presented by him against that portion of the decree which exonerated the shares of defendants Nos. 5 to 9. This view is in accordance with the decisions in *Hur Proshad Roy* v. *Enayet Hossein*(2) and *Raghunath Pershad* v. *Abdul Hye*(3). As observed in the former case by the Court "the reason for suspending the operation of the law of limitation during the pendency of an appeal is that it is manifestly undesirable to force the execution of a decree while there is any doubt as to the rights of the decree-holder against the appellant." Our attention has been called to the case of *Nur-ul-Hasan* v. *Muhammad Hasan*(4), in which it was remarked as an *obiter dictum* that the terms of article 179 of the Limitation Act were so wide that they must be held to apply to every case in which an appeal had been presented, without regard to the interest of the person presenting the appeal and the extent of the power of the Appellate Court to interfere. We are unable to assent to this view. Suppose that A, obtaining a decree for the possession of land against B, presented an appeal against so much of the decree as disallowed A his costs, and the appeal was dismissed, it would be unreasonable to hold that the time for the execution of the decree, so far as it awarded A the land,

(1) I.L.R., 4 All., 36.
(2) 2 Cal. L.R., 471.
(3) I.L.R., 14 Cal., 26.
(4) I.L.R., 8 All., 573.

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began to run from the date of the appeal decree. We consider that the sounder principle is that laid down in the Calcutta Court, and we therefore dismiss this civil miscellaneous second appeal with costs.

APPELLATE CIVIL.

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

NARASIMMA (PLAINTIFF), APPELLANT,

v.

SURYANARAYANA (DEFENDANT No. 1), RESPONDENT.*

1889. March 11, 22.

Rent Recovery Act (Madras)—Act VIII of 1865—Suit in Civil Court to enforce exchange of patta and muchalka—Declaratory decree—Civil Procedure Code, s. 53—Amendment of plaint.

A suit in the Court of a District Munsif to enforce acceptance of a patta and execution of a muchalka by defendant in respect of a holding in a village to which plaintiff claimed title, was dismissed as not being maintainable:

Held, that the suit should not have been dismissed, but the plaint should have been amended by the addition of a prayer for a declaration of the plaintiff's title: and that the Court then would have had jurisdiction to grant by way of consequential relief the relief originally sought.

SECOND APPEAL against the decree of C. W. W. Martin, District Judge of Salem, in appeal suit No. 150 of 1886, reversing the decree of Sultan Mohidin Saheb, District Munsif of Krishnagiri, in original suit No. 265 of 1885.

Suit to enforce acceptance of a patta and execution of a muchalka.

The plaint alleged that the village in which the defendant occupied certain land had been sold to the plaintiff and that the plaintiff had called on the defendant to accept a patta and to execute a muchalka, and that the defendant had refused. The defendant in his written statement denied the plaintiff's title and alleged that he was holding under another landlord.

The District Munsif passed a decree "that the defendant do

* Second Appeal No. 879 of 1888.

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"accept the patta marked as exhibit B, and execute a correspond-"ing muchalka to the plaintiff in respect of the plaint lands." The District Judge on appeal held that the suit was not maintainable and dismissed the suit without recording any finding as to the plaintiff's title.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar for appellant.

Subramanya Ayyar 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 (Collins, C.J., and Shephard, J.).

JUDGMENT.—At the hearing of this appeal the doubt occurred to us whether, inasmuch as the duty of accepting a patta and giving a muchalka is one imposed by statute and a special remedy for enforcing it is prescribed by the same statute, this suit instituted in a Civil Court was maintainable. The object, however, of the Act in requiring the exchange of patta and muchalka is to insure the existence of evidence of the terms of the holding; and, as a landlord can, on proper occasion arising, certainly maintain a declaratory suit, so we think that in such suit he might obtain, by way of consequential relief, the delivery of a muchalka corresponding to the patta already tendered by him. Being entitled to a declaratory decree, he should not be remitted to another suit, to obtain the muchalka to which the Act entitles him. It will be understood that he can only be so entitled if he succeeds in proving that he has before suit tendered a patta in the form in which the defendant was bound to accept it, and further that it is not competent to the Court trying this question to exercise the power of amending the patta which the Collector has under section 10 of the Act.

In the present case there is no prayer for a declaratory decree. The plaintiff asks only that the defendant be compelled to accept the patta tendered by him and to execute a muchalka in like terms.

The District Judge has dismissed the suit on a ground which is clearly not tenable and has recorded no finding on the main issue. We must reverse the decree of the District Judge and direct him, after amending the plaint by the insertion of a prayer

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for declaration of the plaintiff's right, to re-hear the appeal on the merits, having regard to the above observations. We make no order as to the costs of this appeal, but the other costs must be provided for in the revised decree.

APPELLATE CIVIL.

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

CHENGAL REDDI AND OTHERS (DEFENDANTS), APPELLANTS,

v.

VENKATA REDDI (PLAINTIFF), RESPONDENT.*

1889. March 27.

Oaths Act—Act X of 1873, s. 9—Civil Procedure Code, s. 462—Consent by guardian of a minor defendant to accept the oath of the plaintiff.

It was agreed by the defendants who were majors and by the father and guardian of a minor defendant on his behalf, that one of the issues in a suit should be determined under Oaths Act, s. 9, by the oath of the plaintiff. The oath was taken and a decree was passed accordingly:

Held, that the minor defendant was bound by the consent of his guardian since there was no evidence of fraud or gross negligence on the part of the latter, although the Court had not sanctioned the agreement under s. 462, Civil Procedure Code.

APPEAL against the decree of C. S. Crole, District Judge of Chittoor, in original suit No. 20 of 1887.

Suit for partition of family property. In the written statement of the defendants it was alleged that a partial partition had already taken place and the first issue was framed upon this allegation. The District Judge said:—"This issue was by consent "left to abide the taking of an oath by plaintiff in a temple at "Chittoor which he has done. So the family is found to be "undivided and the plaintiff to be entitled to half the total pro-"perty belonging to it." A decree was passed accordingly.

The defendants preferred this appeal, on the ground, *inter alia*, that defendant No. 4, who was a minor, was not bound by the decree passed under the above circumstances.

Mr. *Ramasami Raju* for appellant.

Mr. *Subramanyam* for respondent.

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* Appeal No. 21 of 1888.

CHENGAL REDDI v. VENKATA REDDI.

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 (Muttusami Ayyar and Parker, JJ.).

JUDGMENT.—This appeal arises from a suit for partition instituted by the respondent. One of the matters in dispute was whether there was a prior division as alleged by the appellants; and they agreed, under section 9 of the Indian Oaths Act, to accept the respondent's oath in regard to it in a certain temple as conclusive. The respondent took the prescribed oath and the Judge passed a decree in his favor on the footing that there was a subsisting co-parcenary. It is urged in appeal that the appellant No. 4 is a minor, that the appellant No. 1, his guardian, was not competent to consent to the claim against the minor being settled by the oath of the respondent, at least without the previous sanction of the Court. We are referred in support of this contention to section 462 of the Civil Procedure Code and to two decisions—*Rajagopal Takkaya Naiker* v. *Muttupalem Chetti*(1) and *Sharat Chunder Ghose* v. *Kartik Chunder Mitter*(2). The conduct of the suit was in the hands of the guardian, and it was for him to produce such evidence as was likely to support the contention and to decide what was best to do in the circumstances of the case. It is not shown that other evidence was available in proof of the prior partition, and that in agreeing to accept the plaintiff's oath, the guardian acted prejudicially to the minor's interest. The step taken by the father affected not only the minor's interest, but also his own interest, and it was concurred in by two of his adult sons. It is noteworthy that this appeal is preferred not only on behalf of the minor, but also on behalf of his father and brothers, and that the objection is pressed upon us by the very parties who entered into the agreement in the Court below. The minor might not be bound by the act of his guardian if it were tainted with fraud or gross negligence savouring of fraud, but we cannot say, in the absence of any evidence, that the father's act was either fraudulent or manifestly unreasonable. Neither section 462 nor the decisions under it have any application to this case.

(1) I.L.R., 3 Mad., 103. (2) I.L.R., 9 Cal., 810.

APPELLATE CIVIL.

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

RAMACHANDRA (PLAINTIFF), APPELLANT,

v.

DEVU (DEFENDANT), RESPONDENT.*

1889. July 24.

Civil Procedure Code, s. 209—Stipulated interest—Interest after filing plaint.

A creditor having stipulated for interest at a certain rate is entitled to a decree for interest at that rate up to the date of decree. *Mangniram Marwari* v. *Dhowtal Roy* (I.L.R., 12 Cal., 569), dissented from.

APPEAL against the decree of M. R. Weld, Acting District Judge of Ganjam, in original suit No. 20 of 1887.

Suit to recover from defendant the sum of Rs. 7,958-14-10, being the principal and compound interest due on a registered bond, dated 24th June 1881, and also principal and interest due on footing of a document described as a receipt, dated 31st August 1886, with interest up to realization of the amount. The stipulated interest was in each case 21 per cent. per annum; the sums due were agreed to be repaid on 4th March 1882 and 23rd October 1886 respectively.

The defendant admitted the claim, but "requested, in consideration of his involved circumstances, that the interest may be reduced" and also asked for a decree by instalments.

The District Judge said:—"I will only give one per cent. per annum from this date, as the interest previously charged is so enormous, nor will I give costs. Decree for the amount of Rs. 7,958-14-10 to be paid in four half-yearly instalments with interest at one per cent. per annum. Interest in case of default to be one per cent. per annum. Each party to bear their own costs."

The plaintiff preferred this appeal "against that portion of the decree which disallowed the plaintiff the costs of the suit and interest on the amount sued for from the date of the plaint to the date of the decree."

* Appeal No. 102 of 1888.

RAMA-CHANDRA v. DEVU.

Sundara Rau for appellant.

The interest was not in the nature of a penalty *Tejpal* v. *Kesri Singh*(1), and the plaintiff is entitled to interest as the agreed rate up to the date of decree—*Bandaru Swami Naidu* v. *Atchayamma*(2), and see Civil Procedure Code, section 209. The District Judge should also have given plaintiff the costs of the suit. *Carvalho* v. *Nurbibi*(3).

[The Chief Justice referred to *Orde* v. *Skinner*(4).]

Ethiraja Mudaliar for respondent.

The case is within the rule of the Full Bench at Calcutta in *Mangniram Marwari* v. *Dhowtal Roy*(5), in which *Orde* v. *Skinner*(4) is distinguished.

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

JUDGMENT.—We think the plaintiff is entitled to interest at the rate stipulated, viz., 21 per cent. to the date of decree. See *Bandaru Swami Naidu* v. *Atchayamma*(2), and *Orde* v. *Skinner*(4). It is true that a Full Bench of the Calcutta Court has decided to the contrary—see *Mangniram Marwari* v. *Dhowtal Roy*(5), but with great respect to that Court we are not inclined to follow their ruling in opposition to the case of *Bandaru Swami Naidu* v. *Atchayamma*(2) and also with reference to the remarks of the Privy Council in *Orde* v. *Skinner*(4). We therefore direct the decree to be amended by allowing interest at the rate of 21 per cent. from the date of the plaint to the date of decree.

With regard to the question of costs, we decline to interfere with the discretion of the District Judge, and as the appeal partly fails, we direct each party to bear their own costs of this appeal.

(1) I.L.R., 2 All., 621.
(2) I.L.R., 3 Mad., 125.
(3) I.L.R., 3 Bom., 202.
(4) I.L.R., 3 All., 107.
(5) I.L.R., 12 Cal., 569.

APPELLATE CIVIL.

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

1889. March 14.

SITHAMMA (PLAINTIFF), APPELLANT,

v.

NARAYANA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, *sch. II, arts.* 120, 123—*Executor* de son tort—*Suit for a share of Government promissory notes by an heir against one falsely professing to hold them under a will.*

Suit in 1887 by a daughter to recover her share of Government promissory notes, being stridhanam of her mother who died in 1880. The property in question had been in the possession of a son of the deceased since her death. He claimed the property under a will, but the will was set aside by the Court as false in 1884:

Held, that Limitation Act, sch. II, art. 123, is applicable only to cases in which the defendant lawfully represents the estate of the deceased, and that the suit was accordingly barred by limitation.

APPEAL against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in original suit No. 28 of 1887.

The District Judge held that the suit was barred by Limitation Act, schedule II, article 120, and accordingly passed a decree dismissing it. The plaintiff preferred this appeal.

Bhashyam Ayyangar for appellant.

Subramanya Ayyar for respondents.

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

JUDGMENT.—This was a suit brought by the appellant to recover her one-third share of three Government promissory notes of the aggregate value of Rs. 9,000 in the possession of the respondent No. 1. The promissory notes belonged to one Bojjamma, who died in September 1880, leaving her surviving a son, respondent No. 1 and three daughters, the appellant and respondents Nos. 2 and 3. Upon Bojjamma's death, respondent No. 1 took possession of her property, including the Government securities, and claimed to hold it under a will, whereby, as alleged by him, the property was bequeathed to him and others. Subsequently litigation ensued regarding the will which was finally set aside by the High Court as false in July 1884. The appellant's case was

* Appeal No. 118 of 1888.

SITHAMMA v. NARAYANA.

that the Government promissory notes were Bojjamma's stridhanam, that her daughters were entitled to take them in preference to her son, that he was wrongfully in possession under the forged will, that, as one of three daughters, she was entitled to a one-third share, and that the cause of action arose in August 1884. The plaint was filed in September 1887. The Acting District Judge held that the cause of action arose on the day that Bojjamma died, that article 120 applied, and that the claim was therefore barred by limitation. Hence this appeal.

It is conceded that the appeal must fail whether the three or six years' rule is applicable to the suit. But it is urged that the respondent No. 1 held the Government promissory notes in dispute as executor *de son tort*, and that the suit is therefore governed by article 123, schedule II, of the Limitation Act. Article 123 purports to apply to a suit for a legacy or a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate. According to its true construction, the article applies only to cases in which the defendant lawfully represents the estate of a deceased person. An executor *de son tort* is certainly liable to be treated as incurring the liability of an executor for certain limited purposes, but the point for consideration is whether he represents the estate of the deceased for purposes of limitation in a suit like the one before us. We are of opinion that he does not. If the contention were to prevail, a suit brought by one who claims to be the heir of a deceased person against every defendant who wrongfully retains the movable property belonging to that person under a claim of title, which has no foundation, would not be barred before the expiration of twelve years. In order that a suit for the recovery of movable property instituted by an heir might be treated as a suit for a distributive share of an intestate estate, it must be established that the party in possession is either really an executor or an administrator, or, to use the language of 23 and 24 Vic., Cap. 38, section 13, a legal personal representative of the deceased. This view is in accordance with the decision in *Issur Chunder Doss* v. *Juggut Chunder Shaha*(1), and the *dictum* of Wilson, J., in *Kally Churn Shaw* v. *Dukhee Bibee*(2).

We agree with the Judge that the claim is barred by limitation and dismiss the appeal with costs.

(1) I.L.R., 9 Cal., 79. (2) I.L.R., 5 Cal., 696.

APPELLATE CIVIL.

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

LAKSHMANA (APPELLANT),

v.

PARAMASIVA AND OTHERS (RESPONDENTS).*

1889. Feb. 15.

Civil Procedure Code, ss. 32, 588 (2)—Appeal against order that a plaintiff be made defendant.

An appeal lies under Civil Procedure Code, s. 588 (2), against an order under s. 32 that a plaintiff be made defendant.

APPEAL against the order of C. W. W. Martin, District Judge of Salem, on civil miscellaneous petition No. 617 of 1887 in original suit No. 8 of 1887.

The District Judge having made an order on 31st August directing that Lakshmana Goundan, defendant No. 6, be made a plaintiff, on 21st December set aside that order and directed that Lakshmana Goundan be made a defendant. Lakshmana Goundan preferred this appeal against the last-mentioned order.

Bhashyam Ayyangar and *Desika Charyar* for appellant.

Subramanya Ayyar for respondents.

The 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 (Muttusami Ayyar and Parker, JJ.).

JUDGMENT.—An appeal does certainly lie and we are unable to accede to the contention that the cases specified in section 588, clause 2, do not include an order, whereby a party, who is plaintiff is made defendant, or a defendant made plaintiff. On the merits it is conceded that the order cannot be supported. The respondents admit the assignment in their application of 21st December 1887, and the assignors admitted the assignment through their vakil when the order of 31st August 1887 was made.

We do not see why the Judge set aside his own order without an application and when the assignment was admitted.

We set aside the order appealed against and restore the order of 31st August 1887. Appellant is entitled to his costs in this appeal.

* Appeal against Order No. 20 of 1888.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

1889. Feb. 22. August 9.

LAKSHMI (PLAINTIFF), APPELLANT,

v.

SUBRAMANYA (DEFENDANT), RESPONDENT.*

Hindu Law—Will of a Hindu in favor of his wife made on his taking a son in adoption—Adoption made on the understanding that the dispositions of the will be observed.

A Hindu, on taking a son in adoption, executed a "settlement as to what should "be done by my adopted son and my wife after my lifetime," providing that on an event, which happened, the wife should enjoy certain land for life in lieu of maintenance. In a suit by the widow of the executant against the adoptive son for possession of the land :

Held, that the instrument was a will.

On its appearing that the defendant's natural father, when he gave him in adoption, tacitly submitted to the arrangement contained in it.

Held, that the adoptive son was bound by its provisions.

SECOND APPEAL against the decree of J. A. Davies, Acting District Judge of Tanjore, in appeal suit No. 490 of 1887, reversing the decree of T. Ganapati Ayyar, Subordinate Judge of Kombakónam, in original suit No. 28 of 1886.

Suit by a Hindu widow to recover from her husband's adoptive son, with mesne profits, certain land which her husband was alleged to have settled upon her under exhibit A. The Subordinate Judge passed a decree in favor of the plaintiff for the land, but disallowed her claim to mesne profits. The District Judge, on appeal, reversed the decree of the Subordinate Judge, holding that exhibit A was on its true construction a will, and that it was for that reason invalid as against the defendant under the rule in *Vitla Butten* v. *Yamenamma*(1).

Exhibit A began as follows:—"Vyavasta Patra Udambadikkai "(deed of settlement), executed on the 25th Kartigai of Rudro-"takary year, by me, Ramaien, son of Subbien, residing in "Veppathoor, as to what should be done in my family. As I this "day adopt ——, aged ——, son of Subbramaien, of the said "village, son of my divided junior uncle, for my spiritual benefit,

* Second Appeal No. 682 of 1888.

(1) 8 M.H.C.R., 6.

"because I have no issue, the following is the settlement as to "what should be done by my adopted son and my wife after my "lifetime;" and proceeded (after making certain dispositions immaterial for the purpose of this report) as follows:—"all the "remaining properties and the cash as per documents shall be "enjoyed by my wife alone until my adopted son, above said, "attains the proper age, and she shall protect the adopted son and "live jointly with (him). If, while so continuing to live, they "shall not agree to live jointly after the said adopted son shall "have attained the proper age, my wife shall enjoy with all "privileges for her maintenance, for her lifetime, the nanjai and "punjai lands appertaining to ¼ karai out of the ⅝ karai in the "'Ulloor' [native village], and the cocoanut tope called the "Cavery Amman Koviladi on account of the Ulnatham and Pora-"natham attached thereto, half of the vessels then remaining and "with the profits, remaining after deducting the vari and erai "[assessment, &c.], in respect of the said ¼ karai, she shall maintain "herself for her lifetime, live in 'Thamanai thalvaram,' including "the 'Rali' [apartments of the house], on the northern side, in "the house on the 1¼ house-ground, on the western side, and are "the backyard."

The plaintiff preferred this appeal against the decree of the District Judge.

Subramanya Ayyar for appellant.

Ramachandra Rau Saheb and *Mahadeva Ayyar* for respondent.

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

MUTTUSAMI AYYAR, J.—The appellant is the widow of one Ramayyan and the respondent is his adopted son. On the 9th December 1863 Ramayyan executed exhibit A which provided *inter alia* that, in case the appellant and respondent did not agree to live together, the former should enjoy the land in dispute during her lifetime in lieu of maintenance. A disagreement arose between them after Ramayyan's death, and the appellant separated from the respondent and claimed to be placed in possession of the land. The respondent resisted the claim, alleging, among other things, that exhibit A was a will and that it was invalid as against ancestral property which devolved on him by right of

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survivorship. The Subordinate Judge was of opinion that the instrument was a deed of settlement and decreed the claim. On appeal the District Judge held that it was a will and dismissed the appellant's suit. I agree with the Judge that exhibit A is upon its true construction a will. The disposition contained in it was clearly intended to take effect after Ramayyan's death and the contention that the document was styled a deed of settlement is immaterial. It is the substance of the transaction that ought to be taken as a guide. It is conceded that where a Hindu father disposes by will of ancestral property, the disposition is inoperative as against his son; but it is argued that when the disposition made is in the nature of a provision for the maintenance of the testator's widow, the will is valid. I am unable to adopt this view. The ground on which a will in regard to ancestral or joint family property was held to be invalid in the case of *Vitla Butten* v. *Yamenamma*(1), is that directly the testator dies the co-parcener's right of survivorship takes effect and that a testamentary disposition cannot be permitted to prevail against that right. In the absence of testamentary power the contention that that power was exercised for the purpose of making a provision for the support of the testator's wife could not in my opinion validate the will.

Another contention in appeal is that in the case before us it was known to all the parties concerned, when the respondent was given in adoption, that exhibit A was in existence and that the respondent was given and taken in adoption on the understanding that the disposition contained in it was to be accepted by him. The decision in *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog*(2), lends support to the contention. In that case it was held that when the adopted son and the person who gave him in adoption were fully cognisant of the disposition of property made by the testator, and with the knowledge of such disposition the natural father consented to the adoption taking place and when the disposition and the adoption might under the circumstances be regarded as one transaction, the disposition though contained in a will could not be repudiated by the adopted son. The principle underlying the decision is that the disposition was one which it was competent to the testator to make prior to the

(1) 8 M.H.C.R., 6. (2) 6 Bom. H.C.R., 224.

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adoption, and that its acceptance being presumably a condition subject to which the adoption was made, it made no difference that the disposition was testamentary. In the case before us the Subordinate Judge observes that exhibit A was made two days prior to the respondent's adoption, and that but for acquiescence in it the adoption might not have taken place. The Judge, however, has expressed no opinion on this point. The disposition impugned is nothing more than charging the appellant's maintenance on a specific portion of family property and creating for her a life estate in A and thereby preventing discord and litigation between the mother and the son by reason of their not agreeing to live together. Before disposing of this second appeal, I would ask the Judge to ascertain whether, when the respondent was given in adoption, the person who gave him in adoption was aware of the existence of exhibit A, and whether, but for his consent to it, Ramayyan would not have adopted the respondent. Both parties will be at liberty to adduce fresh evidence, if so advised, in regard to this issue. If the Judge should be of opinion that the respondent's parents consented, either expressly or tacitly, to the arrangement when the adoption took place, he will also return findings on the 7th and 8th issues.

SHEPHARD, J.—While I agree in thinking that there should be a finding on the proposed issue, I should like to add my reasons for holding that a finding on that issue may entitle the plaintiff to a decree in the suit. The question is whether the parties to an adoption, that is, the parents on the one side and on the other, can by contract between themselves, prescribe the terms on which the adopted child shall enter the family of the adopting parent, in such manner as to bind the adopted child, and further whether such a contract can be effectively carried out by a will executed by the adopting parent. As far as this Court is concerned there appears to be no distinct authority on the question, for in the case of *Lakshmana Rau* v. *Lakshmi Ammal*(1), the disposition made by the adopting widow was upheld on another ground and the judgment does not profess to decide the point now at issue. On the other hand in the Bombay reports there is distinct authority in favor of the plaintiff's contention and in one case the disposition impugned by the adopted son was, as it is in the present

(1) I.L.R., 4 Mad., 160.

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case, made by will—*Vinayak Narayan Jog* v. *Govindrav Chintaman Jog*(1). In the present case the adoption was made not by a widow, as in the case of *Lakshmana Rau* v. *Lakshmi Ammal*(2), but by the plaintiff's husband who, before the adoption took place, was unquestionably at liberty to alienate his property as he pleased, subject only to the plaintiff's right of maintenance. If being thus full owner he might before the adoption have disposed of his property in part or in whole in favor of the plaintiff, I fail to see why he should not, when making the adoption, stipulate with the other party to the adoption that a certain part of his property should be set apart for the maintenance of his wife and to that extent taken out of the category of property in which his intended son should have the full right of a co-parcener. It seems to me a mistake to say that the infant adopted son on whose behalf the natural father consents to such a stipulation can only be bound by that consent on the principle on which he might be bound by other agreements made on his behalf, viz., on the principle that the agreement is made for a necessary purpose, *Lakshmana Rau* v. *Lakshmi Ammal*(2), for the supposition is that, but for the consent of the natural father, the adoption would never have taken place. To object to the agreement is therefore tantamount to objecting to the adoption. The adoption and the disposition of his property by the father being part of one transaction, the son never acquired any interest in the property disposed of and therefore no question can arise as to his guardian's competency to deal with it.

These considerations, if well founded, also dispose of the defendant's contention that, in view of the right of survivorship, Ramayyan's will must as against him be inoperative. The will was only a means by which the supposed contract was carried into effect. It was a term of that contract that certain property should be withdrawn from Ramayyan's estate and applied to a particular purpose, which should take effect after his death. To that extent the defendant never acquired co-parcenary right in his father's property and consequently there was no right of survivorship. The circumstance that the disposition was made by will makes no difference because the will must not be regarded by itself but as part of the contract, and before the adoption took place it was

(1) 6 Bom. H.C.R., 224. (2) I.L.R., 4 Mad., 160.

competent to Ramayyan to bind himself by contract to make the will which he did make. For these reasons I am of opinion that if it can be shown that the adoption was made on an understanding between the parties that the defendant should take his place in the family subject to the arrangement made by his adoptive father in favor of the plaintiff, the plaintiff ought to succeed in this suit.

[The District Judge recorded a finding in the affirmative on the issue framed by the High Court; and when the case came on for re-hearing and the Court passed a decree setting aside the decree of the District Judge and restoring that of the Subordinate Judge.]

APPELLATE CIVIL.

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

VALLABHA (DEFENDANT No. 1), APPELLANT,

v.

MADUSUDANAN (PLAINTIFF), RESPONDENT.*

1889. March 11. April 29.

Defamation—Illegal declaration that one is out-casted—Observations on the use of books of history to prove local custom, and on the position as heads of their caste of the representatives of the ancient sovereigns of the West Coast.

According to the usage of certain Nambudris, a caste enquiry is held when a Nambudri woman is suspected of adultery, and if she is found guilty, she and her paramour are put out of caste.

An enquiry was held into the conduct of a certain woman so suspected; she confessed that the plaintiff had had illicit intercourse with her and thereupon they were both declared outcastes, the plaintiff not having been charged nor having had an opportunity to cross-examine the woman or to enter on his defence and otherwise to vindicate his character. In a suit for damages for defamation by the plaintiff against those who had declared him an outcaste:

Held, the declaration that the plaintiff was an outcaste was illegal, and it having been found that the defendants had not acted *bonâ fide* in making that declaration, the plaintiff was entitled to recover damages.

Observations on (1) the use of books of history to prove local custom, and (2) on the position as heads of their caste of the representatives of the ancient sovereigns of the West Coast.

SECOND APPEAL against the decree of the District Judge of South Malabar, in appeal suit No. 613 of 1887, confirming the

* Second Appeal No. 151 of 1888.

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decree of the District Munsif of Angadipuram, in original suit No. 479 of 1886.

Suit by a Nambudri Brahman who alleged that the defendants had defamed him by declaring him an outcaste, to recover Rs. 140 as damages. It was stated in the plaint that defendant No. 1 and the plaintiff were on bad terms, that defendant No. 1 gained over to his side defendant No. 3, and his mother, who had been long leading a life of adultery and caused them to say that plaintiff was guilty of illicit intercourse with her; that the defendants subsequently made a show of holding a caste enquiry and declared the mother of the third defendant an outcaste and maliciously published that the plaintiff was unfit to enter temples, to get his meals in choultries, and to enter the houses of Nambudri Brahmans; and that the caste enquiry was held contrary to custom and the shastras.

Defendant No. 1, who is the Rajah of Walawanad, denied the allegations in the plaint and stated that the suit being one concerning religious questions was not maintainable, that it was at the request of defendant No. 3 and agreeably to usage that he directed a caste enquiry into the charge of adultery against the plaintiff with the mother of defendant No. 3, that at the enquiry the plaintiff was declared guilty of adultery, that he consequently interdicted the plaintiff from entering temples, that this act was within the scope of his authority and was done *bonâ fide*, and that the suit ought, therefore, to be dismissed.

Defendant No. 2 denied the allegations in the plaint and stated that he took part in the enquiry into the charge of adultery against the mother of defendant No. 3 under the direction of defendant No. 1 who is the Rajah of the country, that this was according to usage, that the enquiry was held in accordance with the custom of the country and the shastras, that in the enquiry so held the plaintiff was found to have committed adultery with the mother of defendant No. 3, and that there were others who took part in the enquiry like himself and that he was not liable to pay damages to the plaintiff.

Defendant No. 3 denied the allegations in the plaint and stated that the suit was not maintainable, that plaintiff was outcasted after an enquiry held in accordance with the rules and customs followed by Malabar Brahmans and that plaintiff was therefore not entitled to recover damages.

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Sankaran Nayar for appellant.

Narayana Rau for respondent.

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 Muttusami Ayyar, J.).

JUDGMENT.—The appellant is the Rajah, and the respondent is a Nambudri Brahman of Walawanad in South Malabar. The latter sued the former and two others for defamation of character and obtained a decree for Rs. 140 as damages. On appeal the award was upheld by the District Judge. Hence this second appeal.

The facts of the case are shortly these:—In April 1884 a Nambudri woman, named Itticheri, preferred a complaint against the respondent to the Tahsildar-Magistrate of Walawanad, stating that the respondent had three years before "reduced her to a position of infamy and promised to get her redeemed from the infamy or to maintain her," and that when she insisted on his fulfilling the promise, he pushed her down and threatened to cut her with a chopper. The Magistrate dismissed the complaint under section 203 of the Code of Criminal Procedure on the ground that whatever the respondent did was on her own showing done in self-defence. It appears that according to the usage obtaining among Brahmans of this class on the West Coast, a caste enquiry is held whenever a Nambudri woman is suspected of adultery, and that if she is found guilty, she and her paramour are put out of caste. According to the evidence in this case when a woman is suspected, her kinsmen and their family priest examine her maid servant and ascertain if there is ground for a fuller enquiry. This preliminary investigation is termed dasi vicharom and it is initiated by her kinsmen and their family priest. On its being ascertained that further enquiry is necessary, a report is made by them to that effect to the Rajah, recognised as the protector of the caste usage, and the woman is meanwhile asked to reside in a detached part of the house called the "anjampura." On the Rajah approving of the report, he appoints a Smarthan (a Brahman acquainted with Smriti), four Mimamsakars (men versed in sifting evidence) and two others called Akomkoima and Puramkoima to aid in the investigation. The investigation is then conducted at the time and place

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appointed, and if the woman is found guilty, the woman and her paramour are pronounced to be outcastes. In Tulam 1060 (October-November 1884) defendant No. 3, Itticheri's son, and his kinsmen and the family priest examined her maid servant, and made a report to defendant No. 1, appellant, the titular Rajah of Walawanad, that further enquiry was necessary. The appellant then appointed defendant No. 2, the hereditary Smarthan in that part of the country, four Mimamsakars (assessors) and two others to conduct the regular investigation. It would seem that on the third day of the enquiry, Itticheri confessed that the respondent had illicit intimacy with her. Relying on her statement and without charging the respondent or giving him an opportunity to cross-examine the woman or enter on his defence and otherwise vindicate his character, the Smarthan and the others pronounced the swarupam or the declaration that Itticheri and the respondent were out of the caste. It is in evidence that the regular enquiry terminated before Kumbom 1060 (February-March 1885). In March 1885 the respondent attempted to enter the Edathpurath temple under the supervision of the appellant and that the officiating priest in charge of the institution objected to his doing so on the ground that he was an outcaste. Thereupon the respondent brought this suit. His case was that he was innocent, that the appellant bore personal ill-will to him and acting in collusion with defendants Nos. 2 and 3, got Itticheri to accuse him of criminal intimacy with her, that the enquiry was not held in accordance with the custom of the caste, and that the declaration that he was an outcaste was false and malicious. The District Munsif considered that the malice attributed to the appellant had no foundation, and that the enquiry conducted in this case was in accordance with caste usage, but he observed that the respondent had no opportunity given to prove his innocence or to cross-examine Itticheri, and that though the procedure followed was in accordance with the practice hitherto followed at caste enquiries, it was at variance with the well-known principle that no one should be condemned without being heard and that it was open to abuse. On that ground he decreed the claim against the appellant and others. It was contended *inter alia* in appeal that the defendants acted *bonâ fide*. The Judge declined to accept the contention on three grounds, viz., (1) that the respondent had no notice of the charge and no opportunity of vindicating his character

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or proving his innocence, (2) that if the caste custom was followed in its integrity, defendant No. 3 and his relatives should have represented the matter to the Collector as the local representative of the Queen-Empress and have awaited the orders of the Government, (3) and that the appellant omitted to make any enquiry before appointing defendant No. 2 to hold the regular investigation and that his conduct was therefore not *bonâ fide*. It is argued before us that none of these grounds can be supported in law.

It was certainly a serious defect in the investigation that the respondent was not heard before he was condemned upon the uncorroborated statement of Itticheri, who had publicly avowed her intimacy with him even before her kinsmen thought of complaining against her conduct and the declaration that the respondent was an outcaste was clearly bad in law. No imputation ought to be made in a reckless or inconsiderate manner. Nor can it be said that when means of obtaining accurate information is available and when it is discarded and no earnest effort is made to arrive at the truth, the belief in which the imputation was made was formed with due care and caution, or *bonâ fide*. No enquiry can be treated as fair when a person deprived of his *status* in his caste is not heard before he is condemned. On the question of *bona fides*, however, the Judge is in error in observing that defendant No. 3 and his kinsmen ought to have reported to the Collector their suspicion against Itticheri and awaited the orders of the Government. Though the appellant is only a titular Rajah and not a sovereign prince, yet he may be the recognised head or hereditary patron of the caste who as such may be entitled by usage to take part in an enquiry like the one before us, especially as non-interference in matters of caste or religion is a recognised principle of the British rule. The Judge has apparently overlooked the fact that what was formerly done by the appellant's ancestors as sovereign princes, who were both rulers and heads of the caste, might still be lawfully done by the appellant by the usage of the caste, and the avowed policy of the British Government. Further the Judge refers to the appellant's omission to hold an enquiry before appointing defendant No. 2 and others to conduct the regular investigation and relies on Sangunni Menon's History of Travancore, p. 77. This book is not one of the exhibits in this case. Neither the

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witnesses for the appellant nor those for the respondent are alleged to refer to such duty. Nor have they been examined in regard to it. We do not consider that it was regular to rely upon the book without first calling the attention of the parties to it and hearing them as to whether the procedure prescribed therein is an incident of the usage as it obtains in the Walawanad taluk. Notwithstanding these errors of procedure to which we call attention in view to prevent their recurrence, we are of opinion that the decision of the Judge must be supported on the ground already mentioned. We dismiss this second appeal with costs.

APPELLATE CIVIL.

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

1889. April 12, 13.

RAMIREDDI (DEFENDANT), APPELLANT,

v.

SUBBAREDDI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 13—Res judicata—Previous suit dismissed as premature.

A suit by the assignee of a mortgage bond against the mortgagor was dismissed on the ground that the plaintiff was not entitled to sue for want of notice to the defendant under s. 132 of the Transfer of Property Act. The plaintiff then gave express notice of the assignment to the mortgagor and sued on the bond again:

Held, the claim was not *res judicata* and the second suit was accordingly not precluded by s. 13 of the Code of Civil Procedure.

SECOND APPEAL against the decree of L. A. Campbell, District Judge of Nellore, in appeal suit No. 188 of 1887, confirming the decree of T. Ramachandra Rau, District Munsif of Nellore, in original suit No. 132 of 1886.

The plaintiff sued as assignee of a mortgage bond executed to his assignor by the defendant. He had sued on it before in original suit No. 1102 of 1885 on the file of the District Munsif's Court, but the defendant then pleaded that he had not notice of the transfer, and the District Munsif holding this plea to be valid, dismissed the suit. In the present suit the defendant pleaded that the claim was *res judicata*. The District Munsif, and on appeal the District Judge, held that the claim was not *res*

* Second Appeal No. 1121 of 1888.

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judicata because the former suit was dismissed as premature, the cause of action in the view taken by the Court not having then arisen, and decreed for the plaintiff.

The defendant preferred this second appeal.

Sadagopacharyar for appellant.

Mr. *Subramanyam* for respondent.

The following authorities were among those cited in the course of the argument: *Ummatha* v. *Cheria Kunhamed*(1), *Parthasaradi* v. *Chinnakrishna*(2), *Avala* v. *Kuppu*(3), *Watson* v. *Collector of Rajshahye*(4).

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 Wilkinson, J.).

JUDGMENT.—The only question for determination in this appeal is whether the Lower Courts were right in holding that the plaintiff's suit is not barred by the provisions of section 13 of the Civil Procedure Code.

As transferree of a mortgage, the plaintiff instituted original suit No. 1102 of 1885 in the Court of the District Munsif of Nellore to recover the principal and interest due under the mortgage deed. The defendant admitted the execution of the mortgage deed, but pleaded—(1) that the mortgagee had not given him notice of the transfer to plaintiff, and (2) that the assignment was invalid, inasmuch as he had discharged the debt. The Court of First Instance disposed of the case on a preliminary point. Being of opinion that under section 132 of the Transfer of Property Act the transferor himself was bound to give defendant notice of the transfer, and finding that the transferor had given no such notice, the District Munsif dismissed the suit "for want of notice." Plaintiff having caused notice to be given to defendant by the transferor then instituted original suit 132 of 1886. The question of notice was not raised, and the only issues were—(1) was the debt discharged? (2) is plaintiff's suit barred as *res judicata*? Both Courts have held that the present suit is not barred by reason of the former decision and the defendant appeals to this Court.

In our judgment the decree of the Courts below is right. To conclude a plaintiff on the ground of *res judicata* it is necessary

(1) I.L.R., 4 Mad., 308. (2) I.L.R., 5 Mad., 304.
(3) I.L.R. 8 Mad., 77. (4) 13 M.I.A., 160.

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to show not only that there was a former suit between the same parties, for the same matter, and upon the same cause of action, but also that the matter directly and substantially in issue has been heard and finally decided by the Court which tried the former suit.

In original suit No. 1102 of 1885, the Court of First Instance decided, no doubt erroneously, that the plaintiff had no cause of action. The merits of the case were not gone into, the suit being dismissed because the plaintiff's assignor had not given the notice which, in the opinion of the Court, he was bound to give before his assignee could seek to make the defendant liable. The matter directly and substantially in issue, viz., the liability of the defendant, was not heard and decided in the former suit. As remarked by the Privy Council in the case of *Kali Krishna Tagore* v. *The Secretary of State*(1) "in order to see what was in issue in a suit or "what has been heard and decided, the judgment must be looked "at. The decree is only according to the Code of Civil Procedure "to state the relief granted or other determination of the suit. "The determination may be on various grounds, but the decree "does not show on what ground, and does not afford any inform-"ation as to the matters which were in issue or have been decided." We make these remarks because the appellant's pleader relies on the judgment of this Court in *Avala* v. *Kuppu*(2), in which it was laid down that "it is by the decree and not by the judgment that a question of *res judicata* must be decided." It was held by a Bench of the Calcutta High Court in *Shokhee Bewar* v. *Mehdee Mundul*(3) that a suit on the same cause of action and between the same parties as a former suit which was summarily dismissed without being tried on its merits is not one which has been heard and determined by a Court of competent jurisdiction in a former suit. The decision is in accordance with the remarks of the Privy Council in the case of *Watson* v. *Collector of Rajshahye*(4).

For these reasons, we think the present suit was not barred and dismiss this second appeal with costs.

(1) I.L.R., 16 Cal., 173. (2) I.L.R., 8 Mad., 77.
(3) 9 W.R., 327. (4) 13 M.I.A., 160.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

ARUNACHALLAM (DEFENDANT), APPELLANT,

v.

MURUGAPPA (PLAINTIFF), RESPONDENT.*

1889. July 18.

Civil Procedure Code, ss. 244, 462—Execution proceedings—Decree by consent of guardian of minor defendant—Application to stay execution, &c., for want of sanction of Court under s. 462—No appeal lies from order rejecting such application.

An application to stay execution of and to set aside a decree, passed with the consent of the guardian of a minor defendant, for want of sanction of the Court under s. 462, Civil Procedure Code, was rejected:

Held, no appeal lay against the order of rejection.

PETITION of appeal against the order of S. Gopalachariar, Subordinate Judge of Madura (East), on miscellaneous petition No. 161 of 1888.

Application of the minor defendant by his guardian that the execution of the decree passed in original suit No. 42 of 1879 be stayed and the decree be set aside, on the ground that it was passed on a compromise entered into with the plaintiff by the guardian of the minor defendant without the consent of the Court given under section 462 of Civil Procedure Code.

The Subordinate Judge held that the consent of the Court had been given and dismissed the application.

The minor defendant filed a petition of appeal against the order of the Subordinate Judge.

Bhashyam Ayyangar and *Kalianaramayyar* for appellant.

Subramanya Ayyar and *Seshagiri Ayyar* for respondent objected that no appeal lay.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the following judgments.

WILKINSON, J.—The defendant in original suit No. 42 of 1879, on whose behalf his mother and guardian had compromised the suit, now applies through his guardian (mother) to stay execution

* Appeal against Order No. 129 of 1888.

ARUNA-CHALLAM v. MURUGAPPA.

of the said decree on the ground that, the compromise having been entered into without the leave of the Court which is required by section 462, Civil Procedure Code, the decree is a dead letter and not enforceable.

The Subordinate Judge dismissed the application on the ground that the leave of the Court had been obtained, that a suit to set aside the compromise had failed, and that the application was too late.

The minor, through his mother and guardian, appeals, and the plaintiff's pleader raises the preliminary objection that no appeal lies. It is argued that unless it is held that the question is one which arises between the parties relating to the execution of the decree, there is no provision of the Code which provides for an appeal. This is conceded by the appellant's pleader, who contends that as the question is merely one which affects the voidability or otherwise of the decree, it is one which relates to the execution of the decree, and as such is cognizable under section 244. It was laid down in the case of *Sudindra* v. *Budan*(1) that "a question whether the decree was obtained by "fraud or collusion is not one which relates to the execution of "the decree, but which affects its very subsistence and validity, "and such a question can only be raised by a separate suit."

The objection taken in this case by the defendant's guardian affects the validity of the decree; for if it is found that the compromise was entered into without the leave of the Court, it would not be binding on the minor. But that question cannot be decided in execution. As was pointed out by Garth, C.J., in the case of *Eshan Chundra Safooi* v. *Nundamoni Dassee*(2), there are only three ways in which a minor can avoid the consequences of his guardian's compromise:—first, by an application to the Court in which the compromise took place, secondly, by a regular suit to set aside the judgment founded on the compromise, or, thirdly, by bringing a fresh suit.

The question whether or not the decree was void as against the minor was not one relating to the execution of the decree and the order passed by the Subordinate Judge was not therefore an order passed under section 244, and no appeal lies. The appeal must therefore be dismissed with costs.

(1) I.L.R., 9 Mad., 80. (2) I.L.R., 10 Cal., 857.

ARUNA-CHELLAM v. MURUGAPPA.

MUTTUSAMI AYYAR, J.—I am of the same opinion. From the order appealed against, section 588 provides no appeal. Every decree passed by a Civil Court is presumed to be valid so long as it is in force. Section 244 accordingly presupposes that there is a decree and that it is valid, and then declares that certain questions shall be dealt with by an order in execution and not by a regular suit. The question whether the decree under execution is valid for the purposes of execution is not within the purview of that section. It may be that the decree is liable to be set aside in a fresh suit or on an application for review of judgment. It may also be, when execution is refused on the ground that the decree is illegal on the very face of it or of the proceedings mentioned therein, an appeal will lie. The order might then be regarded as substantially setting aside a subsisting decree and consequently as being in the nature of a decree as defined by section 2 of the Code of Civil Procedure. But it is not necessary to determine that question for the purposes of this appeal, and it would suffice to state that the order before us did not refuse execution.

I would also dismiss this appeal with costs.

APPELLATE CIVIL.

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

ADAKKALAM AND OTHERS (DEFENDANTS), APPELLANTS,

v.

THEETHAN (PLAINTIFF), RESPONDENT.*

1888. October 20. 1889. April 2.

Registration Act—Act III of 1877, s. 17 (c)—Unregistered agreement by mortgagor to sell to mortgagee—Subsequent assignment of equity of redemption to third person for value, but with notice of agreement.

In a suit for redemption filed by an assignee for value of the equity of redemption against a mortgagee in possession, it was found that the mortgagor had agreed with the defendant to sell the mortgage premises to him, that part of the purchase-money had been acknowledged as paid and that the balance had been tendered in pursuance of the agreement. It was further found that the plaintiff had taken his assignment with notice of the above agreement and tender. The agreement was in writing, but not registered:

* Second Appeal No. 88 of 1888.

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Held, that though the agreement was not admissible in evidence as creating an interest in land, still it might be used for the purpose of obtaining specific performance, and the plaintiff having purchased the equity of redemption with notice as above was not entitled to redeem.

Per cur.:—The plaintiff having knowledge of the agreement was put upon enquiry to ascertain whether the tender had been made and whether there was any objection to his purchase on that ground.

SECOND APPEAL against the decree of J. A. Davies, Acting District Judge of Tanjore, in appeal suit No. 872 of 1886, reversing the decree of T. Kanagasabai Mudaliar, Subordinate Judge of Tanjore, in original suit No. 38 of 1885.

Suit by the assignee of the equity of redemption to redeem mortgages, dated 1874 and 1881, and executed by Narayana Ayyar (deceased) and his widow, Latchmi Ammal, to the late father of the defendant and to defendant No. 1, respectively. The assignment to the plaintiff took place on 15th June 1885; on 22nd July the plaintiff called on defendant No. 1 to surrender the mortgage premises on payment of the amount due on the mortgages, and on his refusal this suit was filed.

The defendant pleaded that the mortgagor entered into a contract with him in writing on the 28th May 1885 to sell him the whole of the plaint properties for Rs. 1,200 exclusive of the amounts of the mortgage, &c., due to him; that she received in advance Rs. 400 and promised to receive the balance and execute a deed of sale on the 11th June; that she refused to fulfil the contract when he went to her with money and stamped paper; that the plaintiff's sale-deed was brought to existence by deliberate fraud, notwithstanding his protest against it at the time and that the deed of sale sued on is not valid in law. He denied the plaintiff's allegation of his offer to redeem and the defendant's refusal.

The agreement set up by the defendant was not registered. Its terms are recited sufficiently for the purpose of this report in the following order of the High Court.

The Subordinate Judge dismissed the plaintiff's suit; on appeal the District Judge reversed his decree and passed a decree for redemption as sought.

The defendant preferred this second appeal.

Bhashyam Ayyangar for appellants.

Rama Rau and *Pattabhiramayyar* for respondent.

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

ORDER.—The land in suit was in possession of defendant No. 1 under mortgages executed to him by Narayana Iyer and his widow, Latchmi Ammal. On 28th May 1885 Latchmi Ammal settled accounts with defendant No. 1 and executed to him exhibit I. By that document she stated that the price settled in full satisfaction of all claims in respect of sale, mortgage, &c., was Rs. 1,200, of which sum she admitted receipt of Rs. 400. The balance Rs. 800 was to be paid by 11th June 1885, on which payment being made Latchmi Ammal was to execute a sale-deed. One-eighth pangoo, which was under mortgage to defendant No. 1, was to be restored to Latchmi Ammal's possession.

Notwithstanding this agreement, Latchmi Ammal sold the equity of redemption of the plaint property to plaintiff on 15th June 1885. Plaintiff on 22nd July 1885 sent a notice by post, calling on defendant No. 1 to accept the mortgage amount and deliver up the land and, on his refusal, brought this suit to recover. Defendant No. 1 pleaded in answer the agreement exhibit I given to him by Latchmi Ammal and resisted plaintiff's suit for possession as plaintiff had bought with notice of that agreement.

The District Judge held that exhibit I was compulsorily registrable under clause (*c*), section 17 of the Registration Act, under the ruling in *Ramasami* v. *Ramasami*(1), but held further—following the ruling in *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji*(2), and *The Bengal Banking Corporation* v. *Mackertich*(3)—that the document would be admissible as proving an agreement to convey. The Judge held, however, that though defendant No. 1 might have a remedy against Latchmi Ammal and plaintiff in the form of a suit for specific performance, such right to sue could be no defence in the present action, as exhibit I was inadmissible in so far as it tended to affect the immovable property in question. The Judge further held that the letter of July 1885 was a good and sufficient tender and gave a decree for the plaintiff, the redemption money having been paid into Court.

We are of opinion that the view taken by the District Judge as to exhibit I was right. Though not receivable in evidence

(1) I.L.R., 5 Mad., 115. (2) I.L.R., 5 Bom., 143. (3) I.L.R., 10 Cal., 315.

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(being unregistered) as creating an interest in land, it might be used for the purpose of obtaining specific performance of the agreement, *The Bengal Banking Corporation* v. *Mackertich*(1). In this respect the want of registration would not be a fatal bar as against the subsequent registered conveyance. See *Kadar* v. *Ismail*(2).

But in this case the defendants were in possession, and had been for years in possession by virtue of their mortgage. Exhibit I stipulated that the balance of the purchase-money (Rs. 800) should be paid by 11th June 1885, and defendant No. 1 alleged that he went to Latchmi Ammal with the money and with the stamped paper for the execution of the conveyance, but that she refused to fulfil the contract, and that plaintiff's sale-deed was deliberately executed on 15th June in fraud of his rights and in spite of his protest, the plaintiff having offered Latchmi Ammal a large sum as purchase-money. If this be the case, *i.e.*, if defendant No. 1 can prove both the agreement to convey and the tender of the purchase-money, we do not think that we ought to compel him to bring another suit to obtain specific performance of his contract of sale. He is in possession, and all that Latchmi Ammal could claim would be the payment of Rs. 800 on her execution of a sale-deed. If plaintiff bought with the knowledge of the agreement and the tender, he ought not to be allowed to obtain possession.

No issue appears to have been framed in the Courts below as to this point and we will therefore refer to the District Judge the following issues for trial:—

(1) Did defendant No. 1 by 11th June 1885 tender to Latchmi Ammal the balance of the purchase-money (Rs. 800) and a stamped paper for the execution of a conveyance?

(2) Did plaintiff purchase from Latchmi Ammal with knowledge of the agreement and the tender?

(3) Is defendant No. 1 entitled to a charge upon the property to the extent of Rs. 400 under section 55, paragraph 6, clause (*b*), of the Transfer of Property Act?

Further evidence may be taken.

The District Judge returned findings in the affirmative on all the above issues.

(1) I.L.R., 10 Cal., 315. (2) I.L.R., 9 Mad., 119.

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The second appeal having come on again for final hearing the Court delivered the following

JUDGMENT:—It is contended that plaintiff had no knowledge of the tender, but we consider that having knowledge of the agreement he was put upon enquiry to ascertain whether the tender had been made, and whether there was any objection to his purchase on that ground. He did not go into the box to explain the matter. We cannot in this appeal consider plaintiff's claim for repayment of purchase-money. We reverse the decree of the Lower Appellate Court and restore that of the Subordinate Judge. The appellant is entitled to his costs in this Court and in the Lower Appellate Court.

APPELLATE CIVIL.

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

1889. April 9.

CHERU KURUP (DEFENDANT), APPELLANT,

v.

CHERU KANDA KURUP (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 624—Who may review judgment—Grant of application for review.

An application for review of judgment was presented on other grounds than those specified in s. 624 to a District Munsif who had delivered the judgment, and he thereupon ordered the decree to be produced. The District Munsif having resigned, his successor heard and determined the application:

Held, it was not competent to the District Munsif who had not delivered the original judgment to entertain the application for review.

SECOND APPEAL against the decree of Lewis Moore, Acting District Judge of South Malabar, in appeal suit No. 74 of 1888, affirming the decree of N. Sarvothama Row, District Munsif of Calicut, in original suit No. 192 of 1886.

An application by the decree-holder in original suit No. 341 of 1885, made under section 331 of Civil Procedure Code, having been registered as a suit between the decree-holder and the claimant came on for hearing before O. Chandu Menon, District Munsif of Calicut, and was dismissed with costs on 29th September 1886.

* Second Appeal No. 739 of 1888.

CHERU KURUP v. CHERU KANDA KURUP.

An application for review was then presented, and on 1st October the District Munsif made an order thereon as follows: "Produce copy of the decree."

The matter came on for determination before the successor in office of the District Munsif above referred to who granted a review and passed a decree for plaintiff as prayed for in the petition. The decree was affirmed on appeal by the Acting District Judge, against whose decree the defendant preferred this second appeal.

Sankaran Nayar for appellant.

Govinda Menon 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 (Collins, C.J., and Shephard, J.).

JUDGMENT.—Two points have been argued on behalf of the appellant, but it is sufficient to express an opinion on the first only, which is that under section 624 of the Civil Procedure Code, it was not competent to the District Munsif who had not delivered the original judgment to entertain the application for review made on the plaintiff's behalf. The District Judge observes that it was not shown that any new and important evidence had been discovered, and in this respect the respondent's Vakil has not succeeded in showing that the District Judge was wrong. But the District Judge held that as the application was in the first instance presented to Mr. Chandu Menon, and he had thereupon ordered the decree to be produced, the terms of the section had been satisfied. The District Judge refers to a decision in *Karoo Singh* v. *Deo Narain Singh*(1) as an authority for the position taken by him and prefers to follow that case to the case of *Pancham* v. *Jhinguri*(2). But even the decision in *Karoo Singh* v. *Deo Narain Singh*(1) does not go so far as to hold that the mere physical reception of an application is sufficient, for there notice had been issued and in order to issue notice the matter had to be judicially considered.

We are of opinion that the order of the District Munsif was wrongly granted, and therefore reverse the decree of the Lower Appellate Court and dismiss the suit with costs to the appellant throughout.

(1) I.L.R., 10 Cal., 80. (2) I.L.R., 4 All., 278.

APPELLATE CIVIL.

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

SAMBASIVA (PETITIONER), APPELLANT,

v.

SRINIVASA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1889. April 1.

Civil Procedure Code, s. 232—Order rejecting petition for execution by transferee of decree—No appeal from such order.

A petition, by one claiming to be the purchaser at a Court sale of the interest of a decree-holder under a decree, for execution of the decree was rejected:

Held, no appeal lay from the order rejecting the petition.

APPEAL against an order made by the Subordinate Judge of Negapatam on a petition for the execution of the decree in original suit No. 80 of 1878.

The petitioner, claiming to be the transferee by operation of law of the decree in original suit No. 80 of 1878 by virtue of his purchase of the decree-holder's interest at a sale held in execution of another decree, applied for execution under section 232, Civil Procedure Code.

The Subordinate Judge rejected his petition.

The petitioner appealed to the High Court.

Sundara Ayyar for appellant.

Kalianaramayyar for respondent.

JUDGMENT.—We are of opinion that no appeal lies from the order of the Subordinate Judge.

The order passed is under section 232, Civil Procedure Code, and refuses to recognize the petitioner as the transferee of the decree by operation of law. The case seems identical with that decided by the High Court of Bengal in *Mohabir Singh* v. *Ram Baghowan Chowbey*(1).

We must dismiss the appeal with costs.

* Appeal against Order No. 63 of 1886. (1) I.L.R., 11 Cal., 150.

PRIVY COUNCIL.

P.C.*
1889.
July 16, 17.

PUTHIA KOVILAKATH KRISHNAN RAJA AVERGAL (DEFENDANT),

v.

PUTHIA KOVILAKATH SRIDEVI AND OTHERS (PLAINTIFFS).

[On appeal from the High Court at Madras.]

Concurrence of Lower Courts in findings upon questions of fact—Agreement for division of family property in equal shares—Malabar custom.

Two Courts in concurrence found that there had been an agreement between two parties, interested in a family fund, that it should be divided into equal fourth parts among the four branches of the family, but that an unequal division, made under a decree, had resulted from unfair dealing. To contest, upon this appeal, those findings of fact, nothing was stated to make it appear to the Committee that, if they went through the whole of the evidence, they would differ from the Courts below on anything but questions of pure fact. Accordingly, their Lordships were of opinion that the case fell within the rule which makes appellate tribunals reluctant to interfere, and in most cases makes them refuse to interfere, with concurrent findings of the Courts below.

APPEAL from a decree (23rd March 1885) of the High Court, affirming a decree (3rd April 1884) of the Subordinate Judge of South Malabar.

The suit out of which this appeal arose was brought by the respondents against the appellant for Rs. 37,633, with interest, calculated from the 19th January 1881, as money received by the defendant on that date on behalf of the plaintiffs, having been paid by the Official Trustee as part of a one-fourth share of joint property to which the plaintiffs were entitled. They alleged that the defendant having received the whole of their share had paid over only part, improperly retaining the balance now claimed.

The defence was that according to an agreement for partition contained in a razinama filed in a suit in which a decree was made by the High Court, the plaintiffs were entitled to no more than the sum which they had received. The plaintiffs and defendant were members of a family of zamorins, or rajas, at

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

Calicut, comprising three "kovilakams," or houses, and the parties belonged to the first of these called the Puthia Kovilakam. They were governed by the Maramakatayam law of inheritance, under which descent is traced in the female line, a person's heirs being the children of his sisters. Each kovilakam, or house, had its separate estate, and the senior female representative of each, known as the Valia Thamburatti of such kovilakam, was entitled to the management of the property belonging to it. There were also five stations, or places of dignity, known as stanoms, to which separate property was attached, and these belonged to the senior male members of the kovilakams in succession as explained in *Vira Rayen* v. *Valia Rani of Pudia Kovilagom*(1). The fund, of which the partition led to the present litigation, consisting of jewels, and money of the value of Rs. 4,77,996, constituted the bulk of the joint estate of the Puthia Kovilakam, and was derived from a zamorin, who died in 1845. The mother of the first and second of these respondents, and grandmother of the third, was the Valia Thamburatti of the Puthia house, and manager. She, being anxious for the safety of the fund, made it over for safe keeping to the Collector of South Malabar, and then at his request to the Official Trustee at Madras.

The first branch, dissatisfied at this, in September 1879, sued the Official Trustee and the Valia Thamburatti, claiming to have the right of that branch to one moiety of the fund declared, as being the defendants of one of the two sisters, whom they declared to have been the donees in 1845.

The Valia Thamburatti in her defence denied their right to interfere with her management. But while matters so stood, a compromise was entered into among the four branches of the family at Calicut. By this it was agreed that the fund in question should be divided into four equal parts, each branch taking one, and to carry this out, an authority to a vakil at Madras was signed at Calicut, to have four persons (parties afterwards to the present suit) made defendants to the then pending suit, and to have it disposed of and partition made. The result was that there was executed at Madras the razinama, which the present suit alleged to be fraudulent, by reason of its arranging, without due consent, and contrary to the subsisting understanding,

(1) I.L.R., 3 Mad., 141.

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that the moiety of the fund should be unequally divided between the two of the parties, one of whom represented, without due authority, the present respondents. On the 5th May 1880 the razinama was filed, and a decree made by consent; the present appellant receiving the moiety of the fund now in question from the Official Trustee on the 19th January 1881.

In the present suit the issues raised between the parties were as to the validity of the razinama, and the decree founded thereon, and also as to limitation.

The Courts below concurred in finding that the agreement in question was for the equal division into four parts, and that the razinama of 1880 was in violation of that agreement, and the result of fraud so that the decree which followed it was not binding on the respondents. The Courts below also concurred in holding that the plaintiff's suit was not barred by limitation, whether it were regarded as a suit to recover money received to their use, and improperly retained, or for relief on the ground of fraud, inasmuch as the suit was brought within three years of the fraud in question becoming known to these respondents.

Mr. *J. D. Mayne*, for the appellant, argued that there were grounds for doubting the correctness of the finding of the Courts below. (Their Lordships referred to *Venkateswara Iyan* v. *Shekhari Varma*(1), where they interfered with concurrent decisions, but pointed out that in that case the question raised was one dependent on the admissibility of subordinate facts and the construction of documents). He took, *seriatim*, the grounds mentioned in the Original Court for its decision, and contended that on important points the Court was in error. (Their Lordships also referred to *Pauliem Valloo Chetty* v. *Pauliem Sooryah Chetty*(2), where concurrent judgments on fact were allowed to be disputed, but they distinguished the present case). The whole evidence showed that the plaintiffs left their interests in the hands of the Valia Thamburatti, the legal manager of their estate, and there was nothing establishing fraud in the razinama of 1880(3).

(1) L.R., 8 I.A., 143; I.L.R., 3 Mad., 385.
(2) L.R., 4 I.A., 109; I.L.R., 1 Mad., 252.
(3) The cases reported in Moore's I. A. in which the concurrence of two Courts upon fact has been adverted to, are given in a list under the title "Practice," in the Digest of the Moore's I. A. Ca. made by the late H. J. Tarrant, Esq., in 1874, see pp. 242, 250, 251 and 258.

Mr. *T. H. Cowie, Q.C.*, and Mr. *R. V. Doyne*, for the respondents, were not called upon. Their Lordships' judgment was delivered by

Lord HOBHOUSE.—Their Lordships consider that this case is concluded by the findings of the Courts in India. So far as regards the merits of the case, two questions are raised: first, whether there was an agreement between the parties interested in the fund which is the matter in dispute, that it should be divided into equal fourth parts among the four branches of the family; and, secondly, whether the unequal division, which actually took place and which was affirmed by the decree of the Court, was due to underhand or foul play. On the first point the Subordinate Judge finds that there was an agreement for equal division, and he finds that on the ground of oral evidence which he believed. It is quite true that in assigning reasons for preferring that evidence to evidence given the contrary way, he relies upon some documents which are contemporary, or nearly contemporary, with the transaction, showing that letters were written or instructions given by other branches of the family in terms which point to the division of the property in equal fourths, and one of which refers to similar documents written on behalf of all the branches of the family. Then it is stated by the defendant that there were letters and papers containing instructions which warranted the actual transaction that was carried out, and the actual division of the money, but none of those letters or papers are forthcoming, and the mention of them and their disappearance does not benefit the case of the defendant. Those are the reasons assigned by the Subordinate Judge for preferring the evidence which affirms an agreement for equal division into fourths. Whatever his reasons are, the question remains one of pure fact. The two Courts have found the same way on that question of fact. Nothing is stated to make their Lordships conclude that if they went through the whole of the evidence, and differed from the Courts below, they would differ from them on anything but questions of pure fact. Therefore the case clearly falls within that wholesome rule which makes appellate tribunals reluctant to interfere, and in most cases makes them refuse to interfere, with concurrent findings of the Courts below. Their Lordships think they would be making a departure from that principle if they were to allow

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this evidence to be canvassed for the purpose of reversing the decision.

The same thing may be said with respect to the second question of dishonesty or foul play. It all resolves itself into a question of credit due to the witnesses, and their Lordships have the same reluctance to interfere with the findings of the Court on that question. So far as to the merits of the case.

Then a defence is raised on the ground of bar by lapse of time; and it is said that the case falls within article 95 of Act XV of 1877. That article provides that a suit to set aside a decree obtained by fraud, or for other relief on the ground of fraud, must be brought within three years from the time when the fraud becomes known to the party wronged. Whether the case does fall within that article or not is a question in controversy, but their Lordships will treat it for the sake of this judgment as falling within that article, that being the ground which is most favourable to the appellant's case. Then the question arises, when did the fraud become known to the plaintiffs in this suit? That again is a question of pure fact. Both Courts have found that there is no evidence that the fraud became known before the month of December 1880. It is doubtful whether it became known so early, but that is sufficient. The plaintiffs swear, and are believed when they swear, that they did not know of the fraud within the statutory time; and as they have given as much evidence of a negative as people can be expected to give, it was for the defendant to come forward and show something which might carry the knowledge home to them. He has not done it. That issue is found against him, and upon those findings their Lordships think that the Court was right in holding that, even if the case falls within article 95, the plea of limitation is not proved.

The result is that the appeal fails, and should be dismissed with costs, and their Lordships will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellant—*Lawford, Waterhouse, and Lawford.*

Solicitors for the respondent—*Burton, Yeates, Hart, and Burton.*